

**University of Cape Town**

**Faculty of Law**

‘The Recognition and Enforcement of Foreign Arbitral Awards: A need for reform of Tanzanian Legislation’

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Word Count: 15142

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Postgraduate Diploma in Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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## DECLARATION

I declare that The Recognition and Enforcement of Foreign Arbitral Awards: A need for reform of Tanzanian Legislation is my own work, that it has not been submitted for any degree or examination in any university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Elias Francis Mkata

Signed this day 9th of September 2014.

## ACKNOWLEDGMENTS

I wish to express my sincere gratitude to Almighty God, and my supervisor Professor Alan Raycroft for the help and encouragement he gave to me during the writing of this thesis. His ability to recall what it was like to be a student served as a major inspiration to me in trying times and greatly assisted the accomplishment of this work.

I would like to say a big thank to my family for their endless support, both moral and financial. Their trust and encouragement have been a source of strength and daily motivation for me.

I also wish to thank Mr. John Francis whose enthusiasm and love for Commercial Law is both infectious and inspirational.

Thanks are also due to my fellows Tanzanian students at UCT for the help, advice and encouragement they gave to me during my academic challenges.

Finally, a deep debt of gratitude is owed to Mr. Frank Kassongo for his financial connections, Mr. John Francis Mkata, and all others that their financial and material assistance made it possible for me to complete my studies.

## DEDICATION

To my parents and the blessed family for their loving support

## ABBREVIATIONS AND ACRONYMS

EAC	East African Community
ICSID Investment Disputes	The International Centre for Settlement of
ICC	International Chamber of Commerce
NCC	National Construction Council
NYC	New York Convention of 1958
UNCITRAL Trade Law	United Nations Commission on International
SADC	Southern African Development Community
TIA	Tanzania Institute of Arbitrators
WTO	World Trade Organization

## Chapter 1: The history of Tanzania Arbitration Act with regard to recognition and enforcement of foreign arbitral awards.

### (a) Introduction

Is the Tanzanian Arbitration Legislation in need of reform in the provisions relating to recognition and enforcement of foreign arbitral awards?

The enforcement of foreign arbitral awards in Tanzania is regulated by the Arbitration Act of 2002 (henceforth referred to as the Act).<sup>1</sup> Prior to the enactment of the Act, arbitration matters (including the enforcement of foreign arbitral awards) were regulated by the Arbitration Ordinance of 1931 (henceforth referred to as the Ordinance),<sup>2</sup> which was enacted during Britain's colonisation of Tanzania.

The Ordinance was based on the English Arbitration Act of 1889.<sup>3</sup> In addition to this Act, Tanzania is subject to a number of international instruments on arbitration. These include the 1923 Geneva Protocol;<sup>4</sup> the Geneva Convention on the Execution of Foreign Arbitral Awards, which came into force on 26 September 1927; the Convention for the Recognition and Enforcement of Foreign Arbitral Awards, which came into force on 10 June 1958;<sup>5</sup> and the International Centre for Settlement of Investment Disputes (ICSID). In addition, Tanzania is a member of the World Trade Organisation (WTO), as well as several other world and regional trade organisations.<sup>6</sup>

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<sup>1</sup> Cap. 15 of the Laws of Tanzania (Revised Edition of 2002). The Arbitration Act provided for the preparation and publication of revised editions of the laws of Tanzania and for continuous revision and maintenance.

<sup>2</sup> Lise Bosman. *Arbitration in Africa: A Practitioner's Guide*. (2013) 239.

<sup>3</sup> Norton Rose Fullbright. 'Tanzania'. *Arbitration in Africa*. (2007). Available at: <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>, accessed on 19 January 2014.

<sup>4</sup> Amazu A. Asouzu. *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*. (2001) 181. 'On the 27<sup>th</sup> September 1924, the United Kingdom (UK) which was the colonizing power over the then Tanganyika, ratified the 1923 Geneva Protocol. This protocol came into force on the 12<sup>th</sup> of March 1926, in Zanzibar and 17<sup>th</sup> June 1926 in Tanganyika. The two states unified on 26<sup>th</sup> April 1964 to form the United Republic of Tanzania.'

<sup>5</sup> Amazu A. Asouzu, *supra* note 4 at 188.

<sup>6</sup> Bosman, *supra* note 2 at 242. Although investment arbitration is not the focus of this research paper, the step serves to show Tanzania's openness to arbitration in general.

International instruments of particular interest are the 1923 Geneva Protocol, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and UNCITRAL Model Law of 1985 with its amendment of 2006,<sup>7</sup> which emphasises the need for the harmonisation of national laws governing commercial disputes relating to the recognition and enforcement of foreign arbitral awards.

However, the above regulations have not been able to respond adequately to the challenges in enforcing foreign arbitral awards in Tanzania. Initially, the Ordinance was unable to cope with an increasing demand for arbitration in commercial disputes, thus providing the basis for its revision by the Arbitration Act of 2002.<sup>8</sup>

In Tanzania, the Arbitration Ordinance was adopted from England and this, coupled with the economic development of Tanzania at that time, particularly its emphasis on socialism, meant that the arbitration process held little relevance until privatisation and the rise of capitalism occurred. This was especially true in the country's free economy market where there was a governmental need to protect citizens against a monopoly economy. This transition paved the way for the enactment of the Arbitration Act of 2002.

It can be argued that the Act has failed in respect of the recognition and enforcement of foreign arbitral awards, when compared to the enforcement of local arbitral awards. The existing legislation on arbitration in Tanzania (mainland), the civil procedure (arbitration) rules, and the Arbitration Act are all mainly geared towards servicing domestic arbitrations.<sup>9</sup> One hindrance to foreign arbitration is that the law affords too great an opportunity for procedural

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<sup>7</sup> Although Tanzanian legislation has not aligned its arbitration with the Model Law, there is a need to do so to meet world economic demands in laws governing commercial arbitration disputes.

<sup>8</sup> Cap. 15 of the Laws of Tanzania (Revised Edition of 2002). The Arbitration Act provided for the preparation and publication of revised editions of the laws of Tanzania and for continuous revision and maintenance.

<sup>9</sup> Hon. Justice Robert V Makaramba. 'Curbing delays in commercial resolution: Arbitration as a mechanism to speed up delivery of justice'. 20<sup>th</sup> of July 2012. *The United Republic of Tanzania the Judicial Round Table Discussion*. 21.

intervention by the courts – an undesirable characteristic for those parties unfamiliar with the Tanzania legal process.<sup>10</sup> A good example in this regard is the award issued by the International Chamber of Commerce (ICC) in November 2010 on the arbitration cases instituted by Richmond Development Company (Richmond) and Dowans Holdings SA (Costa Rica)/Dowans Tanzania Limited (Dowans) against Tanzania Electric Supply Company Ltd. (Tanesco), whereby the High Court was empowered to reject the ICC ruling that awarded highly controversial payments in favour of Dowans Holdings SA on the basis of gross irregularities in the proceedings of the case, and the illegality of the actual ruling itself. The High Court denied Tanesco’s petition and an appeal against the High Court’s decision is still pending in the Court of Appeal of Tanzania.<sup>11</sup> This situation has resulted as the Arbitration Act is one of the oldest laws in the country and has been amended only once since its enactment. Therefore, it does not deal specifically with recognition and enforcement of foreign arbitral awards.<sup>12</sup> The Act was reviewed only once in 2002, and no amendments were made apart from a name change, which altered the word ‘Ordinance’ to ‘Act’.<sup>13</sup>

*(b) Research Question*

People who choose arbitration as a method of resolving their commercial disputes at international level believe that, at the end of the hearing of such a dispute, the tribunal will hand down an award that will be final and binding on them and, if

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<sup>10</sup> *Ibid.*, at 21.

<sup>11</sup> *Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania)*. High Court of Tanzania, unreported case no 08/11 of 28 September 2011.

<sup>12</sup> The Arbitration Act, which was first introduced in 1931, was first amended in 1971.

<sup>13</sup> ‘Commercial dispute settlement and contract enforcement were identified as problematic for investors in Tanzania. The Arbitration Act and Contract Act were considered outdated and inconsistent, and were found to have gaps with regard to modern business organizations, modern practices, and modern business systems and technologies. Commercial dispute settlement and arbitration is dealt with in the 1997 Investment Act, which has yet to be updated. Contract enforcement is codified in the Law of Contract Act, 1961, which also has not been updated’. Although contract enforcement, codified in the Law of Contract Act, is not a focus of this research paper, it shows the need for reform of Tanzanian laws relating to investment and arbitration in general. This was stated during the United Nations Conference on Trade and Development. Report on the Implementation of the Investment Policy Review in the United Republic of Tanzania, made in New York and Geneva. 2011. available at: <http://unctad.org/en/docs/diapcb201006en.pdf>, accessed on 9<sup>th</sup> February 2014.

necessary, able to be enforced.<sup>14</sup> It is therefore important for a party that any international arbitral awards that have been issued are recognised and enforced in Tanzania. In reality, however, the recognition and enforcement of foreign arbitral awards in Tanzania still encounters a number of challenges as a result of the country's failure to align their provisions relating to this recognition and enforcement of awards with those of current international laws governing commercial arbitration, specifically the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (also referred to as the New York Convention), and the Model Law of 2006.

This dissertation will investigate the advantages of compliance with these international conventions and will propose steps which need to be taken to achieve these advantages through compliance.

This dissertation is divided into four parts; first, it contains an investigation of the alleged ineffectiveness of the Arbitration Act, specifically in relation to the recognition and enforcement of foreign arbitral awards. Secondly, the arguments for the reform of Tanzanian legislation to align with international laws, which govern international commercial disputes, are considered. Thirdly, the dissertation will critique the alleged failure of Tanzanian law to conform to the current international laws governing commercial arbitration. Finally, it considers the reasons for Tanzania's apparent reluctance to adopt the Model Law and to uphold the fundamental provisions of the New York Convention, as agreed with other counterpart countries who are members of the respective regional economic integration, and who have in this respect adopted the Model Law and are upholding the fundamental provisions of the New York Convention.

