STATE OF COMMERCIAL ARBITRATION IN TANZANIA; A COMPARATIVE STUDY WITH UGANDA

LILIAN RICHARD MUSINGI

(Student No: MSNLIL002)

Supervised by: Professor RICHARD CHRISTIE

(Department of Commercial Law)

FACULTY OF LAW, UNIVERSITY OF CAPE TOWN

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University of Cape Town

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Signed by candidate

LILIAN RICHARD MUSINGI

DATE 11th february 2008

DEDICATION

To my parents, Richard Musingi and Fortunata Magesa

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LIST OF ABBREVIATIONS

ADR	-	Alternative Dispute Resolution
CADER	-	Centre for Arbitration and Dispute Resolution
Cap.	-	Chapter
CECORE	-	Centre for Conflict Resolution
EAC	-	East African Community
EACJ	-	East African Court of Justice
E.g.	-	*Exemplum gratia* (for example)
Etc	-	*Et cetera* (and other similar things)
Ibid	-	*Ibiden* (in the same place)
i.e.	-	*id est* (that is)
ICC	-	International Chamber of Commerce
ICSID	-	International Centre for Settlement of Investment Disputes
LCIA	-	London Court of International Arbitration
NCC	-	National Construction Council
No.	-	Number
Op cit	-	Opus citatum
Pg	-	Page
R.E	-	Revised Edition
Sec.	-	Section
TIA	-	Tanzania Institute of Arbitration
UNICITRAL	-	United Nations Commission on International Trade Law

V	-	Versus
Vol.	-	Volume

GLOSSARY

Ad hoc	-	for this special purpose
Functus officio	-	having performed his office
Inter alia	-	among other things
Lacuna	-	a gap
Op cit- (opus citatum)	-	the work has previously been refered to

CHAPTER ONE

GENERAL OVERVIEW

1.1 Introduction.

In general terms arbitration is the determination of dispute by the decision of one or more persons called arbitrators. It is an alternative means of dispute resolution to litigation. In arbitration parties have a say in the decision as to who should be involved in the determination of the dispute between them unlike in litigation where parties besides deciding on where to file a case which depends on the jurisdiction (territorial and pecuniary) of the courts, have no say not even influence on who should preside in their cases. In arbitration parties are also involved in deciding the venue of the arbitration.[1]

It is a voluntary procedure, also enforceable where parties to the dispute enter into an agreement that in case a dispute arises out of their commercial relationship, arbitration would be the mode of settling it. This means that the parties enter agreement selecting arbitration as mechanism to settle their dispute. Arbitration can be also ordered by the court on the application of the parties to the dispute. Its central features are that it is based on an agreement between the parties to the dispute, involves referral of a dispute to an independent arbitral tribunal (made up of one or more arbitrators) and produces a binding decision which may be enforced through the courts.[2]

Agreements to arbitrate are of two kinds, those which refer an existing dispute to arbitration and those which relate to disputes which may arise in the future. An agreement which refers to an

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[1] Institute of Law Research and Reform, Edmon, Alberta, "Towards a New Arbitration Act for Alberta", Issue No. 1, 1987.

[2] Mustill B., Commercial Arbitration, 2nd Ed, Butterworth, London, 1995

existing dispute is often called '*ad hoc* submission', and the second type of agreement usually takes the type of clause inserted in the contract which creates those rights and duties which in the event of disputes, will be the subject of the intended arbitration.[3]

Since disputes are predictable in daily life and especially to the businessmen, they need to be resolved in an orderly manner in which the outcome will not create another misunderstanding. The orderly mechanism of resolving disputes creates *inter alia* social harmony on one hand and economic development on the other hand.

Because of this reason, members of society need a proper and effective means of resolving their disputes. Court litigation is the most common way of resolving disputes whereby the end result creates a misunderstanding between the parties especially in the adversarial system when one loses all and the other party wins. In this way parties to disputes submit themselves to the adversarial rules and procedures established in an ordinary judicial system whereby courts of law are vested with powers to determine cases which are brought before them according to the rules and procedures established by law.

Although arbitration has been disregarded by some members of society due to a number of reasons which this study attempts to examine, it is a better way of settling disputes since it offers many advantages. Such advantages include amicable settlement, privacy, low cost, parties can choose their own rules and procedures, the ability of the parties to choose their own judges, permit choice of an expert in the field who is more able to view the dispute in its commercial

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[3] Ibid

settings and the times and places of hearing can be chosen according to the convenience to the parties.[4]

1.2 Statement of the Problem.

Although arbitration has been one of the best ways of resolving disputes, experience has shown that most of the members of the public prefer to settle their dispute by way of litigation. This situation suggests that although arbitration has more advantages than litigation but for various reasons members of society have not readily made meaningful use of it. This study therefore sought to find out the reasons behind this scenario and identify the impediments thereof.

Besides, in their agreements, contracting parties usually prefer arbitration as means of resolving their disputes but when it comes to selection of applicable law in case of dispute, they select foreign rules that are normally applied by foreign institutions (such as UNCITRAL,[5] ICC,[6] ICSID,[7]) to govern their arbitration. This scenario suggests that, the majority of those who are expected to make use of the Tanzanian arbitration laws and institutions are not invoking application of such laws. The study sought to examine the reasons behind this.

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[4] National Construction Council in Collaboration with Tanzania Institute of Arbitrators, Course on Conduct and Practice of Arbitration, Dar es Salaam, Tanzania. 5th – 7th October, 2005

[5] The United Nations Commission on International Trade Law (UNCITRAL) established by the United Nations General Assembly in 1966,

[6] Founded in 1919 to serve the world business by promoting trade and investment. In 1923 the ICC International Court of Arbitration was established in Paris.

[7] Established by the World Bank pursuant to Article 1 of the Convention on the Settlement of Investment Dispute between States and Nationals of other States in October 1966. It is specifically designed to facilitate the settlement of disputes between governments and foreign investors with a view to helping in promoting an increased flow of international investment.

In Tanzania, arbitration still sounds unfamiliar to the community. Most of the times advantages of arbitration as an attractive dispute settlement mechanism have been concealed to the parties by their advocate. Advocates seem to prefer court litigation to arbitration because of their own personal interests including fear to lose the huge amount of money sometimes payable to them as litigation instruction fees, which may differ from the fees payable to them in arbitration.

Furthermore, there is only single known arbitration institution in Tanzania. The institution still does not offer a competitive and adequate arbitration services for it is unknown to stakeholders especially to the members of the public.

1.3 **Objective of the Study.**

The study examines the state of arbitration in Tanzania, focusing on the strength and weaknesses of arbitration law. In order to achieve this, an attempt to compare the situation in Uganda was made with a view to determining its suitability in the Tanzania environment. The study attempts to inform the reader whether or not the state of arbitration in Uganda is different from Tanzania. Reference is made to the Uganda arbitration laws and rules together with the established institutions (on how they operate and whether there is a significant progress in arbitration).

In addition the study sought to explore major problems that face the members of the public whenever they want to make use of arbitration in settling disputes among them. Having identified such major problems, this study makes recommendations for the way forward. Indeed the study aimed at raising awareness to the business community in Tanzania.

Generally the main objective of the study was to find out the impediments that lead to the underutilization and non-development of arbitration mechanisms in dispute settlement in Tanzania with a view to bringing them to the attention of the members of the public.

1.4 Significance of the Study.

The study sought to contribute to the existing knowledge in understanding the importance of arbitration through analysis of the existing relevant legal framework. A critical evaluation of the provisions of the Arbitration Act, 2002 and respective rules has been carefully undertaken together with comparative analysis of Ugandan arbitration laws with a view to buttressing proposals for the way forward.

The importance of arbitration against court litigation has been highlighted with a view to encouraging the members of the public to refer their dispute to arbitration. The study also is expected to assist the government of Tanzania, Law Reform Commission and the Legislature in improving the arbitration legal regime as one of the effective alternative mechanisms of settling disputes in Tanzania.

Awareness of stakeholders is expected to be raised through this study on the advantages of arbitration in resolving their disputes. This is more so because in Tanzania most of the people still assumed that arbitration was a waste of time and could not resolve their disputes conclusively.

The study was vital, as it provided an input to the law makers by addressing the shortcomings of the arbitration regime in Tanzania, thereby underscoring the need to amend the Act. It is anticipated that this study will be useful to various people such as arbitrators, lawyers, advocates, judges, businessmen, investors, law scholars, law makers and even laymen.

1.5 Hypothesis.

The study set out to test the following hypothesis:

(a) Arbitration is not a popular dispute settlement mechanism in Tanzania because its stakeholders especially lawyers do not give it prominence.

(b) The arbitration law and rules in Tanzania are imperfect for they do not sufficiently respond to the needs of the Tanzanians; and also the institutions are not known to the people.

1.6 Research Methodology

In carrying out this study, we basically relied on library and field research.

In library work, the University of Cape Town and University of Dar es Salaam libraries particularly law collections were of vital importance where various books, periodicals, journals, newspapers, statutes, theses, cases and other related materials were consulted.

The field research was conducted in Tanzania and it involved visiting various courts, institutions, organizations and interviewing various senior judicial officers, arbitrators, Law Reform Commissioners, some members of the legal profession, the public especially businessmen who had been involved in arbitration and those who had not. This study relied also on information technology and internet to reach distant sources and correspondents. Interviews, questionnaires, documentary review and observation were the key data gathering techniques that this work relied on.

1.7 Literature Review.

The literature survey exercise revealed that, this particular area of study had never before been subject of research and scholarship in Tanzania. Various writers have contributed to the better

general understanding of arbitration law worldwide. However, the researcher in this study attempted to examine some literature that related to the Tanzanian situation and to the topic under study. Their contributions were useful for they provided background for the way forward. The following is the list of some of the literature that was reviewed in this study.

Russell[8] gives an account of the English Arbitration Act of 1950, by underlining the need to have a comprehensive piece of national legislation that would govern matters of arbitration. He points out that arbitration is the parties' own choice, yet it is necessary that some assistance should be lent by the ordinary machinery of law.

Although the author made reference to English law (which was replaced by the 1996's Act), his work provided a substantial input in this study as it show how the law in Britain systematically changed to cope with time and adapt to the needs of changing society. His book assisted the study in explaining the importance of the changes that were made, and this laid a foundation for the argument that Tanzania needs to develop its law of arbitration to adapt to the present time.

Arguably, the newest edition of Russell would have been a better reference. However, we prefer the 1970 edition because of the similarity between the Tanzanian Act of 2002 and the English Act of 1950.

Markanda[9] has written on the history of arbitration in India. He traces the genesis of the Indian arbitration law from the ancient times to the present. He argues that the Arbitration and Conciliation Act, 1996 of India was enacted to update the law of arbitration so as to make it conform to the UNCITRAL Model Law. According to him, the Act sought to provide for an

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[8] Russell W. A., The Law of Arbitration, 18th ed Stevens & Sons, London, 1970
[9] Markanda, P.C., Law Relating to Arbitration and Conciliation, 4th ed. New Delhi, 2001

effective mode of settlement of disputes both for domestic and foreign commercial arbitration. He argues that this is a result of economic liberalization that had seen the coming of huge foreign investments in India. The author was able to show a comparative analysis between the Indian Arbitration Act of 1940 and the Arbitration and Conciliation Act of 1996. The objectives of the Bill and reasons for the enactment of the Arbitration and Conciliation Act 1996 are analyzed. This analysis assisted this study in discussing and examining whether or not those objects actually fit the current situation in Tanzania which in the ten past years had been undertaking a trade liberalization crusade.

The ICC and UNCITRAL rules of arbitration appended to this text also assisted in identifying the weaknesses in the Ordinance and Rules as well as the arbitration institutions in Tanzania. There are also arbitration rules of different High Courts of India in the author's work. These provided the study with comparative information necessary for a critical analysis of those rules and the rules of arbitration in Tanzania.

Ratal, et al,[10] give a very comprehensive definition and types of arbitration. They also discuss the origin of arbitration in many countries in the world such as China, India, Italy, United Kingdom and United States of America. They comment that, the origin of arbitration is obscure, in that it had developed with time and that to date it has become a popular means of setting disputes in inter-national, national and commercial spheres. They discuss the history of arbitration in India, the sources of Indian arbitration law and its defects, and argue that arbitration is still a progressive subject in dispensing justice.

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[10] Ratal C., Law Arbitration and Conciliation, 4th ed. (New Delhi 1966)

The authors ably analyze different aspects of both domestic and international commercial arbitration and the rationale of having large number of disputes today, which are being adjudicated by different arbitration tribunals all over the world. Of more interest is the authors' analysis of the rules and procedures of arbitration institutions namely, the ICC, UNCITRAL and ICSID. An analysis of the provisions, section by section, of the Indian Arbitration and Conciliation Act, 1996 is also made. It has been shown that the Indian Act, virtually, adopts the UNCITRAL Model Law.

Despite the fact that the authors did not make reference to Tanzanian arbitration law, their work was relevant to this study in identifying the need to have a substantive law of arbitration which would accommodate the rapid growth of trade and commerce in Tanzania, which this work was all about. They have further assisted the researcher in this study by showing the experience and the level of development of arbitration law in other countries. This assisted the study in its endeavor to find out whether or not the law relating to arbitration in Tanzania has been left behind.

Redfern, et al,[11] deal primarily with international commercial arbitration. They point out that in nurturing international arbitration there must be in place a national law that governs recognition and enforcement of the agreement to arbitrate, that regulates the actual arbitration proceedings themselves and most importantly, the law, which the arbitral tribunal has to apply to the substantive matters in dispute before it. The authors discuss the dependence of the international commercial arbitral process upon the rules of a national law. Their work also helped the study on grounding the fact that the Tanzanian arbitration law has to copy international commercial

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[11] Redfern, et al, Law and Practice of International Commercial Arbitration, 3rd Ed. Sweet & Maxwell, London 1999.

arbitration in order to accord it with international practices, now that globalization cannot be avoided. Inevitably, the advent of liberalization of economy and the interest being shown by both foreign and local investors to invest in Tanzania intensify the pressure for change of the arbitration law.

Maina[12] comments that, in commerce there is a tendency to underplay the whole question of dispute settlement and that, occurrence of disputes in all aspects of life is a reality, which cannot be washed away. In addition to these comments, the author goes on to examine disputes that are related to investments.

Furthermore an examination is made on how national legislations in the Hashemite Kingdom of Jordan, Republic of Kenya and the United Republic of Tanzania protect foreign investments. The Foreign Investment (Protection) Act[13] and its regulations[14] have been discussed in brief. He argues that this investment law underplayed the whole question of dispute settlement. Only subsection (3) of section 6 of that Act provides for reference to arbitration of any dispute that arises between the Government and the investor. There is no indication of procedure to be followed in such arbitration. Although the author did not mention anything in the Ordinance, which is the subject of this study, his work helped the study at least to show that arbitration had hardly been addressed by the lawmakers and professionals in Tanzania.