The four parts mentioned above stand as justification for the research problem and are detailed in order below.

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<sup>14</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4ed. (2004) 416.

(i) *The ineffectiveness of the provisions of the Arbitration Act relating to the recognition and enforcement of foreign arbitral awards*

Provisions relating to the recognition and enforcement of foreign arbitral awards in Tanzania are made under part four of the Tanzanian Arbitration Act, and include section 28, 29, 30 and 31, which should be read together with section 16 and 17, as well as its 3<sup>rd</sup> and 4<sup>th</sup> schedule.<sup>15</sup> In Tanzania, a successful party can only execute its foreign awards by relying upon provisions set out under section 29(1) of the Arbitration Act, which states that, ‘A foreign award shall, subject to the provisions of this part, be enforceable in the high court either by action or as if it were a court decree’.<sup>16</sup>

In order for a foreign arbitration award to be enforceable in Tanzania: (1) it must be final; (2) it must have been made pursuant to arbitration; it must have been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties; (3) it must have been made in conformity with the law governing arbitral procedure; and (4) it has to have been made 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 public policy or law of Tanzania.<sup>17</sup> However, a foreign arbitration award is not deemed to be final, ‘if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made’.<sup>18</sup>

Therefore, a successful party who is desirous of executing foreign awards in Tanzania is required to request the arbitral tribunal to file the award, or cause it to be filed in court.<sup>19</sup> After paying the requisite fees and any other expenses of the arbitral tribunal, the tribunal will file the award or cause it to be filed in the court, which will then execute it as an ordinary court decree if there is no petition

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<sup>15</sup> Optic (n 9) 18.

<sup>16</sup> Wilbert B Kapinga-Mkono & Eric S Ng’maryo. ‘Registration and Enforcement of Arbitral Awards in Tanzania’ *The European, Middle Eastern and African Arbitration Review* (2013) 94.

<sup>17</sup> Bosman, *supra* note 2 at 241.

<sup>18</sup> Bosman, *supra* note 2 at 241. See also section 30(1)-(d) of the Arbitration Act.

<sup>19</sup> Optic. (n 2) 241. See also Rule 4 of the Arbitration Rules of 1957.

challenging the validity of the award on any ground of misconduct by the arbitrator.<sup>20</sup>

However, the current Arbitration Act appears ineffective as far as the recognition and enforcement of foreign arbitral awards is concerned. In brief, the following are some of the challenges:

1. The Arbitration Act imposes the burden of proof on the applicant who wishes to execute such awards in Tanzania.<sup>21</sup> The problem with this provision is that it obliges the applicant who is a winning party in arbitral litigation to show the evidence upon which he or she relied in the arbitration. This means that the enforcing of foreign arbitral awards in Tanzanian Court through the Arbitration Act makes the winning party start the tendering of evidence afresh on a matter which has already been settled by a competent tribunal. This leads to an unnecessary delay in the enforcement of foreign arbitral awards.<sup>22</sup>

2. The Arbitration Act requires that, for foreign arbitral awards to be enforced in Tanzania, the award must be final in the place it was made. Finality is understood to mean that it will not be considered as such if it is open to opposition, appeal or *pourvoir en cassation* in the country where such forms of procedure exist, or if it is proved that any proceedings for the purpose of contesting the validity of the awards are pending.<sup>23</sup> The challenge imposed by this provision is that the applicant seeking enforcement in Tanzania is entitled to prove this only by tendering a leave of enforcement known as *exequatur*, or any like document issued by the court of the country of origin where such award has been made evidence. *Exequatur* is also a requirement in Tanzania where such enforcement is sought as a result and this amounts in a system called ‘double *exequatur*’. Moreover, this creates a loophole for the respondent side to obstruct the finality of the award by filing proceedings to contest its validity in the country

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<sup>20</sup> Kapinga-Mkono & Eric S Ng’maryo, *supra* note 16 at 94.

<sup>21</sup> Section 31(3) of the Arbitration Act.

<sup>22</sup> *Bosman*, *supra* note 2 at 242. In that case the ‘Court may postpone the enforcement of awards or order its enforcement subject to the giving security by the person seeking the enforcement.’ See section 31(1)(b)-(c) and (3) of the Arbitration Act.

<sup>23</sup> Section 29(2) of the Arbitration Act, read together with Article 1(d) of its Fourth Schedule.

where it has been made.<sup>24</sup> This can, of course, lead to economic loss for the winning party (applicant side), due to the fact that it is ordered to follow all procedures first in the country of origin where such an award has been made, then again later in Tanzania where the enforcement should be done.<sup>25</sup>

3. The Arbitration Act requires that, for a foreign arbitral award to be enforceable in Tanzania, such an award must not be made contrary to the principles of the law of the forum state.<sup>26</sup> The problem with this provision is that it invites the Tanzanian court to engage in a full merits review, in line with substantive laws, to determine whether the award was in conformity with the laws of the United Republic of Tanzania or not. It has therefore created a loophole for the court to deny the enforcement of foreign arbitral awards on this basis. It is uncontroversial that a state should not recognise and enforce awards that run contrary to public policy.<sup>27</sup> However, it is less understandable that the principles of law of the forum state should be taken into account when an award has been made in another state in accordance with other, no doubt equally valid, legal principles.<sup>28</sup> The Tanzanian Arbitration Act is, in addition, silent on a definition of what constitutes public policy in this regard; it rests on the judge to determine what public policy is.<sup>29</sup> This creates a loophole for the unsuccessful party in international disputes to challenge the validity of such foreign awards on the grounds of public policy, either personally or through an advocate, using a legal technicality. As a result, not only can this cause undue delay in enforcement of the award, but also economic loss for the parties as the interpretation of the term ‘public policy’ may vary from one jurisdiction to another.<sup>30</sup> This finds evidence in

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<sup>24</sup> *Dowans Holding SA and Dowans Tanzania LTD Tanzania Electric Supply Co Ltd v High Court of Justice Queen’s Bench Division*. 2010. Commercial Court, Case No. Folio 1539.

<sup>25</sup> Section 31(1) (b) and (c) and (3) of the Arbitration Act.

<sup>26</sup> Section 30(1) (e) of Arbitration Act, read together with Article 1(e) of its 4th schedule. See Lise Bosman *Arbitration in Africa: A Practitioner’s Guide*. (2013)241.

<sup>27</sup> *Ibid.*

<sup>28</sup> Optic. (n26).

<sup>29</sup> Hon. F.M. Werema. ‘Contract Enforcement through Judicial System in Tanzania: Enforcement of foreign judgment and arbitral awards in Tanzania’. In *The United Republic of Tanzania the Judicial Round Table Discussion*. (2011) 11.

<sup>30</sup> *Ibid.*, at 11. In this regard, Hon. F.M. Werema referred to public policy in Swahili as ‘mhemuko’, literally meaning public sympathies, but he stated that the ultimate goal is the rule of law which must

the *Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania)* case,<sup>31</sup> (on which a decision is still pending to date), which was instituted in the High Court of Tanzania in 2007 for execution of foreign arbitral awards, and later in the Court of Appeal of Tanzania, after the unsuccessful party in an international dispute challenged the recognition and enforcement of foreign arbitral awards made by the ICC on the grounds of public policy.<sup>32</sup>

4. For a foreign arbitral award to have legal validity so that it will be enforceable in Tanzania, such an award must have been made in pursuance of an agreement for arbitration which was valid under the law governed.<sup>33</sup> However, the current Tanzanian Arbitration Act does not only neglect to stipulate the definition and form of ‘arbitration agreement’, it also does not define other terms, such as ‘foreign awards’, and does not portray how such awards are to conform to the new developments in laws governing commercial arbitration worldwide, especially the Model Law of 2006.<sup>34</sup> In Tanzania, a foreign arbitral award refers to an award made outside of Tanzania, the enforcement of which is permissible in terms of the Arbitration Act, unlike an award 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. This defeats the primary object of the New York Convention, to which Tanzania is a contracting party and which deals specifically with the recognition of foreign arbitral awards and the indirect enforcement of international commercial arbitration agreements.<sup>35</sup>

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prevail. He emphasized that the judge should be left alone to make judgment, because determination of what constitutes public policy is not for the people of Tanzania to decide, but for the judge to do so.

<sup>31</sup> *Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania)*. High Court of Tanzania, unreported case no 08/11 of 28 September 2011.

<sup>32</sup> Section 30(1) (e) of Arbitration Act, read together with Article 1(e) of its 4th schedule. See: Lise Bosman *Arbitration in Africa: A Practitioner’s Guide*. (2013) 241.

<sup>33</sup> Section 30(1) of the Arbitration Act.

<sup>34</sup> Article 7 of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>35</sup> Makaramba, *supra* note 9 at 21 and 34.

Moreover, only two terms such as ‘the court’ and ‘submission’ appear to be defined in the Tanzanian Arbitration Act. Seeing as the Tanzanian laws have an interpretation section and not a definition section, the lacuna left in the Arbitration Act is not a novel challenge. One of the defined terms is that of ‘submission’, which is defined to mean a written agreement used ‘to submit present or future differences to arbitration, whether an arbitrator is named therein or not’.<sup>36</sup> It can be argued that this definition limits the current description of an arbitration agreement. The written agreement and legal obligation of the contracting parties is contrary to the international requirement and, as a result, poses a great challenge once the defaulting party in an international dispute objects to the recognition and enforcement of foreign arbitral awards in Tanzania.<sup>37</sup> The same was found to be the case in the current Tanzanian Arbitration Rules of 1957,<sup>38</sup> as held in the case of *Tanzania Cotton Marketing Board v Corgecot Cotton Company SA*.<sup>39</sup> In this case, the term ‘registered by post’ was challenged. This was a requirement needed to be adhered to by a successful party when requesting the arbitral tribunal to file a foreign award or cause it to be filed in the high court so as to be executed in Tanzania. Justice Nsekela had occasion to construe the words ‘registered by post’ appearing in Rule 4 of the Arbitration Rules, 1957. He held that, ‘[w]hile it is undisputed fact that under Rule 4 of the Arbitration Rule 1957, the award is to be forwarded to the registrar of the high court by registered post, the words ‘registered post’ should be interpreted widely enough to take into account the current development in communication technology that has taken place since 1957 when the rules were enacted. It is a common knowledge that since that time other modes of postage have been introduced. The DHL system which was used in this case is among such modes of communication’.<sup>40</sup>

Apart from this, another challenge is whether Tanzanian courts can enforce the provisions of the New York Convention on the Recognition and Enforcement

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<sup>36</sup> Section 2 of the Arbitration Act.

<sup>37</sup> Article 35(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>38</sup> Rule 4 of the Arbitration Rules of 1957.

<sup>39</sup> *Tanzania Cotton Marketing Board v Corgecot Cotton Company SA*. 1997. TLR 165.

<sup>40</sup> *Ibid*(n39).

of Foreign Arbitral Awards of 1958, despite not being legislated. This question does not find an easy answer, although it has been settled that a judge may have recourse to principles of public international law found in treaties and public customary international law as a guide when interpreting national law.<sup>41</sup>

Tanzanian courts have held that the constitution incorporates the Universal Declaration of Human Rights (UDHR) as well as other global and regional human rights treaties, which courts should consult when interpreting provisions in the bill of rights and duties. It is not yet settled whether recourse could be had by Courts to private international law principles to interpret a local statute dealing with private law matters in the course of enforcement and recognition of a foreign arbitral award.<sup>42</sup> A potential way to deal with this lacuna is for Tanzanian legislation to enact a new Arbitration Act, which will meet the current world economic demands.

- (ii) *The recognising of the need for reform to Tanzanian legislation to be aligned with international laws which govern international commercial disputes.*

This was revealed during a workshop on international arbitration practice for Tanzania government lawyers, held at the Law School of Tanzania.<sup>43</sup> The workshop aimed to equip the government lawyers with methods of tackling possible challenges that may arise during the process of negotiating international commercial contracts and investment agreements and in conducting international arbitration proceedings. The Honourable Justice Robert Makaramba commented on the current Tanzanian Arbitration Act in relation to the recognition and enforcement of foreign arbitral awards.

He started by pointing out that the current Arbitration Act forms formidable obstacles for any practicing arbitration lawyer in the country, particularly when trying to resist the enforcement of an arbitral award in courts of law. He said, 'It has created confusion among arbitrators when filing awards in

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<sup>41</sup> Makaramba, *supra* note 9 at 29.

<sup>42</sup> *Ibid.*

<sup>43</sup> Alex Bitekeye. 'Tanzania arbitration laws outdated, new statutes a must'. *The Citizen*. 30 April 2013.

Courts for the registration and enforcement of filed arbitral awards'.<sup>44</sup> He went further, stating that the arbitrators have been facing difficulties due to a lack of rules for the conduct of arbitration proceedings in the country. As a result, they are forced to rely on the United Nations Commission on International Trade Law's (UNCITRAL) arbitration rules (as revised in 2010).<sup>45</sup> As Justice Makaramba observed:

They also rely on Arbitration rules of the Chamber of Commerce (ICC) and in the case of disputes arising in the construction industry, great reliance is put on the Arbitration rules of the National Construction Council (NCC).<sup>46</sup>

He further stated that:

Having in place a modern law on arbitration and rules for the conduct of arbitration proceedings and for the enforcement of arbitral awards, both foreign and domestic, will make it much easier for the legal practice in the area of law to thrive.<sup>47</sup>

In recognition of this fact, the Tanganyika Law Society has proposed a new Arbitration Bill, based on the current English Arbitration Act of 1996,<sup>48</sup> which is still pending review by the Attorney General.<sup>49</sup> The National Construction Council (NCC) and the Tanzania Institute of Arbitrators (TIA) have paved the way by enacting their own rules governing arbitral proceedings, instituted under their umbrella, which are similar to some basic aspects of the Model Law of 2006.<sup>50</sup>

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Norton Rose Fullbright. 'Tanzania'. *Arbitration in Africa*. (2007). Available at: <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>, accessed on 19 January 2014.

<sup>49</sup> *Ibid.*, at 6.

<sup>50</sup> *Ibid.*

(iii) *The failure of Tanzanian law to conform to the current international laws governing commercial arbitration.*

To date, several countries are party to international conventions for the enforcement of arbitral awards, including the Convention for the Recognition and Enforcement of Foreign Arbitral Awards.<sup>51</sup> Foreign arbitral awards are therefore more enforceable in various nations and are easier to enforce when compared to national court decisions.<sup>52</sup> This is so because a successful party in an arbitral process is entitled to enjoy all privileges and rights of enforcing its awards in any country where property is of the person against whom the award is made; provided that country is a contracting member state of the New York Convention.<sup>53</sup>

(iv) Tanzania's reluctance to adopt the Model Law, and to uphold the fundamental provisions of the New York

Tanzania is a contracting member state of the World Trade Organization (WTO),<sup>54</sup> and regional economic integration such as the East African Community (EAC),<sup>55</sup> Southern African Development Community (SADC),<sup>56</sup> and commonwealth

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<sup>51</sup> New York Arbitration Convention. 'New York Convention Countries'. Available at: <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>, accessed on 9<sup>th</sup> February 2014.

<sup>52</sup> Article I(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>53</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4 ed. (2004) 517. In this context, 'legal sanctions may include seizure of property and other assets, forfeiture of bank accounts, and even, in extreme cases, imprisonment. Where the defaulting party is a corporate body enforcement is usually directed primarily against the property and other assets of the corporation, such as its stock-in trade, bank accounts, trading accounts, in circumstance where directors of company is held liable, the sanctions may be directed against him'.

<sup>54</sup> Article 25(1)-(4) understanding on rules and procedures governing the settlement of disputes. 'It acknowledges the uses of arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties, therefore the parties to the proceeding shall agree to abide by the arbitration award'. Although dispute resolution under the WTO is not the focus of this research paper, the step serves to show Tanzania's openness to arbitration in general. Available at [http://www.wto.org/english/rese/booksp\\_e/analytic\\_index\\_e/dsu\\_e.htm](http://www.wto.org/english/rese/booksp_e/analytic_index_e/dsu_e.htm), accessed on 9<sup>th</sup> February 2014.

<sup>55</sup> The Treaty for the Establishment of the East African Community was signed on 30<sup>th</sup> November 1999 and entered into force on 7<sup>th</sup> July 2000, following its ratification by the three original partner states of Kenya, Uganda and Tanzania. The Republic of Burundi and the Republic of Rwanda acceded to this EAC Treaty on 18<sup>th</sup> June 2007 and became full members of the Community with effect from 1<sup>st</sup> July 2007. Available at: <http://meaindia.nic.in/staticfile/regionalorganisation.pdf>, accessed on 3<sup>rd</sup> February 2014. Moreover, by virtue of Article 32(a), (b) and (c), the EAC Treaty enjoins the support of the courts in advancing and promoting alternative dispute resolution mechanisms as far as arbitration is concerned.

<sup>56</sup> Tanzania joined the Southern Development Community (SADC) on August 17, 1992 in Windhoek, Namibia when the Declaration and Treaty was signed at the Summit of Heads of State and Government

countries.<sup>57</sup> Some of the countries in these communities have updated their laws by adopting the Model Law and upholding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>58</sup> They have also managed to establish an International Centre for Commercial Arbitration Settlement,<sup>59</sup> purposely to satisfy the needs and expectations of their contracting member states and other development partners who engage in trade activities.<sup>60</sup>

The situation of having modern law in some other contracting member states of EAC, SADC, and commonwealth countries, which governs international commercial arbitration as far as the recognition and enforcement of foreign arbitral awards is concerned, creates a conducive environment for ensuring fairness and justice to both conflicting parties in international disputes.<sup>61</sup>

Despite the facts elucidated above, the legislature of Tanzania has not yet made the necessary amendments to align the Arbitration Act with the New York Convention of 1958, or adopt the Model Law of 1985 as amended in 2006. Even more detrimental to the recognition and enforcement of awards is the fact that the Act makes provisions for the enforcement of international arbitral awards under the 1923 Arbitration Clauses, otherwise referred to as the Geneva Protocol of 1923,<sup>62</sup> as well as the Geneva Convention on the Execution of Foreign Arbitral Awards, which came into force on 26<sup>th</sup> September 1927, and these are still used in

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thereby giving the organisation a legal character. Available at: <http://www.au.int/en/recs/sadc>, accessed on 7<sup>th</sup> February 2014.

<sup>57</sup> Tanzania became a member of the Commonwealth in 1961. Available at <http://www.royal.gov.uk/monarchandcommonwealth/commonwealthmembers/membersofthecommonwealth.aspx>, accessed on 8<sup>th</sup> February 2014.

<sup>58</sup> Kenya enacted the Arbitration Act, 4 of 1995, which adopted the UNCITRAL Model Law of 1985. It revised the same in the year 2009 to align the Act with the revised UNCITRAL Model Law, 2006.

<sup>59</sup> In January 2013, Kenya enacted the Nairobi Centre for International Arbitration Act 26 of 2013, establishing the Nairobi Centre for International Arbitration. The Board of the Centre has since been appointed and is in the process of setting up an International Arbitration Centre in Nairobi. Moreover, Mauritius not only had enacted the International Arbitration Act in December 2008, based on the UNCITRAL Model Law, but had also established the Mauritius International Arbitration Center. Mauritius also established a Chamber of Commerce and Industry and set up a permanent Court of Arbitration in 1996. Furthermore, Zambia had enacted its Arbitration Act 19 of 2000. The First Schedule of the Arbitration Act contains the UNCITRAL Model Law. Available at: <http://uk.practicallaw.com/7-502-7595>, accessed on 9<sup>th</sup> February 2014.

<sup>60</sup> Amazu A. Asouzu, *supra* note 4 at 33.

<sup>61</sup> *Ibid.*

<sup>62</sup> Norton Rose Fullbright. 'Tanzania'. *Arbitration in Africa*. (2007). Available at: <http://www.nortonrosefulbright.com/files/tanzania-25762.pdf>, accessed on 19 January 2014.