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[12] Maina. P.C., "Settlement of Investments Disputes" Journal of International Arbitration, Vol. 5, No. 1 Geneva, 1988.
[13]The Foreign Investment (Protection) Act of 1963, Cap.533
[14] The Foreign Investment (Protection) Regulations of 1964.

In the year 1994, ***Maina***[15] again attacked the investment law in Tanzania for its failure to address adequately the whole concept of dispute resolution mechanism. In that other work, he argued that, the mode of investment disputes settlement was an important factor which any serious investor would examine with great care.

According to him, the National Investment (Promotion and Protection) Act[16] does not put any impetus on the investment disputes settlement mechanism. Only section 29 provides for settlement of any dispute amicably, and failure of which the same to be settled by arbitration. Unlike the repealed Act, the new one designates a forum in which the said disputes shall be referred to. The Act refers the parties to the rules and procedures of ICSID[17], or any bilateral, or multi-lateral agreement on investment protection, where the Government and the country in which the investor is a national are a party, or in accordance with any other international machinery for the settlement of investment disputes agreed by the parties. Yet, no mention is made on the Ordinance[18].

Despite the fact that he does not make any reference to the Ordinance his work will help the study in its pursuit for identification and examination of the problems associated with the arbitration law in Tanzania.

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[15] Maina. C. P., Foreign investment in Tanzania: The Mainland and Zanzibar, Friedrich Egbert Stiftung, Dar es Salaam, 1994.

[16] The National Investment (Promotion and Protection) Act No. 14 of 1997.

[17] The International Centre for Settlement of Investment Disputes (ICSID), an institution of the World Bank group based in Washington, D.C., was founded in 1966 pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Washington Convention). With a view to helping in promoting international investments.

[18] The Arbitration Ordinance, Cap 15. (before it was repealed)

Benjamin[19] concerns himself with obstacles faced by arbitral legislation in the developing world, a case study of Japan, United States, Italy, Brazil, Burma, India, Malawi, Gabon, Mali, Cambodia, Nigeria, Niger, Ceylon, Pakistan and Vietnam. He comments that, the legislation of these nations despite their heterogeneousness in character, is, to a larger extent the legislation of the countries of Europe and North America, particularly so in the case of former colonial territories. The author noted the reception of the arbitral legislation of the developed world in the developing nations. He observes that an effort to upset and revise the received legislation after independence is not one, which is generally prevalent in the field of arbitration.

At the time of writing that book in the sixties, the adequacy of existing legislation to cope with the changed needs of society was not the problem of the developing nations alone. However, in view of what had happened in Britain, America, Australia, India, Canada and even Kenya, his position today would have been different.

The author insists that arbitral legislation should not be altered purely on a stubborn insistence on theory without regard to practicality or suitability reasons. He has the view that the modification of arbitral legislation is intimately connected with the actual or anticipated growth of international and domestic trade.

Although Tanzania was not one of his cases of study yet his work is of vital assistance in this study as it provides comparative material. Most of his concerns are largely the concerns of this study. What he experiences in the sixties regarding the development of arbitration law in both developed and developing countries is somewhat similar to what Tanzania presently experiences,

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[19] Benjamin P.I., "Developed Nations and Legislative 'Obstacles', International Arbitration" Liber amicorum for Martin Dornke, The Hague, 1967

hence this study. His work will help the study in its task to investigate the extent to which changes in arbitral legislation have to adapt, taking into consideration what other nations have done on the subject as well as the growth of international and domestic trade.

Mustill, et al,[20] discussed the law and practice of commercial arbitration in England. They set out the synopsis features of the English system, tracing the sources of arbitration law. The work dwells on showing how commercial arbitration disputes are determined through arbitration. This work contains information that was compared to the Tanzanian situation as far as the Arbitration Law is concerned.

It has been researched that, no author has dealt with examination of the state of arbitration in Tanzania with a comparison analysis to Uganda. This work however, picks some elements of the above mentioned works, and applies them where relevant to Tanzania. Since most of the studies mentioned above focused on the English law, and both Tanzania and Uganda being members of the Commonwealth countries they definitely stand to benefit from the English experience and practice thereof.

1.8 Scope and Limitation.

Since the study seeks to make a comparative analysis of arbitration between Tanzania and Uganda, the scope of this study therefore is geographically limited to only the said two countries. Due to geographical factors and time limit, we were able to collect data and some other information about arbitration law largely through use of questionnaire and very few viva voce interviews.

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[20] See Mustill B, Op Cit.

1.9 Organization of the Study.

This study comprises of five chapters. Chapter One gives the introduction and the general overview of the study. A survey of state of arbitration regime including the historical background of arbitration in both Tanzania and Uganda is made in Chapter Two and Three respectively. These two chapters provide the arbitration landscape and necessary historical information of the two countries in relation to arbitration with a view to building comparative landscape in Chapter Four that deals with empirical data obtained from field research and analysis thereof. Chapter Five deals with conclusion and recommendations/proposals for reform.

CHAPTER TWO

ARBITRATION LAW IN TANZANIA

2.1 Historical Background

Before the advent of colonialists and the division among themselves of African continent in 1889 into what we know today as countries, Africans were used to settling disputes amicably by way of mediation. Use of Courts and indeed invocation of arbitration as a major disputes settlement mechanism alternative to court litigation were all colonialists' innovations. It was therefore a clear importation in Africa of systems that were used in Europe where they came from. Since Tanzania was one of the victims of western colonial invasion, it could not escape importation and application of colonial systems of governance and dispute settlement, arbitration being one of them.

"The English common law of Arbitration and the English Arbitration Act form the main sources of the law of arbitration in most of the commonwealth countries"[21] . Tanzania being one of the commonwealth countries her law relating to arbitration is traceable from the English Arbitration Act of 1889 and Indian Arbitration Act. This observation is deduced from the provision of section 17(2) of the Tanganyika Order in Council of 1920.[22]

By this order all laws which were applicable in India by the 10th day of January, 1920 were also made applicable to Tanganyika, save where the Customary Law applied. The order also provided

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[21] Chowdhury S. K and Ratal, *Law Arbitration and Conciliation*, 4th ed. (New Delhi 1966) at pg 10.

[22] Government Notice No. 80 of 1920

that where there was a ***lacuna,*** the substance of Common Law, the doctrines of equity and statutes of general application in force in England at the date of the order were made to apply in Tanganyika (now Tanzania). Although the Indian Arbitration Act[23] was not specifically mentioned in the order, the wording of section 17(2) that;

> *".....other Indian Acts and other laws which are in force in the territory at the date of the commencement of this order.....",*

presupposes that the said Indian Arbitration Act was made to apply to Tanganyika (as it then was). In his second reading of the Arbitration Bill 1931 before the Legislative Council of Tanganyika, the Minister submitted:

> *".....This bill is submitted for the purpose of consolidating the law with respect to arbitration....."*[24]

From the Minister's submission it is not clear as to which laws of arbitration were being consolidated. However, in view of the provisions of section 17(2) of the Tanganyika Order in Council, 1920, the referred laws should be the Indian Arbitration Act of 1899 and the English Arbitration Act of 1889, together with the substance of Common Law, the doctrines of equity and statutes of general application in force in England by 1920.

According to the Minister's speech, Part II of the Ordinance follows the English Arbitration Act of 1889 and closely resembles the Indian Arbitration Act of 1899, which itself was modeled on the English Act.