Tanzania today.<sup>63</sup> However, Article VII(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards states that, ‘the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention 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’.<sup>64</sup> Arguably, the Tanzanian government’s failure to discharge its obligations under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 makes it difficult for the recognition and enforcement of foreign arbitral awards in Tanzania. The necessity for Tanzania to update and modify its current Arbitration Act to adopt the Model Law and uphold the New York Convention of 1958 is a matter of urgency in the sense that failure to do so will mean that it may lose investors to neighbouring countries that have aligned their law to conform with current international laws governing commercial arbitration, specifically the New York Convention and Model Law. This state of affairs is affecting Tanzanian’s socio-economic standing in the region as well as its sustainable development. This will not only affect its citizens but also nationals of other contracting member states who wish to invest in Tanzania.

*(c) Anticipated conclusion on the need for reform*

This research paper recommends that the Arbitration Act, which has largely remained unchanged since its enactment and is now outdated, should be reformed to enact either the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, or the Model Law of 1985 as amended in 2006, in order to ensure uniformity with its EAC, SADC and commonwealth country counterparts. This is important for Tanzania to compete competitively with these counterpart countries for investment. The aim of this reform will be to harmonise and allow for mutual enforcement of foreign arbitral awards, not just with countries in the EAC, SADC and commonwealth contracting member states, but also with other countries outside the region.

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<sup>63</sup> Bosman, *supra* note 2 at 236.

<sup>64</sup> Article VII(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

In so doing, not only will the Tanzanian government discharge its obligations under the convention, but it will introduce a dispensation for the recognition and enforcement of foreign arbitral awards to promote international uniformity.

## Chapter 2: Examination of the Arbitration Act on recognition and enforcement of foreign arbitral awards in Tanzania

### (a) Introduction

The previous chapter provided an explanation of how those who seek to have their arbitral awards recognised and enforced in Tanzania face a number of challenges, due to the outdated provisions set out under the Arbitration Act on the recognition and enforcement of foreign arbitral awards, when compared to current international laws governing commercial arbitration disputes.<sup>65</sup> This chapter will examine the various provisions of the Arbitration Act, relating to the recognition and enforcement of foreign arbitral awards, and their weaknesses, by comparing these to the New York Convention of 1958 or the Model Law of 1985, as amended in 2006.

The Tanzanian Arbitration Act provides the conditions and grounds for the enforcement of foreign awards.<sup>66</sup> These conditions include that the award must have been made in pursuance to an agreement for arbitration which was valid under the law by which it was governed; it must have been made in conformity with the law governing the arbitration procedure; and it must have become final in the country in which it was made.<sup>67</sup>

*(i) The contrasts that can be observed between the New York Convention's grounds for refusing enforcement and those of the Tanzanian Arbitration Act are as follows:*

a. The grounds for refusal of the recognition and enforcement of foreign arbitral awards under the New York Convention have been categorised into two. The first category consists of the grounds that can mainly be raised by

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<sup>65</sup> The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>66</sup> Section 30(1)(a)-(e), (2)(a)-(c) and (3) of the Arbitration Act.

<sup>67</sup> Section 30(1) of the Arbitration Act.

the party resisting enforcement.<sup>68</sup> The second category is the category that involves the grounds that can be invoked by the court, *sua sponte* in its entirety.<sup>69</sup>

Under the Arbitration Act of Tanzania this is not the case. No categories are made whatsoever based on the grounds that can be raised by the resisting party, and those by the court. They are placed together in the same provision.<sup>70</sup>

b. Another challenge is that all the grounds for refusal of the recognition and enforcement of arbitral awards under the New York Convention have been stated expressly; they leave no room for speculation or ambiguity upon which grounds can be raised for refusal. The Arbitration Act is the complete opposite; it leaves room for other grounds that are not stipulated within the Act to serve as grounds for refusal. The Act states that, ‘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 ...’<sup>71</sup>

c. The Arbitration Act requires that, for a foreign arbitral award to be enforced in Tanzania, the award must be final in the place it was made.<sup>72</sup> This is a consequence of the fact that the Tanzanian Arbitration Act adopted, in its entirety, the Geneva Convention of 1927.<sup>73</sup> Under the New York Convention, the recognition and enforcement of foreign arbitral awards have been stated expressly since its intention is to make enforcement of a foreign award more straightforward and, in particular, to remove the previous necessity for a double *exequatur*,<sup>74</sup> as

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<sup>68</sup> Article V(1)(a)-(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>69</sup> Article V(2)(a) and (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>70</sup> Section 30(2) of the Arbitration Act.

<sup>71</sup> Section 30(3) of the Arbitration Act.

<sup>72</sup> Section 29(2) of the Arbitration Act, read together with Article 1(d) of its 4<sup>th</sup> schedule.

<sup>73</sup> Article 1(d) and Article 3 of the Geneva Convention of 1927.

<sup>74</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4ed. (2004) 522.

was held in the case of *Oil & Natural Gas Commission v Western Company of North America*.<sup>75</sup> The Indian Supreme Court decided that the arbitration, which had its seat in London, was governed by Indian Law.<sup>76</sup> In this regard it is on record that the elimination of double exequatur under the New York Convention is achieved in two ways. First, the word ‘final’ is replaced by the word ‘binding’ in order to indicate that it does not include the exequatur in the country of origin.<sup>77</sup> Secondly, it is no longer the party seeking enforcement of the award who has to prove that the award has become binding in the country in which the award is made; rather, the party against whom the enforcement is sought has to prove that the award has not become binding.<sup>78</sup> This was stated in the case of *Rosseel .N. v Oriental Commercial & Supply Co (UK)*.<sup>79</sup>

In this case there was no application pending in New York to set aside or suspend a New York award, but defendants resisted enforcement on the basis that it had not yet become binding. Steyn (LHC) held that the New York Convention eliminated the ‘double exequatur’ requirement under the earlier Geneva Convention. Steyn goes further as to state that, under the Geneva Convention, a party who sought to enforce an award had to prove an exequatur (leave to enforce) issued in the country in which he sought enforcement. The New York Convention abolished the need to obtain leave to enforce in the country where the award was made.<sup>80</sup>

However, this is not the case in the Arbitration Act; the party seeking to enforce a foreign award must produce the evidence proving that the award has become final and such evidence as may be necessary to prove that the award is

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<sup>75</sup> *Oil & Natural Gas Commission v Western Company of North America*. (1987). AIR SC674 (ONGC).

<sup>76</sup> *Dowans Holding SA and Dowans Tanzania LTD Tanzania Electric Supply Co Ltd v High Court of Justice Queen’s Bench Division*. 2010. Commercial Court, Case No. Folio 1539.

<sup>77</sup> Article V (1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>78</sup> Albert Jan van den Berg. *The New York Convention of 1958 Towards a Uniform Judicial Interpretation*. (1981) 266.

<sup>79</sup> *Rosseel N.V. v Oriental Commercial & Supply Co. (UK) Ltd*. (1991). 2 Lloyd’s Law. Rep 625.

<sup>80</sup> *Dowans Holding SA and Dowans Tanzania Ltd. Tanzania Electric Supply Co Ltd v High Court of Justice Queen’s Bench Division*. 2010. Commercial Court, Case No. Folio 1539.

foreign. Without doing so, such awards will not be enforceable.<sup>81</sup> The elimination of the double *exequatur* was one of the accomplishments of the New York Convention and Model Law, as it removed one step in the enforcement process, thus reducing the burden on the enforcing party and making it easier to enforce a foreign award. There are few obvious advantages to the double *exequatur*, though the Model Law regime is generally more favorable to arbitration, as it makes it easier to enforce a foreign award thus oiling the wheels of the international arbitration system and making arbitration a more attractive system.

d. The Arbitration Act requires that, for a foreign arbitral award to be enforceable in Tanzania, such an award must not be made contrary to the principles of the law of the forum state.<sup>82</sup> In this regard the recognition and enforcement of foreign arbitral awards in Tanzania is subject to refusal not only on the grounds of public policy but also on the grounds that it offends the legal principles of the place of arbitration, a requirement which was found to be one of the main weaknesses of the Geneva Convention of 1927, which is incorporated in the Tanzanian Arbitration Act.<sup>83</sup> Under the the New York Convention, this is different as the recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the ‘public policy’ of that country. The New York Convention paraphrases this ground set out under the Arbitration Act by removing the wording or requirement of the words, ‘such awards offending the legal principles of the place of arbitration’<sup>84</sup>, purposely to limit the power of court intervention and to ensure direct recognition and enforcement of foreign arbitral awards in places other than where such awards have been made.<sup>85</sup>

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<sup>81</sup> Section 31(1)(b) and (c) of the Arbitration Act.

<sup>82</sup> Section 30(1)(e) of the Arbitration Act.

<sup>83</sup> Redfern & Hunter, *supra* note 53 at 522.

<sup>84</sup> *Dowans Holding SA and Dowans Tanzania LTD Tanzania Electric Supply Co Ltd v High Court of Justice Queen’s Bench Division*. 2010. Commercial Court, Case No. Folio 1539. *Dowans Holding SA and Dowans Tanzania LTD Tanzania Electric Supply Co LTD*, High Court of Justice Queen’s Bench Division, Commercial Court, Case No. 2010, Folio 1539. *Ibid* (n 24) 16.