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[23]The Indian Arbitration Act of 1899

[24] Hansard, Tanganyika Legislative Council 6th May, 1931 at p.47

Indeed this part as per the speech followed the then arbitration law of Kenya, Uganda and Zanzibar. The enactment therefore was expected to bring the law of arbitration of Tanganyika into line with the neighboring territories[25]

2.2 Legal Framework

Tanzanian law like the laws of most of the world's jurisdictions, provides for litigation in the courts (whether those of general jurisdiction or business courts) as the default methods of dispute resolution. Nevertheless, under certain circumstances, Tanzanian law allows commercial disputes to be resolved, not through Tanzanian judicial system, but, particularly through arbitration. The Tanzanian Civil Procedure Code, Chapter 33 of the Laws of Tanganyika, for example, acknowledges the existence of arbitration as one of the civil disputes settlement mechanisms in Tanzania.[26] As we further endeavor to show below, Tanzanian laws contain provisions that constitute the legal foundation for the organization and conduct of the arbitral proceedings.

2.2.1 Arbitration Ordinance

The foregoing discussion brings us to the enactment of the Arbitration Ordinance in Tanganyika[27] (The Ordinance) in the year 1931.

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[25] Ibid on page 48
[26] See sections 64 and 80 of the Civil Procedure Code, Chapter 33 of the Laws of Tanganyika.
[27] The Arbitration Ordinance, Cap. 15 of 1930

The Indian Arbitration Act of 1889 and other English laws remained in force in Tanganyika up to the 22nd day of May 1931 when The Ordinance came into force. The provisions of The Ordinance did not directly or expressly state that it repealed and replaced, the Indian Arbitration Act, 1899. However, section 22 of the Ordinance has been interpreted to mean that the Indian Arbitration Act was repealed and replaced. The section reads as follows:

> *"... Whenever in any contract it is directed or agreed that any arbitration under or in pursuance of such contract shall be under the arbitration Act 1889 (Imperial), or the Indian Arbitration Act 1899 such contract shall be read as if this part was Substituted for the aforesaid Acts....."*

Before the enactment of the Ordinance, Tanganyika was under the British Colonial rule, and undoubtedly the British colonial administration brought the Ordinance into existence for their own purposes since it intended to assist them achieve the objectives of their colonial government. This view is also reflected in the observation by Mihyo[28], that.

> *".....Legislators do not pass laws to justify themselves to the electorate. They do so to enable the government to accommodate certain situations or to achieve certain goals....."*

The business community during that period comprised of producers and sellers of raw materials, on one had and consumers of the same being industries on the other hand. While producers and sellers were basically located in the colonies, the consumers were industries in Europe or America. This being the nature of relationship where colonies were reduced to mere sources of raw material for colonialists industries, laws also were enacted to promote and facilitate those

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[28] See Preface in Mihyo, P.B., *Industrial Conflict and Change in Tanzania*, Tanzania Publishing House, Dar es salaam, 1983.

objectives. The Ordinance was therefore enacted for purposes of facilitating the settlement of commercial disputes in Tanganyika with a view to ensuring smooth exploitation of natural and human resources. However, since Tanganyika was not the only British colony like many other laws of colonial era had to resemble those of other colonies. It is thus not an accident to find that the contents of the Ordinance resembled those of other colonial states and also of colonial foreign-based business communities.

The Ordinance provides for matters such as, stating a special case,[29] challenging[30] and enforcement of a foreign award,[31] appointment of arbitrators,[32] staying of proceedings,[33] enlargement of time for making an award,[34] removal of arbitrators,[35] issue of summons to witness,[36] setting aside an appointment of arbitrators,[37] rewriting of an award[38] and costs.[39] All these were to be done by courts of law. These provisions show close resemblance to the English Arbitration Act of 1889.

In a nutshell, the Ordinance was divided into four parts. Part 1 provides for preliminary provisions, part II is essentially a reproduction of the English Arbitration Act 1889, which also resembles quite closely, the Indian Arbitration Act 1899, provides for general provisions relating to arbitration by consent out of court. Provisions relating to the protocol on arbitration clauses are found under part III of the Ordinance whereby matters regarding enforcement of foreign

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[29] Section 10(b) of the Arbitration Ordinance, 1931
[30] Section 15 Ibid
[31] Section 16(1) Ibid
[32] Section 9 Ibid
[33] Section 6 & 26 Ibid
[34] Section 13 Ibid
[35] Section 7 Ibid
[36] Section 12 Ibid
[37] Section 9(2) Ibid
[38] Section 14 Ibid
[39] Section 18 Ibid

awards are extensively provided in part IV read together with the Fourth schedule in the Ordinance. The first schedule provides for some implied provisions to the submission while the second schedule prescribes the forms to be used for various purposes, namely, submission to and appointment of a single arbitrator, enlargement of time by arbitrators, case stated and awards.

2.2.2. Arbitration Act

Later on the Ordinance was re-enacted in 2002 and sections were rearranged. It is now cited as The Arbitration Act (Cap 15 Revised Edition, 2002) (hereinafter referred to as the Act) of Tanzania. Part II of the Act as states above, provides for the general provisions relating to arbitration by consent out of court, whereby the application of this part is clearly provided under section 3 of the Act[40] which states;

> *".....This part shall apply only to disputes which, if the matter submitted to Arbitration formed the subject of the suit, the High Court only will be competent to try: Provided that in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the President may, with the concurrence of the Chief Justice, confer the powers vested in the court by this part either upon all subordinate courts or any particular subordinate court or class of court....."*

Under this part, are provision relating to appointment of arbitrator(s) by third parties,[41] power to stay proceedings,[42] power of the court for extension of time[43] and powers of the court in certain

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[40] Section 3 Ibid
[41] Section 5 Ibid
[42] Section 6 Ibid
[43] Section 7 Ibid

cases to appoint an arbitrator, umpire or third arbitrator,[44] powers of arbitrator or umpire[45] and his removal,[46] powers in relation to the award.[47]

Part III of the Act provides for provisions relating to the protocol set forth in the third schedule. In this part there is only one section which is section 27, that provides for the stay of court proceedings in respect of matters to be referred to arbitration under agreements relating to submission to arbitration.

The last part comprised of provisions relating to the Convention set forth in the fourth schedule is Part IV. This part applies according to the Act,[48] to an award made after the 28th July 1924, in pursuance of an agreement for arbitration to which the Protocol set out in the schedule applies. Subsection (2) of section 28 puts restrictions and bars the application of this part to an award which is made on an arbitration agreement governed by the laws of Tanzania. It provides;

> *".....This part shall not apply to any award made on an arbitration agreement governed by the law of Tanzania...."*

2.2.2.1. Arbitration Rules

The Civil Procedure Code[49] under section 80 established the rules, whereby under rule 1 it is clearly stated that "These Rules may be cited as the Civil Procedure (Arbitration) Rules. The

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[44] Section 8 Ibid
[45] Section 11 Ibid
[46] Section 18 Ibid
[47] Sections 12, 14, 15, 16 and 17 Ibid
[48] Section 28(1) of Act no 10 of 1971 (The Arbitration Act)
[49] Civil Procedure Code, Cap 33 of the laws of Tanzania

rules simply regulate general conducts of proceedings in courts of law, which are instituted under the Ordinance.

These rules regulate matters pertaining to filing of an award in court, stating a special case, stay of proceedings, applications made under the Act, service of notices as well as the general conducts of proceedings in courts of law under the Ordinance. Actually these rules are for use in and by courts of law and not for arbitrator or parties to an arbitral proceedings.

As we have seen, the arbitral legislation in Tanzania like most other legislation appears to be part of the attributes of statehood. It is also a legislation of former colonial government. The contents of the Act and Rules are to a large extent, an imprint of the legislation of either England[50] or India.[51]Yet unlike in other jurisdiction, they have remained the same without major changes to reflect the current world despite the advantages available in arbitration domestically and internationally, in the modern economy. Even if there are any efforts to revise and improve the law on arbitration we can say that those efforts are too slow since it has been years and years compared to economic growth of the country.