<sup>85</sup> Article V (2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

In the case of *Tanzania Electric Supply Company Ltd. v Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)*<sup>86</sup>, a case was instituted in the High Court of Tanzania in 2007 by the Tanzania Electric Supply Company Ltd., challenging payment of 65 812 630 US dollars (about Sh105 billion), as part of an execution of foreign arbitral awards given by the International Chamber of Commerce Arbitration (ICCA) in favour of Dowans Companies following a dispute involving the generation of electricity in Tanzania. Two Dowans Companies, Dowans Holdings (Costa Rica) and Dowans Tanzania Limited, had applied in London court to execute the award in question after Tanesco lost its case in the High Court of Tanzania in 2011. In challenging the enforcement of foreign arbitral awards made by the International Chamber of Commerce (ICC), the Tanzania Electric Supply Company Ltd. based its argument on the grounds of misconduct by the arbitrators in erroneously interpreting some of provisions in the Public Procurement Act of 2004, and failing to interpret the law on prohibition and public policy.<sup>87</sup>

In his ruling, Judge Mushi rejected the petition made by the Tanzania Electric Supply Company Ltd.<sup>88</sup> He held that, taking into consideration the well-established principles of law regarding arbitration proceedings in Tanzania and elsewhere within the common law jurisdiction, it would not be proper for the High Court of Tanzania to interfere with the findings of the ICC's Arbitral Tribunal for, in doing so, it would amount to the reopening and re-arguing of the issues of fact and law that parties, by their own agreement, submitted to the ICC Arbitral Tribunal for its consideration and decision.<sup>89</sup>

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<sup>86</sup> *Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania)*. High Court of Tanzania, unreported case no 08/11 of 28 September 2011.

<sup>87</sup> Makaramba, *supra* note 9 at 23.

<sup>88</sup> *Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania)*. High Court of Tanzania, unreported case no 08/11 of 28 September 2011.

<sup>89</sup> Makaramba, *supra* note 9 at 23.

Additionally it also entails the intention of the contracting party to be bound by such a legal regime, though this is one aspect of our ‘public policy’ towards having finality of disputes and arbitral commercial awards.<sup>90</sup>

Judge Mushi appeared to reach this decision based on the fact that the Arbitration Act fell short in its provisions relating to the recognition and enforcement of foreign arbitral awards when compared to the provisions set out under the New York Convention.<sup>91</sup> As a consequence, Honourable Justice Robert Makaramba is of the view that if Tanzania had modernised its law by incorporating provisions of the New York Convention, specifically Article V, on the grounds for refusing the recognition of awards, perhaps the Tanzanian Court in this case would have had the opportunity to explore case law on the interpretation of the New York Convention (NYC).<sup>92</sup>

The UNCITRAL Model Law on international commercial arbitration 1985, with its amendments as adopted in 2006, makes no reference to conditions for the enforcement of foreign arbitral awards. The grounds on which recognition and enforcement of a foreign arbitral award may be refused have been outlined and provided for under Article 35(1) of the UNCITRAL Model Law. Under this provision, the grounds for refusal have been categorised into two. The first category consists of the grounds that can mainly be raised by the party resisting enforcement<sup>93</sup>.

The second category involves grounds that can be invoked by the court, *sua sponte* alone.<sup>94</sup> Unlike in the Tanzanian Arbitration Act, the grounds for refusal of recognition or enforcement have not been categorised, they can all be found under section 30(2) and no consideration has been put as to who may raise these grounds.

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<sup>90</sup> *Ibid.*

<sup>91</sup> Article V (1)(a)-(e) and (2)(a)-(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>92</sup> Makaramba, *supra* note 9 at 23.

<sup>93</sup> Article 36(1)(a)(i)-(v) of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>94</sup> Article 36(1)(b) UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

(ii) *The contrasts that can be observed between the UNCITRAL Model Law's grounds for refusing enforcement and those of the Tanzanian Arbitration Act are as follows:*

For a foreign arbitral award to have legal validity so that it will be enforceable in Tanzania, such an award must have been made in pursuance of an agreement for arbitration which was valid under the law governed.<sup>95</sup> However, the current Tanzanian Arbitration Act does not cover the definition and form of an arbitration agreement, and does not define other terms such as 'foreign awards', or state how the awards are to conform to the new developments in laws governing commercial arbitration worldwide, especially the Model Law of 2006.<sup>96</sup> Seeing as the Tanzanian laws have an interpretation section and not a definition section, the lacuna left in the Arbitration Act is a challenge.

The term 'submission' is defined to mean a written agreement 'to submit present or future differences to arbitration, whether an arbitrator is named therein or not.'<sup>97</sup>

It can be argued that this definition provided under the Tanzanian Arbitration Act limits the current description of an arbitration agreement; a written agreement and the legal obligation of contracting parties is contrary to the international requirement<sup>98</sup> and, as a result, poses a great challenge once the defaulting party in international disputes objects recognition and enforcement of foreign arbitral awards in Tanzania.<sup>99</sup> Apart from a general contractual obligation, as explained above, there are no specific substantive or formal requirements for an arbitration agreement to be enforceable.<sup>100</sup> For the arbitration agreement to have

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<sup>95</sup> Section 30(1) of the Arbitration Act.

<sup>96</sup> Article 7 of UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006.

<sup>97</sup> Section 2 of the Arbitration Act.

<sup>98</sup> Article 7(1),(2),(3),(4),(5) and (6) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006. In this regard 'arbitration agreement' is defined to mean an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

<sup>99</sup> *Tanzania Cotton Marketing Board v Corgecot Cotton Company SA*. 1997. TLR 165.

<sup>100</sup> Wilbert Kapinga, Karel Daele and Susanne Seifert Mkono. 'Getting the Deal Through – Arbitration in 42 Jurisdictions Worldwide: Law and Institutions'. *The International Journal of Public and Private Arbitration*. (2008) 236.

legal validity, it needs only to have been drafted with sufficient clarity to be capable of interpretation, a standard requirement applicable to any contractual provision in Tanzania.<sup>101</sup> In this regard, section 10 of the Tanzanian Contract Act, in the revised edition of 2002, which works *mutatis mutandis* with the Tanzanian Arbitration Act, falls short in that it does not define what constitutes an agreement to meet the requirement provided under the Model Law, which acknowledges the fact that electronic communication and the use of internet is on the rise.<sup>102</sup> This lacuna left in the Contract Act is a challenge.

Under the UNCITRAL Model Law on International Commercial Arbitration of 1985, with amendments as adopted in 2006, this is substantially different, as the language referring to the use of electronic commerce is modernised by adopting wording derived from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the use of electronic communications in international contracts.<sup>103</sup> In this regard, two approaches were proposed by the UNCITRAL Model Law Commission for enacting states to consider, depending on their particular needs and with reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting state. Both approaches are intended to preserve the enforceability of arbitration agreements under the New York Convention.<sup>104</sup> The first approach suggested is based on confirming the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (*compromis*) or a future dispute (*clause compromissoire*). This is to say, the agreement to arbitrate may be entered into in any form, including orally, as long as the content of the agreement is recorded. The second approach is to define the arbitration agreement in a manner that omits any formal requirement.<sup>105</sup>

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<sup>101</sup> Section 30(1) of the Arbitration Act.

<sup>102</sup> Article 7(4) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006.

<sup>103</sup> Article 7 of UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006.

<sup>104</sup> Part Two. Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

<sup>105</sup> *Ibid.*, at 28.

The Arbitration Act provides that a foreign award shall not be enforceable in Tanzania if the party against whom the award is sought was not given notice of arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and not properly presented.<sup>106</sup> Seeing as the Arbitration Act adopted the Geneva Convention<sup>107</sup> in its entirety, the adoption of the word ‘incapacity’, which was later removed from the former Convention, is problematic. The term ‘legal incapacity’, which is set out under the Tanzanian Arbitration Act, poses a great challenge in relation to the recognition and enforcement of foreign awards because neither the Arbitration Act nor Arbitration Rules defines what constitutes legal incapacity, contrary to the Model Law which modified the term incapacity after realising that it contains an incomplete and potentially misleading conflict in interpretation.<sup>108</sup>

In addition, in both the Arbitration Act and UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006, for a foreign arbitral award to be recognised and enforced, the party seeking to enforce a foreign award must produce the original award or its copy duly authenticated in the manner required by the law of the country in which it was made.<sup>109</sup> On this point there appears not to be a significant difference, except perhaps as to the method of authentication of the copy of the award. The Arbitration Act, which incorporated the provisions of the Geneva Convention, may thus set a higher requirement regarding authentication, placing an additional burden on the enforcing party to establish the facts, in order for the Tanzanian court to determine which evidence must be furnished by a party seeking to enforce an award.<sup>110</sup> Contrary to Article 35(2) of the Model Law, its amendments in 2006 to liberalise formal requirements, and reflect the amendment made to Article 7 on

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<sup>106</sup> Section 30(2)(b) of the Arbitration Act.

<sup>107</sup> Article 2(b) of the 4<sup>th</sup> Schedule of the Arbitration Act.

<sup>108</sup> Part Two. Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006.

<sup>109</sup> Section 35(2) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 with amendments as adopted in 2006. See section 31 (1)(a) of the Arbitration Act.

<sup>110</sup> Section 31(3) of the Arbitration Act.

the form of the arbitration agreement, stipulate that presentation of a copy of the arbitration agreement is no longer required.<sup>111</sup>

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<sup>111</sup> Part Two. Explanatory Note by the UNCITRAL secretariat 37. Though in reality practice shows that under the Model Law it is still necessary to present the original or a copy of the award.

### Chapter 3: The need for reform of the Arbitration Act to align with the New York convention or Model law provisions relating to recognition and enforcement of foreign arbitral awards

#### (a) Introduction

The previous chapter examined various provisions of the Arbitration Act relating to the recognition and enforcement of foreign arbitral awards and their weaknesses. In the same way, this chapter emphasises the need for the harmonisation of national law governing commercial arbitration to align with provisions set out under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (The New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration of 1985 with its amendment of 2006 (the Model Law) relating to recognition and enforcement of foreign arbitral awards and the consequence of the Tanzanian government's failure to respect the New York Convention or adopt Model Law.

Tanzania is a dualist country,<sup>112</sup> meaning that in order for a treaty or any international convention such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to be binding, it has to go through a process of domestication by an act of parliament.<sup>113</sup> This process involves signature and ratification or any other process that the treaty requires from it before Tanzania has to adopt the said treaty in its domestic legislation.<sup>114</sup> This is done by accepting the treaty in parts or as a whole and inserting a declaration to that effect into the domestic legislation, or by inserting the text wholly or partially in the domestic legislation that the international treaty contains, to bridge any existing gaps.<sup>115</sup>

Under the New York Convention only two reservations can be done by its contracting member states. In the first place, a contracting member state is allowed

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<sup>112</sup> Kennedy Gastorn. 'The Common Market of the East African Community and the right of access to land by non-nationals in Tanzania' in Kennedy Gastorn, Harald Sippel and Ulrike Wanitzek (eds). *Processes of Legal Integration in the East African Community*. (2011) 104.