2.2.2.2. Procedure for Arbitration

The arbitral legislations are silent as to the procedures to be adopted by the arbitral tribunal in conducting arbitral proceedings. The rationale for this stems from the party autonomy principle. The parties should be autonomous in the choice of the procedures to be adopted in the reference.

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[50] English Arbitration Act of 1889
[51] India Arbitration Act of 1899

Courts have similarly refused to set out rules under which the arbitral proceedings should be conducted. Since arbitration is a creature of agreement of the parties to the dispute it is for the parties to agree on the procedures of arbitration. The following are the common procedures which have been adopted in various arbitration proceedings.

2.2.2.3. Preliminary Meeting

This is the meeting which gives the first opportunity to the arbitral tribunal and the parties to meet. In this meeting, the first, amongst other issues is the discussion on the procedures for the reference. Where the parties have not agreed on the procedure or evidential matters the arbitral tribunal has power to decide about them. Other matters to be discussed in the preliminary meeting include the first opportunity for the arbitral tribunal to impose its authority on the reference, confirmation of its jurisdiction act, fees and expenses. The tribunal should resolve at the preliminary meeting whether or not strict rules of evidence are to be used; whether or not and to what extent there should be oral or written submissions or evidence; language to be used where the arbitration proceedings are international; whether to proceed inquisitional or adversarial, the seat of arbitration and representation by advocates. Preliminary objections as to jurisdiction of the arbitral tribunal may be raised and disputed at this juncture.

At the preliminary meeting parties may agree on a statement of facts. The meeting should set down the timetable for the service of statement of claim defense, counterclaim or set-off, if any, replies and other rejoinders, if it is appropriate. However, this does not take away the flexibility nature of arbitral proceedings. Thus in *Damond Lock Grabowski and Partners vs Laing*

Investments (Bracknell) Ltd[52] it was established that where timetable is set down the arbitral tribunal should not slavishly adhere to it when a party has a reasonable excuse for not complying with some or all of the agreed schedule.

2.2.2.4. Pleadings

There is no standard form of the nature of the statement of case (referred in procedure as pleading) with the arbitral tribunal. The most common nature of the pleadings are the statement of claim, reference to the statement of claim and counter claim or set off, if any. The tribunal may however, subject to the agreement of the parties dispense with the written statements. Sometimes even letters instead of formal pleadings do suffice.

For example in England there is another form of pleadings known as "Scott Schedule". This is a form of pleadings which put together in tabular form the parties' respective claim and defense.

2.2.2.5. Interim Hearing

It might be impracticable to deal with all procedural matters during the preliminary meeting. In such a situation the arbitral tribunal may conduct interim hearing to dispose of some preliminary matters, including, applications by either of the parties. The arbitral tribunal may make interim orders at this stage. These are simply decisions on procedures.[53] These include orders for disclosure of documents otherwise known as discovery under civil procedure law.[54]

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[52] (1992) 60 BLR 112),
[53] See Exmar *B V v. National Iranian Trader Co. (1992) 1 Lloyds Rep 169*
[54] See section 25 of the Civil Procedure Code, *Op cit*

2.2.2.6. Hearing and appointment of the arbitrator.

In order for parties to resolve their dispute through arbitration there must be an agreement in which the parties had agreed that any matter in difference between them should be referred to arbitration. This is clearly provided under section 1 (1) of the Arbitration Rules. For commercial agreements, practice has been to include arbitration clauses in the contracts to that effect.

Arbitration proceedings are usually commenced by one party to the arbitration agreement serving on another party a notice of dispute requiring the latter to appoint an arbitrator or to agree to the appointment of an arbitrator. Section 8 of the Act covers the situation where parties fail to come to an agreement regarding the appointment of the arbitrator(s). Any party may serve the other party or the arbitrators, as the case may be, with a written notice to concur in appointing the missing arbitrator. Subsequently, by virtue of the same section, the court may, on application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint the arbitrator.

There are however, some other alternative ways of commencing arbitral proceedings under certain institutional rules. For instance under LCIA Rules[55] a party who wishes to commence arbitration is required to send to the Registrar a written request for arbitration. Equally under EACJ Rules[56] the request is sent to the Registrar. Under the NCC Arbitration Rules[57] commencement is done by sending a written request for arbitration to the council.

Sometimes an arbitration agreement stipulates a time within which a party who wishes to commence arbitration proceedings should act. Where the prescribed time has lapsed, a party who

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[55] London Court of International Arbitration Rules
[56] Arbitration Rules of the East African Court of Justice
[57] National Construction Council (of Tanzania) Arbitration Rules

wishes to commence the proceedings may apply to the court for an extension of time as the law of limitation applies to matters relating to arbitration proceedings[58] and so does the English Arbitration Act 1996.[59]

The arbitrator shall be appointed in such a manner as may be agreed upon between the parties[60] and the parties are at liberty to agree as to the mode of hearing their case. They may agree that the hearing be oral or by written evidence or submissions. The conduct of arbitration other than by oral hearing is known as conduct on documents only basis. This is a rare procedure normally preferred on small claims' cases and where the issues in dispute are clear and well documented or involve points of law only.

When there is to be a full oral hearing each part must have been given equal opportunity. An attempt was made to set the minimum requirements which the tribunal must observe when parties submit themselves to it for arbitration[61] that:

1. *Each party must have notice of the hearing;*
2. *Each party must have a reasonable opportunity to be present at the hearing together with his advisers and witnesses;*
3. *Each party must have the opportunity to be present throughout the hearing'*
4. *Each party must have the reasonable opportunity to test his opponents case by cross examining him and his witnesses, presenting rebutting evidence and addressing oral arguments ;*

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[58] Section 6 of Laws of Limitation Act of 1971
[59] Section 12(2) of the English Arbitration Act, 1996
[60] Section 2 of Arbitration Rules

[61] Mustill B., *Commercial Arbitration*, 2nd Ed, Butterworth, London, 1995. At pg 302

5. *Each party must have reasonable opportunity to present evidence and argument in support of his own case;*
6. *The hearing must, unless the contrary intention is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."*

The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them, strangers are therefore excluded from the hearing and conduct of arbitration. Confidentiality is an essential ingredient in arbitration. The privacy of arbitration proceedings is a benefit which litigants in ordinary courts of law do not have. However there are exceptions to the rule of confidentiality. The most common is where a party discloses the award to the court either for enforcement or challenge.

2.2.3. The Arbitral Awards

The end of arbitral proceeding is by the arbitrator to issue an award after the conclusion of the hearing. The parties are free to agree on the form of an award. In his article Tweeddle[62] set out minimum standards that an award should conform with and in case parties did not agree on, they could adopt them. He states that, the award must:-

a) Resolve all issues referred to the arbitration;

b) Avoid extraneous issues going beyond the jurisdiction of the arbitrators;

c) Be final and unconditional;

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[62] Tweeddle at pg 172

d) Be certain and capable of performance by the parties; and

e) Be capable of enforcement by the parties.

If the arbitral award does not meet the above criteria, the award is irregular and this may be taken as a ground for misconduct on the part of arbitrators. Under article 31 of the UNCITRAL Model Law, it requires the award to be in writing and signed by or on behalf of all arbitrators including dissenting arbitrator if any. This is also provided under Arbitration Rules[63] that after the award has been made the person who made it shall sign it and cause it to be filed in court, together with any deposits and documents which have been taken and proved before them, and notice of the filing shall be given to the parties.

In making his award the arbitrator defines clearly, unambiguously, justly and enforceably what the parties are to do, and when to do it in order to resolve the matter in dispute.

In England, section 52 of Arbitration Act 1996 provides for requirement of the form of an award, should the parties fail to agree. The requirements under this Act conform to that under UNCITRAL Model Law. It also requires that the award should contain reasons unless the parties agree to dispense with reasons, it should state the seat and the date of when the award was made. The seat of arbitration determines where the award was made notwithstanding the fact that it was signed, dispatched or delivered elsewhere.[64]

After complying with the above requirements then the award becomes final and binding. The parties may however enter into an exclusion agreement to the effect that the award is not subject

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[63] Section 10 of Arbitration Rules, Cap 33
[64] Section 53 of English Arbitration Act, 1996

to any challenge by parties.[65] Where there is no such agreement the parties have a right to challenge the award.

The arbitral award may also contain costs and incident to the reference unless the parties had agreed otherwise. There is yet no statutory guidance as to basis on which the arbitrators are to rely while allocating costs. Nevertheless, there is a long-standing common law principle to the effect that, exceptional circumstance aside, costs are to follow the event.[66] The English Arbitration Act of 1996[67] has given this principle a statutory force. The arbitrators may however, depart from that rule where the circumstances so demand.[68] One such instance where the arbitrators may depart from the said rule is where the successful party has, in some ways, delayed the proceedings, for example by introducing irrelevant evidence.[69]

The arbitral tribunal may as well correct an award where there is accounting mistake or error arising from accidental slip or omission.[70] The correction can be made either on the arbitrators own motion or upon an application by either party. The order to correct or modify an award is given by the court. The result of the correction or interpretation process is the making of an additional award. Additional award forms part of the final award. The arbitral tribunal therefore is also seized with power to make an additional award.

The parties are principally free to agree on the powers of the tribunal to correct an award or make an additional award. If there is no such agreement, the tribunal may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising

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[65] *Arab African Energy Corporation v. Olioproddukten Nederland BV* (1983) 2 Lloyds Rep 417.
[66] *Smeaton, Hanscomb & Co. Ltd v. Sassoon I Setty, & Co (No.2) (1953) 2 All. ER 1588.*
[67] Section 61
[68] *Tramountana Armadora SA v. Atlantic Shipping Co. Ltd (1978) 2 All. ER 870.*
[69] The Rosel (1994) 2 Lloyds rep 161.
[70] Section 12 of the Arbitration Rules.

from an accidental slip or omission or clarify or remove any ambiguity in the award, or make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. Any correction of an award shall form part of the award.

2.2.3.1. Challenge of the award.

The award can be challenged on a number of grounds to wit: lack of the substantive jurisdiction on the part of the arbitral tribunal, and serious irregularity. One or more of the following constitute serious irregularity namely failure on the part of the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties to comply with the requirement as to the form of the award to deal with all the issues, and comply with the general duty. Others are ambiguity or uncertainty of the award, the award being obtained by fraud or through wrong procedure or contrary to the public policy. Where the arbitral tribunal exceeds its powers also commits serious irregularity under the English law.

The difference between substantive jurisdiction and serious irregularity is that the latter concerns with procedural defects. The court will only intervene in the case of serious irregularity if the irregularity had caused substantial injustice. Serious irregularity was prior to the English Arbitration Act 1996 known as misconduct. This is what the Act provides as a ground to challenge the award. Another ground according to section 16 of the Act is where the award was improperly procured. The section provides that:

> *".....Where an arbitrator or umpire has misconducted himself or arbitration or award has been improperly procured, the court may set aside the award....."*

The Act however does not elaborate as to what constitutes misconducts or the circumstance under which an award can be said to have been wrongly procured. Neither does it contain matters in substantive jurisdiction.

Recourse to a court of law against an award may be made only on application by an aggrieved party for setting aside such an award. Where the court is satisfied that the grounds so advanced calls for its intervention, section 16 of the said Act provides for remedy of setting aside the award, whereas section 15 concerns with the remittance of the same.

2.2.3.2. Enforcement of the Arbitral Award

An arbitral award may be enforced in the same manner as a judgment or order of the court. Under section 17 of the Act an award on being filed in the High Court is mandatorily enforceable as if it were a decree of the court of law. The Act also provides for the enforcement of foreign awards[44]. In order for the court to enforce it must have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed, or has been made by the tribunal provided for in the agreement, or constituted in a manner agreed upon by parties, or has been made in conformity with the law governing the procedure or has become final in the country in which it was made and has been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania. The conditions for the enforcement of a foreign final award are read together with the provisions of the Geneva Convention on the Execution of Foreign Arbitral Award of 1923 reproduced in the Fourth Schedule to the Act. . It is this adoption of such international instrument by the Act that makes Tanzania not look like a stranger to international commercial arbitration in the eyes of foreign investors. It is also important to note at this stage the fact that Tanzania has not adopted the New York Convention of 1958 on the

recognition and enforcement of foreign awards. The definition of final award is therefore deduced from the provisions of section 32 of the Act which provides that;

> *".....an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made....."*

Therefore the award to be final, it must not be contested by anyone. These provisions correspond with Articles 35 and 36 of the UNCITRAL Model Law (1985). They are the only provisions, which appear to be relatively comprehensive in the Act and also under sections 66 of English Act. These are also similar to the provisions under the Arbitration and Conciliation Act of Uganda.

2.3. Tanzania Institute of Arbitrators

About ten years ago the Tanzania Institute of Arbitrators (TIA) the domestic arbitration body was established in accordance with the Tanzania arbitration law. TIA was published in the Official Gazette of 15th July 1997, as sole domestic arbitral institute in Tanzania under Societies Ordinance[71] as amended, and became operational on that day.

The main reasons that militated for its establishment were:-

(i) To promote, encourage and facilitate the practice of settlement and other Alternative Dispute Resolution mechanism.

(ii) To promote and/or provide education and training for those practicing or wishing to practice as arbitrators.

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[71] Cap 337

(iii) To asses the competence of all candidates for admission into the institute by examination in theory and practice.

(iv) To establish and/or adopt rules for resolution of disputes.

(v) To advise on the improvement of the law relating to arbitration.

(vi) To promote the profession status, interests, rights, powers and privileges of arbitrators and adjudicators.

(vii) To act as clearing house and information centre among its members and providing corporate services for their own common purpose and benefit[72]

While the reasons for its establishment as provided above are very impressive, it seems like TIA has not been able to achieve them and has proven to be inefficient given that the majority of arbitral proceedings that have taken place in Tanzania over the years have been conducted in a haphazard and inefficient manner. This leads to most disputers going to international arbitration institutes such as International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

For instance it is almost ten years now since its establishment, but only 18 cases have been received by the Institute[73]. Stakeholders still prefer to take their disputes to courts for litigation. This finding is confirmed by loads of commercial disputes in the Commercial Court of Tanzania. Although this court as well has been in operation for almost 8 years, it has received thousands of cases unlike the TIA which has been operational for ten years but was able to handle only eighteen cases.

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[72] This is as per our interview with Mr. Mushi , Chairman of the Institute
[73] Ibid

The Government of Tanzania established the said commercial court in September 1999 to address, among other things, the problem of delay by courts in determining commercial disputes. The Commercial Court of Tanzania like its Ugandan counter part also conducts court annexed mediation as form of dispute settlement mechanism alternative to litigation.[74] It is a division of the High Court of Tanzania and, in principle, provides a place for speedy, efficient and commercially aware litigation of commercial disputes. The Commercial Court has helped in speeding up some commercial cases though arguably the fees chargeable are very high compared to the other ordinary courts but still the stakeholders use this court in settling their disputes.[75]

TIA also has been conducting arbitration courses twice a year based on the Chartered Institute of Arbitrators-London syllabus, whereby at the end of every course they provide examination for participants. The participants include arbitrators and non arbitrators. The foregoing notwithstanding, the institute is still undergoing a very slow growth.