<sup>113</sup> Article 63(3)(d) and (e) of the Constitution of the United Republic of Tanzania of 1977 with its amendments.

<sup>114</sup> Article 64(5) of the Constitution of the United Republic of Tanzania of 1977 with its amendments.

<sup>115</sup> Article 17(1)(2) and Article 19 of the Vienna Convention on the Law of Treaty of 1966.

to apply the New York Convention on the basis of mutual dependence or influence and a mutual exchange of privileges, such as the recognition of two or more countries (reciprocity). This is only done to recognise awards made in another state which has ratified the Convention.<sup>116</sup> Secondly, a contracting member state is allowed to apply the Convention only to those transactions considered commercial under its own national law.<sup>117</sup> Currently Tanzania is a contracting member state of the New York Convention,<sup>118</sup> though it has not yet incorporated its provisions on the recognition and enforcement of foreign arbitral awards into the Arbitration Act.

The main objective of the New York Convention is to respond to the demand for uniform rules on the recognition and enforcement of foreign arbitral awards worldwide<sup>119</sup> by promoting harmonisation of the enforcement of arbitral awards in foreign countries.<sup>120</sup> Under this Convention, the presumption is now in favor of validity of an arbitral award and its enforceability is vested upon the national Courts in jurisdictions other than where the award has been made.<sup>121</sup>

This is so because currently international commercial arbitration cannot function without the assistance of the national Courts. The New York Convention is built upon this principle. It can be said that the Convention effectively derives its authority from the national Courts. This is to say the manner in which the national Courts of its contracting member states interpret and apply the Convention is the main source of its effectiveness.<sup>122</sup>

In acknowledging the role of the national Courts, the New York Convention makes a requirement that for a state to be its member it needs to sign

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<sup>116</sup> Joseph T. McLaughlin and Laurie Genevro. *Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts*. 3 INT'L TAX & BUS. LAW. 249 (1986) 252. Available at: <http://scholarship.law.berkeley.edu/bjil/vol3/iss2/2>, accessed on 5<sup>th</sup> February 2014.

<sup>117</sup> *Ibid.*, at 252.

<sup>118</sup> New York Arbitration Convention. 'New York Convention Countries'. Available at: <http://www.newyorkconvention.org/new-york-convention-countries/contracting-states>, accessed on 9<sup>th</sup> February 2014. To date 149 states have ratified this treaty.

<sup>119</sup> Redfern & Martin Hunter, *supra* note 53 at 516.

<sup>120</sup> Amazu A. Asouzu, *supra* note 4 at 180.

<sup>121</sup> M.L. Moses. *The Principles and Practice of International Commercial Arbitration*. 2ed. (2012) 216.

<sup>122</sup> Optic. (n116). 251.

and ratify the Convention.<sup>123</sup> The effect of this ratifying and signing of the Convention, as the Tanzanian government did, is that it is an expression of its intention to be bound an international convention which governs international commercial disputes.<sup>124</sup> It also imposes a binding legal obligation on Tanzania's Court, specifically the High Court and Court of Appeal which is vested with jurisdiction to deal with foreign arbitration to recognise and enforce foreign arbitral awards within the conditions it laid down.<sup>125</sup> In addition, there is an obligation to apply the same conditions and fees provided for in the laws governing the disputes process in Tanzania when dealing with the recognition and enforcement of foreign awards.<sup>126</sup>

- (i) *The advantages for Tanzania to uphold the provisions on recognition and enforcement of foreign arbitral awards set out under the New York Convention are as follows;*

Under the New York Convention the procedure for obtaining enforcement of an award are straightforward, to remove undue delay in the foreign jurisdiction. Therefore, what is needed is the party seeking such enforcement must to supply the court with a duly authenticated original award, which can be an original or certified copies of the arbitration agreement.<sup>127</sup>

The continuing strength of the New York Convention lies in its seven grounds for refusing enforcement of an arbitral award.<sup>128</sup> It obliges the defaulting party that wishes to challenge the validity of an award to bear the burden of proving that one of the seven grounds for refusing enforcement exists, thus reducing the burden on the enforcing party and making it easier to enforce a foreign award in a place other than where it has been made, as the existence of the grounds for refusing

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<sup>123</sup> Article I(III) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>124</sup> *Ibid.*

<sup>125</sup> Article III of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>126</sup> *Ibid.*

<sup>127</sup> McLaughlin & Genevro, *supra* note 116 at 252. See: Article IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>128</sup> Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

recognition and enforcement of foreign arbitral awards is accepted in serious cases only.<sup>129</sup> Secondly, it lists the grounds on which a national court may refuse enforcement on its own motion due to the violation of public policy. This process may be determined by several factors including, but not limited to, a country's level of development, its legal and political characteristics, culture, values and norms of conduct. Judges may interpret public policy to cover many areas, though the same must be in serious cases only, thereby using the distinction between domestic and international public policy.<sup>130</sup>

In addition, the New York Convention focuses on the recognition of foreign arbitral awards and the indirect enforcement of international commercial arbitration agreements, making it easier to enforce a foreign award emanating from both international commercial arbitrations held in Tanzania itself and awards obtained in foreign jurisdictions.<sup>131</sup> Apart from this, under the New York Convention the two sets of grounds for refusing the recognition and enforcement of foreign arbitral awards are provided under the Arbitration Act,<sup>132</sup> and have been combined together with some slight changes to form seven grounds for the national court to refuse this. For instance, the requirement that the award must be 'final' under the Geneva Convention for foreign arbitral awards to be recognised and enforceable was replaced by the word 'binding'<sup>133</sup>, purposefully to clarify that no leave for enforcement from the country in which the awards was made would be required.<sup>134</sup>

Another strength of the New York Convention lies in the requirement that the national courts of a contracting member state must give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration

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<sup>129</sup> Albert Jan van den Berg. 'The New York Convention of 1958: An overview'. *Year Book*. Vol. XXVIII. (2003) 13. Available at: <http://www.kluwerarbitration.com>, accessed on 2<sup>nd</sup> February 2014.

<sup>130</sup> *Ibid.*, at 13. See: Article V(2) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>131</sup> Makaramba, *supra* note 9 at 23.

<sup>132</sup> *Ibid.*

<sup>133</sup> Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>134</sup> Albert Jan van den Berg. *The New York Convention of 1958 towards a Uniform Judicial Interpretation* (1981) 266.

agreement and to recognise and enforce awards made in other jurisdictions, subject to specific limited exceptions.<sup>135</sup>

Apart from this, in an effort to ensure that the objectives of the New York Convention are met and to look for the solution of its challenges, the United Nations Commission on International Trade Law (UNCITRAL) was established.<sup>136</sup> Its primary goal is to create uniformity in rules concerning international commercial disputes.<sup>137</sup> This process involves preparing international legislation for use by states in reforming, modernising, and harmonising the law of international trade relating to arbitral procedure,<sup>138</sup> and non-legislative text<sup>139</sup> for use by commercial parties in negotiating transactions,<sup>140</sup> deliberately to meet the needs of international commercial arbitration.<sup>141</sup> Currently there are more than 135 countries that have adopted the UNCITRAL Model Law.<sup>142</sup> African countries which have adopted the Model Law in their domestic legislation include Kenya, Egypt, Mauritius, Uganda, Zambia, Zimbabwe, Nigeria, Tunisia, and Madagascar.<sup>143</sup>

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<sup>135</sup> *Ibid.*, at 134.

<sup>136</sup> The United Nations Commission on International Trade Law (UNCITRAL) was established by the General Assembly in 1966 (Resolution 2205 (XXI) of 17 December 1966). Available at <http://www.uncitral.org/uncitral/en/about/origin.html>, accessed on 9 February 2014.

<sup>137</sup> *Ibid.*

<sup>138</sup> International commercial disputes resolution, which is covered by UNCITRAL registration, including arbitration and conciliation, electronic commerce, insolvency, cross border insolvency, international transport of goods, international payments, procurement and infrastructure development, and security interests international sale of goods.

<sup>139</sup> Non-legislative texts include rules for conduct of arbitration and conciliation proceedings, notes on organising and conducting arbitral proceedings, and legal guides on industrial construction contracts and counter trade.

<sup>140</sup> Part Two. Explanatory note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, at 1 and 2.

<sup>141</sup> *Ibid.*

<sup>142</sup> Linda Ensor. 'Arbitration System for Commercial Disputes to be Overhauled'. *Business Day*. 30<sup>th</sup> December 2013.

<sup>143</sup> *Ibid.* See: Duncan Bagshaw, 'Arbitration as a Tool for Strengthening Cross –Border Deals: Making a case for the Harmonization of the Arbitration Laws in the SADC Region.' (2013) A paper for the XIV<sup>th</sup> Annual SADC Lawyers' Association General Meeting and Conference at page 7. Available at: [http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20\(D.%20Bagshaw\)\\_0.pdf](http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20(D.%20Bagshaw)_0.pdf), accessed on 18<sup>th</sup> May 2014.

- (ii) *The advantages for Tanzania to align the provisions on recognition and enforcement of foreign arbitral awards set out under the Model Law of 2006 are as follows;*

At present, Tanzania has not yet incorporated the provisions of the Model Law on International Commercial Arbitration of 1985 with its amendment of 2006 into its Arbitration Act. If Tanzania's legislation made the necessary amendment to align its Arbitration Act by adopting these provisions, it would make the process easier for the recognition and enforcement of foreign arbitral awards in Tanzania.

The fact that the Model Law on international commercial arbitration 1985, with its amendments as adopted in 2006, makes no reference to conditions for enforcement of foreign arbitral awards. It is submitted that if the Tanzanian government adopt the Model Law, it will enable the dispensation for the recognition and enforcement of foreign arbitral awards that will enhance its conformity with international norm.