The main strategies set out by the institute include promotion of its services to the stakeholders, acquisition of arbitration and dispute resolution skills, provision of incentives for local arbitration and formation of strategic alliances with reputable arbitration agencies and learning from their achievements.

Parallel with TIA, are other institutions which were established to determine disputes by way of arbitration, although are not well known to the public. These institutions include:

(i) National Construction Council (NCC)

(ii) Land Dispute Tribunals established under Land Act of 1999.

(iii)Ministry of Labour and Youth Development

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[74] The effectiveness of court annexed mediation is discussed at pages 50-51 and 62 of this work.

[75] See MUSINGI L.R. *"Position of Commercial Court in Furtherance of Justice in Tanzania: Court Fees: An Impediment or Incentives"*, Compulsory research paper submitted in partial fulfillment of the requirements of the Bachelor of Laws degree at the University of Dar Es Salaam, May 2003, p.25 (Unpublished)

The reasons oftenly given for the lack of awareness about the existence of these institutions are that majority of Tanzanians live in rural areas whereby they lack communication facilities such as televisions, radios and current newspapers. Also enlightened people cannot easily reach out these areas to educate the public because of poor infrastructure and transport facilities. This view was also expressed by the Chairman of TIA but without proposing any possible solution out.

2.4 Challenges

The Institute does face some of challenges such as, long delay in review of arbitration law. Since 1931 the law relating to arbitration has not been amended, which makes it very difficult for lawyers and other enlightened people to convince the stakeholders to opt for old fashioned law.

Another challenge is based on the lack of knowledge about Alternative Dispute Resolution and also on deep rooted historical prejudice in favour of litigation in the society. This has to a large extent built permanent tendency among business community to the extent of holding courts as the only traditional institute for administration of justice.

Administrative and procedural guidelines that work in favour of litigation rather than Alternative Dispute Resolution poses another challenge that faces the institute and the arbitration regime as a whole.

TIA has its mission and strategy that it wants to achieve. Its mission is to provide and promote arbitration and other Alternative Dispute Resolution services of the highest professional standard so as to contribute effectively at speeding a better environment for doing business in Tanzania. However, this seemingly attractive mission remains on paper as there are no deliberate efforts to make it a reality. This is confirmed by the fact that TIA has been in existence for ten years now since its establishment in 1997 but none of its goals has been fully accomplished.

2.5 Conclusion

In this chapter, the study has discovered that the arbitral legislation in Tanzania like most other legislations is essentially reflective of the attributes of statehood. It is also a legislation that still carries former colonial master's sentiments. The contents of the Ordinance and Rules are to a large extent, an imprint of the legislation of either England or India. Yet unlike in other jurisdictions, they have remained unchanged for many years. Despite, the advantages for domestic and international arbitration, in modern economy, there are no serious efforts to revise and improve the law on arbitration. Even if efforts are there, still such efforts are very slow and not known to the public. There were rumors that the Tanzania Law Reform Commission was working on the amendment of the Act, but when confirmation of this rumour was sought, a disappointing answer was given to the researcher that matters had not reached a stage where they could be revealed to the public.[76]

[76] See pages 58-59 of this work for further discussion and analysis of this response by the Tanzania Law Reform Commission official

CHAPTER THREE

ARBITRATION IN UGANDA

3.1 Historical Background

Uganda like Tanzania was colonized by Britain up to 1962 when it attained independence. Inevitably, Uganda's legislation could not escape the influence of Britain the colonial master. Arbitration legislation in Uganda therefore dates back to 1922 when English legislation and judicial practice were received and incorporated in Uganda law through reception clause. On the 22nd March 1922 the Reciprocal Enforcement of Judgment Act, Cap 21 of laws of Uganda was enacted. In 1929 The Treaty Series No. 33 of 1929 Command Paper 3491 applied the protocol on Arbitration Clauses Treaty through the United Kingdom Arbitration Clauses (Protocol) Act 1924 was incorporated into Ugandan legislation.

In 1930 Uganda adopted the Arbitration (Foreign Awards) Arbitration Clauses signed on behalf of the assembly of the League of Nations held on the 4th of September 1923.

3.2 Legal Framework

3.2.1 Arbitration Act

In May 2000 Uganda introduced The Arbitration and Conciliation Act, of 2000, Cap 4 of the Laws of Uganda, the Act that repealed the Arbitration Act of 1930, Cap. 55. The new Act is described as "an Act to amend the law relating to domestic arbitration, international commercial

arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing". This is the main legislation governing arbitration in Uganda. Nevertheless, in the administration of the arbitration proceedings, apart from the parent legislation, principles of the common law, equity and natural justice apply.

This comprehensive piece of legislation consists of 73 sections divided into 7 parts and two accompanying schedules. The largest part lays down the principles governing arbitration, from the initial agreement to the final award. These provisions for the most part reflect the principles expressed in the UNCITRAL model law.[77] However, Uganda has chosen to diverge on certain points. For instance, a sole arbitrator shall be appointed if the parties have not stipulated the number to be appointed.[78] English is in principle to be the language of arbitration. Regarding the rules applicable to the substance of a dispute, failing a choice by the parties, the tribunal shall apply those considered appropriate in light of the circumstances.[79]

Certain differences are also noted between arbitration as envisaged by Uganda's new Act and the ICC Rules of Arbitration[80]. For instance, the former sets a time limit of two months for making an award, compared to the ICC Rules[81] which set a six-month time limit.

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[77] UNCITRAL Model Law on International Commercial Arbitration of 1958. Law applies to International Commercial Arbitration, subject to any agreement in force between the state and any other states.

[78] See The Arbitration and Conciliation Act, No 4 of 2000

[79] Ibid

[80] International Court of Arbitration of International Chamber of Commerce (ICC) Rules of Arbitration, 1998.

[81] Article 24 of the ICC Rules

Part three of the new Act contains provisions facilitating enforcement of awards made in states that are parties to the New York Convention[82], and part four does likewise for those made pursuant the Convention on the Settlement of Investment Disputes between States and Nationals of other States.[83]

The Act also establishes a body known as the Centre for Arbitration and Dispute Resolution, (CADER)[84] which is intended to fulfill various functions defined elsewhere in the Act. The Centre also devises rules for the implementation of arbitration, conciliation and ADR processes, establishes a code of ethics for, and maintains a list of, qualified arbitrators, conciliators and experts, sets fees for arbitrators, and facilitates certification, registration and authentication of arbitral awards and conciliation settlements.

A further feature of the new Act is a set of model forms for use by the parties or the arbitrator at different stages of arbitral proceedings. They include an agreement to submit to arbitration following the occurrence of a dispute, an agreement on the appointment of a single arbitrator and a form relating to the extension of the time allowed for the arbitrator to make his award.

Uganda's new Arbitration and Conciliation Act, Cap 4 of 2000 provides for both domestic and international arbitration and brings arbitration in Uganda in line with prevailing international practice. A notable change introduced by the new Act is the widening of arbitrability to cover any dispute arising from a legal relationship, "whether contractual or not".

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[82] Convention on the Recognition and Enforcement of Foreign Award (New York Convention, 1958)

[83] International Center for the Settlement of Investment disputes (ICSID Arbitration Rules, as amended, 2006)

[84] It was established in 1998 as a response to the increasing need in Uganda for a new dimension in the resolution of disputes by cutting the cost of conflict resolution in terms of time and expenses

The legislative framework of arbitration in Uganda continued to be incorporated in other pieces of legislation, for example in 1950 the Penal Code Act gave reference to arbitration and also in the Foreign Judgments Act Cap 9, of 1961.