The grounds on which the recognition and enforcement of a foreign arbitral award may be refused have been provided for under Article 35(1) of the Model Law. Under this provision, the grounds for refusal have been categorised into two. The first category consists of the grounds that can mainly be raised by the party resisting enforcement.<sup>144</sup> The second category involves grounds that can be invoked by the court, 'sua sponte' alone.<sup>145</sup> This is to say, the Model Law represents a helpful model for an arbitration law, particularly governing the question of when a court can set one aside. By doing so the Tanzanian government will be able to offer both an effective regime for enforcing arbitral awards, which will promote investment, and an effective regime for dealing with challenges to the recognition and enforcement of foreign arbitral awards.<sup>146</sup> The party seeking to

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<sup>144</sup> Article 36(1)(a)(i)-(v) UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>145</sup> Article 36(1)(b) UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>146</sup> Duncan Bagshaw, 'Arbitration as a Tool for Strengthening Cross –Border Deals: Making a case for the Harmonization of the Arbitration Laws in the SADC Region' (2013) A paper for the XIVth Annual SADC Lawyers' Association General Meeting and Conference at page 7. Available at:

have the arbitral award set aside must prove that one of the grounds mentioned above has been breached.<sup>147</sup>

The continuing strength of the Model Law is seen in changes adopted in the year of 2006, which focus on definitions and the form of arbitration agreements, purposely to suit the current development of communication technologies.<sup>148</sup> This provision, before being amended, was limited by the description of ‘written agreement’. The new provision now defines an agreement to be in writing if its content is recorded in any form, whether the arbitration agreement or contract has been concluded orally, by conduct, or other means.<sup>149</sup> Moreover, the requirement for an arbitration agreement to be in writing is met by electronic communication.<sup>150</sup> This will help Tanzania’s court to recognise electronic communication as valid communication for agreements. For instance, e-mails, cell phone texts, online meetings, voice messages on a cell phone, electronic-commercial transactions, among others, which now form part and parcel of means of communication in our daily activities. This is relevant to Tanzania, where there has been increasing advancements in the use of communication technology in the past five years.

Furthermore, this will help Tanzania’s court to have a wider scope of interpretation on different terms, such as international and non-international awards, commercial and non-commercial disputes, foreign awards and domestic awards, international public policy, and domestic public policy.<sup>151</sup> Though the Model Law does not specify any definition or clarification of what constitutes public policy in the law itself, it leaves the application of the law to judges.<sup>152</sup> It is often said that, in international arbitration matters, the public policy ground for

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[http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20\(D.%20Bagshaw\)\\_0.pdf](http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20(D.%20Bagshaw)_0.pdf), accessed on 18<sup>th</sup> May 2014.

<sup>147</sup> *Ibid.*, at 11.

<sup>148</sup> Article 7(2) and (3) of the 1985 UNCITRAL Model Law on International Commercial Arbitration.

<sup>149</sup> Article 7(3) of the 2006 UNCITRAL Model Law on International Commercial Arbitration.

<sup>150</sup> Article 7(4) of the UNCITRAL Model Law on International Commercial Arbitration (original 1985 version).

<sup>151</sup> The Arbitration Act does not define these terms used in arbitration litigation. However, only two terms appeared to be defined in a narrow scope of interpretation.

<sup>152</sup> Bagshaw, *supra* note 146 at 12.

refusing enforcement or setting aside an award should be restrictively applied so that only matters of international public policy can be relied upon, and not merely domestic public policy.<sup>153</sup>

The consequence of the Tanzanian government's failure to ratify the New York Convention or adopt the Model Law is that it makes it difficult for Tanzania's Court to enforce a foreign award emanating from both international commercial arbitrations held in Tanzania itself, and awards obtained in foreign jurisdictions.

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<sup>153</sup> *Ibid.*

## Chapter 4: Recommendations and conclusion

### (a) Introduction

The previous chapters emphasise the need for the harmonisation of Tanzania's national law governing commercial arbitration to align with provisions set out under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) or the UNCITRAL Model Law on International Commercial Arbitration of 1985 with its amendment of 2006 (the Model Law) relating to the recognition and enforcement of foreign arbitral awards. This chapter recommends and concludes that there is a need for the reform of current Tanzanian arbitration provisions to conform to the New York Convention of 1958 and Model Law of 1985 as amended in 2006.

#### (i) *Recommendation*

It is undisputed that the arbitration legislation in force (both the Arbitration Act and the Arbitration Rules) predates both the New York Convention and the UNCITRAL Model Law, although it has never been amended to take into account their provisions.<sup>154</sup>

It is this researcher's submission to the Tanzania Law Reform Commission to recommend to the National Assembly that Tanzania should uphold the provisions relating to the recognition and enforcement of foreign arbitral awards set out under the New York Convention and adopt the UNCITRAL Model Law as amended in 2006.

The UNCITRAL Model Law, including provisions governing the recognition and enforcement of arbitral awards, are closely modeled on the rules of the New York Convention and the provisions of the Model Law. Its eighth and last chapters are based on the assumption that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad and that these rules should closely follow the New York Convention.<sup>155</sup>

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<sup>154</sup> Norton Rose, *supra* note 3 at 6, accessed on 2 January 2014.

<sup>155</sup> T.B. Vucurovic. '50th Anniversary of the NYC: Any progress in the recognition and enforcement of foreign arbitral awards in Ukraine' (2008). 2 *International Arbitration Law Review*. 5, 3.

This indicates that these two treaties need each other to work effectively and to fulfil their intended purposes. As they work best in unison, this combined approach will successfully ensure that Tanzania achieves its desire to introduce a dispensation for the recognition and enforcement of foreign arbitral awards that will promote international uniformity.

In a similar vein, the Honorable Justice Robert Makaramba has provided guidelines whereby, in the event that the National Assembly decides to enact its new arbitration law, it should have two separate and distinct arbitral Acts. One which addresses matters of enforcement of domestic awards, and the other which deals with the recognition and enforcement of foreign arbitral awards or should have only one statute covering both.<sup>156</sup>

Furthermore, he is of the opinion that it is essential to have in place a law on arbitration that is in tune with today's economic business trends and to have rules for the conduct of arbitration proceedings as well as the enforcement of both domestic and foreign arbitral awards which will facilitate the smooth running of the Tanzanian arbitration field and enable it to flourish.<sup>157</sup>

To achieve this anticipated outcome, the National Assembly will need to amend section 2 of the Arbitration Act,<sup>158</sup> which deals with interpretation of the laws, due to fact that this section fails to define some fundamental terms, which are required in commercial arbitration. This includes terms such as arbitration; written agreement; international and non-international awards; commercial and non-commercial disputes; awards; foreign awards and domestic awards; international public policy and domestic public policy; and, recognition and enforcement, to conform to the new developments in laws governing commercial arbitration worldwide, especially the Model Law 2006.<sup>159</sup>

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<sup>156</sup> Makaramba, *supra* note 9 at 30. The trend in some countries of the world, including Australia and Mauritius, is to have separate legal regimes on arbitration.

<sup>157</sup> *Ibid.*

<sup>158</sup> Cap. 15 of the Laws of Tanzania (Revised Edition of 2002).

<sup>159</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

For instance, the term ‘public policy’ – which is one of the grounds for refusing recognition and enforcement of foreign awards or conditions for setting aside an award under the Arbitration Act,<sup>160</sup> – should be given a clear interpretation, specifically to show differences between domestic public policy and international public policy, based on the differing purposes of domestic and international relations.<sup>161</sup>

Additionally, it must be specifically stated in the Arbitration Act that foreign arbitral awards shall lack recognition and enforcement in Tanzania, if the court is satisfied that: ‘There has been a serious and manifest breach of international public policy which discard domestic policy issues, regarding international nature of the arbitration, and the inherent desirability of enforcing the parties’ agreement to arbitrate and to be bound by the result of the arbitration, nevertheless makes it unconscionable for court to permit the award to be enforced’.<sup>162</sup> The National Assembly should adopt this principle, in this way acknowledging that this interpretation is acceptable in the SADC countries, where Tanzania is a contracting member state and in other jurisdictions.<sup>163</sup> However, the determination or interpretation of what constitutes domestic public policy should be left to the national judges.<sup>164</sup>

The UNCITRAL Model Law has emphasised that in the interpretation of laws there is the need for uniformity in its application and the observance of good

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<sup>160</sup> Section 30(1)(e) of the Arbitration Act.

<sup>161</sup> Article V (2)(a) and (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. See Albert Jan van den Berg. ‘The New York Convention of 1958: An overview’. *Year Book*. Vol. XXVIII. (2003) 18. Available at <http://www.kluwerarbitration.com>, accessed on 2<sup>nd</sup> February 2014.

<sup>162</sup> Duncan Bagshaw, ‘Arbitration as a tool for strengthening cross –border deals: Making a case for the Harmonization of the Arbitration Laws in the SADC Region.’(2013) A paper for the XIVth Annual SADC Lawyers’ Association General Meeting and Conference at page 7, available at: [http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20\(D.%20Bagshaw\)\\_0.pdf](http://www.sadcla.org/sites/default/files/Harmonisation%20of%20Arbitration%20Law%20paper%20(D.%20Bagshaw)_0.pdf), accessed on 18 May 2014.

<sup>163</sup> The countries which have aligned their law to conform with the current international laws governing commercial arbitration, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the Model Law of 2006.

<sup>164</sup> Amazu A. Asouzu, *supra* note 4 at 12.

faith.<sup>165</sup> This indicates that, although this instrument is used for disputes that are international in their origin, the need for uniformity must be observed.

The Model Law draws a distinction between international and non-international awards instead of the traditional line between foreign and domestic ones. This new line distinction is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for the reasons of convenience of the parties and the dispute may have little or no connection with the state where the arbitration takes place. Consequently, the recognition and enforcement of international awards, whether foreign or domestic, should be governed by the same provisions. For this reason, reciprocity is not included as a condition for recognition and enforcement of awards.<sup>166</sup> It is the researcher's submission that the Tanzanian Law Reform Commission should recommend to the National Assembly that the new demarcation adopted by the Model Law be incorporated into the Arbitration Act. Arguably, it is by doing so that Tanzania's courts will be assisted in promoting international law. Treating an award rendered in international commercial arbitration in a uniform manner irrespective of where it was made will meet the acceptable international standard with regard to the recognition and enforcement of foreign arbitral awards in a place other than where such award has been made.

The other innovation the Tanzanian Law Reform Commission should consider recommending to the National Assembly is to be specific on the requirements of an agreement clause, to describe what an arbitration agreement is, and to not remain silent on whether it shall be in writing or not, as it is under the current Arbitration Act. It is important to bear in mind the level of development reached in the field of electronic transaction and communication within the country and the world at large. In responding to this the National Assembly should

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<sup>165</sup> Article 2A(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

<sup>166</sup> Article 35(1)-(2) and Article 36 of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. See Part Two. Explanatory Note by the UNCITRAL secretariat at page 37.

regard the proposed first clause adopted by Model Law 2006 as ideal and adopt it. Furthermore, the Tanzanian Law Reform Commission should consider recommending to the National Assembly the possible amendment of section 10 of the law of Contract Act.<sup>167</sup> The purpose of the amendment is to meet the requirement provided under the Model Law, which acknowledges the fact that electronic communication and use of internet is on the rise. As a consequence, the law of contract needs to be amended to conform to modern means of communication and to widen its scope of application.

It is significant that Article 35(2) of the Model Law 1985 was itself amended, deleting the requirement for the party requesting enforcement to supply an original agreement.<sup>168</sup> The researcher's submission to the Tanzanian Law Reform Commission is to recommend to the National Assembly that they should leave section 31(1)(a) of the Arbitration Act, which is similar to this provision, as is and grant the courts power to use this whenever called upon to enforce a foreign award. However, this should be subject to certain limitations and without any requirement that a party seeking recognition and enforcement of a foreign award in Tanzania must first obtain leave for the enforcement of such awards from his local Court or the Court of the place in which the award was made in order to show that the award was final.<sup>169</sup> The main advantage is to help the party seeking recognition and enforcement of such award in Tanzania to reduce costs that will be incurred in running the case, time spent in seeking justice, and to meet the requirements set out under the New York Convention of 1958.<sup>170</sup>

Likewise, the National Assembly should consider amending section 31(1)(b) and (c) of the Arbitration Act which state that, 'The party seeking to enforce a foreign award must produce evidence proving that the award has become final; and such evidence as may be necessary to prove that the award is a

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<sup>167</sup> Cap. 345 of 2002.

<sup>168</sup> Part Two. Explanatory note by the UNCITRAL secretariat 37. Though reality in practice shows that under the Model Law it is still necessary to present the original or a copy of the award.

<sup>169</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4ed. (2004) 440.

<sup>170</sup> Article IV(a) and (b), read together with Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

foreign award'.<sup>171</sup> In response to this, the National Assembly should regard the proposed first clause adopted by the New York Convention of 1958 as ideal and adopt it. The purpose of the amendment is to shift the burden of proof from the party seeking enforcement to the party opposing it; to limit the defenses to enforcement; to eliminate the 'double exequatur';<sup>172</sup> to provide the Tanzanian Court with discretion over whether to enforce an award;<sup>173</sup> and, to meet the requirement in the New York Convention.<sup>174</sup> The main objective of this is to respond to the rising demand for uniform rules on recognition and enforcement of foreign arbitral awards worldwide<sup>175</sup> by promoting the harmonisation of the enforcement of arbitral awards in foreign countries.<sup>176</sup> In response to this, the National Assembly should look at the proposed first clause adopted under the New York Convention as ideal and adopt it into the Arbitration Act.<sup>177</sup>

In the same way, the Tanzanian Law Reform Commission should recommend to the National Assembly to amend section 30(2) of the Arbitration Act, which provides that, 'Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part if the court is satisfied that- 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,

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<sup>171</sup> Section 31 (1)(b) and (c) of the Arbitration Act, cap. 15 of 2002.

<sup>172</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4ed. (2004) 522. In this context the term 'double exequatur' is one of requirement which was set out under the Geneva Convention of 1927, which obliged a party who sought to enforce an award to prove leave to enforce such award issued by the competent court in the country in which such award was made. In the same way this party also had to obtain leave to enforce such award in the country other than the place such award was made in which he sought enforcement

<sup>173</sup> Albert Jan van den Berg. *The New York Convention of 1958: Towards a Uniform Judicial Interpretation*. (1981) 306.

<sup>174</sup> Albert Jan van den Berg. *The New York Convention of 1958 Towards a Uniform Judicial Interpretation*. (1981) 266. See Article V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which read as follows: (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 competent authority where the recognition and enforcement is sought, proof that: (e)the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which ,that award was made.

<sup>175</sup> Alan Redfern & Martin Hunter. *Law and Practice of International Commercial Arbitration*. 4ed. (2004) 516.

<sup>176</sup> Amazu A. Asouzu. *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*. (2001) 180.

<sup>177</sup> Van den Berg, *supra* note 174.

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.’ In this regard this research suggests that this provision should read as follows: ‘the recognition and enforcement of the foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that: the award deals with deference not completed or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised or enforced.’ This is purposely to meet the requirement provided under the New York Convention with regard to the grounds that can be raised by the party resisting enforcement,<sup>178</sup> and the grounds that can be invoked by the court ‘sua sponte’ in its entirety.<sup>179</sup>

In addition to this, the National Assembly should consider the amendment of section 30(3) of the Arbitration Act, which reads as follows, ‘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 ...’<sup>180</sup> The researcher proposes that this section be amended to read, ‘No party shall seek to resist enforcement on any other grounds other than those stipulated under subsection 1 of this section’. The main aim of this is to make sure that all the grounds for refusal of recognition and enforcement

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<sup>178</sup> Article V (1)(a)-(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

<sup>179</sup> Article V (2)(a) and (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which states that recognition and enforcement of arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter is of a difference not capable of settlement by arbitral under the law of the country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

<sup>180</sup> Section 30(3) of the Arbitration Act, cap. 15 of 2002.

of arbitral awards provided under the Arbitration Act are stated clearly and expressly, and that they leave no room for speculation or ambiguity to raise yet another ground for refusal that is not stipulated within the Act to serve as grounds for refusal.

The Tanzanian Law Reform Commission should consider recommending amendment of the grounds for setting aside an award. Section 16 states that, ‘where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award.’ In dealing with this, this research suggests that the National Assembly take the position provided under the Model Law of 2006, which is of great importance and should be incorporated into the Arbitration Act.<sup>181</sup> This will widen the scope of the application of the Tanzanian Arbitration Act. At the same time this will make it easier for the party resisting enforcement to make application before Tanzania’s courts for setting aside a foreign award rendered in Tanzania.<sup>182</sup>

It is to be noted that the Model Law 1985 was also amended, deleting the allowance for the refusal of recognition and enforcement of foreign arbitral awards on the ground that a person was under some legal incapacity, modifying the term ‘incapacity’ after realising that it contained an incomplete and potentially

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<sup>181</sup> Article 34(2) of UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, which reads that: (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article. (2) An arbitral award may be set aside by the court specified in Article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was 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 this State; or (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.

<sup>182</sup> See Part Two. Explanatory note by the UNCITRAL secretariat at page 36. In practice application for setting aside made under Article 34(2) of the Model Law, may only be made to a court in the state where the award was rendered, while application for enforcement may be made in a place other than where the award had been made.

misleading conflicting interpretation of law rules.<sup>183</sup> The suggestion of this research is that section 30(2)(b) of the Arbitration Act should not be amended because it is similar to the Model Law and gives Tanzanian judges the discretion to determine what constitutes ‘legal incapacity’.

(ii) *Conclusion*

It is time for the arbitration legislation in force in Tanzania (both the Arbitration Act and the Arbitration Rules) to be reformed by the National Assembly, either by enacting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,<sup>184</sup> or the Model Law of 1985 as amended in 2006, by the adoption of both in one statute or in two separate statutes. The primary motivation for this is to ensure uniformity with EAC, SADC and the commonwealth countries. This is important to be competitive with these countries for investment purposes and to be an attractive venue for arbitration. The aim is to harmonise and allow for the mutual enforcement of foreign arbitral awards, not just with countries in the EAC, SADC and commonwealth contracting member states, but also with other countries outside the region. By doing so not only will the Tanzanian government discharge its obligations under the convention but will also introduce a dispensation for the recognition and enforcement of foreign arbitral awards that will promote international uniformity.

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<sup>183</sup> Part Two. Explanatory Note by the UNCITRAL secretariat 37. Though practice shows that under the Model Law it is still necessary to present the original or a copy of the award.

<sup>184</sup> Although there are elements to the New York Convention that may appear to be outdated, it is noteworthy that there are a number of aspects that are still very useful to date. This was pointed out by the Working Group itself, which was of the view that the New York Convention has already achieved a unifying effect. See Working Group II on International Contract Practices. Third Session. (1982) 25.

## CASES

*1 Dowans Holding SA and Dowans Tanzania LTD Tanzania Electric Supply Co Ltd v High Court of Justice Queen's Bench Division.* 2010. Commercial Court, Case No. Folio 1539.

*2 Oil & Natural Gas Commission v Western Company of North America.* (1987). AIR SC674 (ONGC).

*3 Rosseel N.V. v Oriental Commercial & Supply Co. (UK) Ltd.* (1991). 2 Lloyd's Law. Rep 625.

*4 Tanzania Electric Supply Company Ltd. and Dowans Holdings SA (Costa Rica) v Dowans Tanzania Limited-(Tanzania).* High Court of Tanzania, unreported case no 08/11 of 28 September 2011.

*5 Tanzania Cotton Marketing Board v Corgecot Cotton Company SA.* 1997. TLR 165.

## LEGISLATION

### (a) Statutes

- (i) The Arbitration Act, Cap 15 Revised Editions of 2002.
- (ii) The Law of Contract Act, Cap 345, Revised Editions of 2002.

### (a) Conventions

- (i) The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
- (ii) UNCTRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

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