The New York Convention of 1958 was assented to by Uganda and become part of domestic legislation in 1992. Uganda also became a signatory to the ICSID Convention (International Centre for the settlement of Investment Disputes) on the 1966, which also provides for arbitration between states and nationals of contracting states.

3.2.1.1 Procedure for Arbitration

Procedure for arbitration in Uganda does not differ from that of Tanzania. It is a matter for the parties to agree, although usually the mechanics of the procedure, including decisions about evidence and hearings are dealt with by the tribunal.

The first step to be followed is usually that one party formally requests for the arbitration. In *ad hoc* arbitration, this will take place in the form of a written demand by one party addressed to the other. If the arbitration is to take place under the institutional arbitration, the party will lodge the request for arbitration with the institution which will then notify the other parties in writing. The parties are free to choose the tribunal although they should provide for a deadlock mechanism in cases where they cannot reach an agreement on the choice of the arbitrator or the person chairing the arbitral panel[85].

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[85] Uganda Law Society Newsletter December 2000

The following are some of the mandatory provisions that are binding on the arbitral tribunal so far as procedure is concerned.[86]

1) The parties must be treated with equality and each party must be given a full opportunity of presenting its case.

2) There must be one consecutive exchange of written submissions which must include certain features.

3) The arbitral tribunal must hold a hearing if either party requests one.

4) If the arbitral tribunal appoints an expert, it must give the parties the opportunity to interrogate the expert at a hearing and the parties must be given an opportunity to present their own expert witnesses on the points at issue.

The rules of most international arbitral institutions provide the tribunal with wide powers to conduct proceedings in a manner it considers appropriate. Where the parties have provided for institutional rules[87] or the UNCITRAL Rules[88], the tribunal will generally have those powers, subject to any overriding provisions of the law of the place in which the arbitration takes place. In the absence of agreed procedural rules, the tribunal's powers will derive from the local law. Most jurisdictions confer powers upon the tribunal to decide procedural matters in the absence of the parties' agreement.

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[86] For elaborate discussion on mandatory procedural requirements see also Sigh A., *Law of Arbitration and Conciliation*, 7th Ed. Eastern Book Co. India, 2005

[87] See International Court of Arbitration of International Chamber of Commerce (ICC) Rules of Arbitration (1998)

[88] also see UNCITRAL Arbitration Rules (Adopted by the General Assembly on December 15, 1976)

In domestic arbitrations, preliminary matters concerning procedure are usually dealt with by correspondence. In international arbitrations parties increasingly opt for a preliminary meeting for this purpose.

Under the Arbitration and Conciliation Act, the first requirement that gives any party an opportunity to file an arbitration proceeding is the existence of an arbitration agreement[89] The provisions of the Arbitration and Conciliation Act apply only where the arbitration agreement is written[90] and also where the parties seeking to rely on it are the same.

We saw earlier that in Uganda there is an arbitration institution known as Center for Arbitration and Dispute Resolution (CADER),[91] whose detailed discussion in this work is provided later in this chapter.[92] To institute a matter at CADER a party has to file a request indicating his details and the respondent's details at CADER registry[93] the form of which should also be accompanied by a statement of claim and relevant documents.[94]

The respondent is notified by the Registrar about the filed case against him and is required to file a defense within 14 days from the date of receiving the notice.[95]

The matter is forwarded to the approved arbitrator who therefore takes charge of the process. As soon as the arbitrator consents to take an office, one party to the proceedings should apply to him for a written appointment of a day for hearing the matter.

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[89] section 2(e) Arbitration and Conciliation Act of 2000, Cap 4 of Laws of Uganda.

[90] Ibid, section 3

[91] See foot note 84 above

[92] See pages 46 – 49 of this work.

[93] See article 8 of CADER Rules,

[94] Ibid, article 17 & 18

[95] Ibid

There is no code of procedure prescribed under the Act as the Civil Procedure Rules do regarding procedure in courts. Although in institutional arbitration there are specific sets of rules by which the parties agree to be bound, such rules are not as exhaustive as the Civil Procedure Rules. In absence of any rules of the tribunal of arbitration, or procedure agreed by the parties to the dispute that is subject to the arbitration, the arbitrator is the master of the procedure.

Generally, and subject to restrictions imposed by the arbitration agreement or by the requirement of natural justice and fair play, the arbitrator controls the procedure of the arbitration and the court can not interfere. He is free to mould the procedure according to the exigency of the situation.

The usual events at the arbitration hearing as pointed out by Ronald Bernstein and Derrick Wood[96] are also confirmed by Zaramba R[97] as applicable in Uganda to wit;

1. The claimant opens the case by referring to the statement of claims.
2. Evidence in chief of the claimant's first witness
3. Cross examination of the said witness by the respondent
4. Re-examination of the said witness by the claimant.
5. The respondent opens his case by setting out a counter claim.
6. Evidence in chief of the respondent's first witness.

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[96]Wood et al, A Handbook on Arbitration, 4th Edition, Sweet and Maxwell, London, 1999 at pg 58

[97] Zaramba R., Commercial Arbitration in Uganda, A case study of the reaction of the business community and legal fraternity, Cape Town University, 2006, Unpublished

7. Cross examination of the said witness by the claimant

8. Re-examination of the said witness by the respondent

9. Closing speech for the respondent

10. Closing speech for the claimant.

The place of arbitration has to be agreed by the parties to a dispute, failure to do so the arbitral tribunal will determine with regard to the circumstances of the case and convenience of the parties.

Under section 24 of the Arbitration & Conciliation Act, the hearing of the proceedings may take the following set-up;

(a) Parties submit their pleadings, prepare common bundles of documents without admitting the contents thereof. Thereafter follows an oral hearing.

(b) There may be statements of cases and replies thereto in place of pleadings as above and then an oral hearing takes place.

(c) There are pleadings and statements of cases and replies, followed by oral agreement.

(d) As in (c) above, if there is more than one expert witness, there ought to be prepared a statement of points on which they agree and the points on which they do not agree.

3.2.1.1 The Arbitral Award

The proceedings in arbitration come to an end with the conclusion of arguments or submissions made by the counsel for the parties.[98] The arbitrator then pronounces that he will make and publish the award within a specified time[99] When an arbitrator makes an award without giving notice the award can be set aside[100]. The arbitrator must make clear to the parties that the hearing of the matter is closed and he will proceed to make an award.

Even if the proceedings have been formally closed, the arbitrator retains his jurisdiction before making the award and at his discretion he may reopen the proceedings and receive additional evidence.[101]

The arbitrator may before closing the case ask the parties to make their submission in writing in respect of the matters in which they want the arbitrator to adjudicate. An award is considered to be valid if it is made on the matters set out in the written statement. The parties through their counsel can also make a joint request to the arbitrator to accept written submissions on the matter to be adjudicated by him.

Uganda is a party to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, pursuant the Reciprocal Enforcement of Judgment Act, judgments of foreign courts are accepted and enforced by Ugandan courts where those foreign courts accept and enforce the judgments of Ugandan courts. Monetary judgments normally are made in local

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[98] Rule 38 of the Rules of Procedure of Arbitration Proceedings of Uganda.

[99] Ibid

[100] Haigh v Haigh (1961) 31 LGCH

[101] Bignall v Gale 133 ER 1980.

currency. Arguably Ugandan penalties are not a sufficient deterrent since the amounts have not been revised upward to take into account depreciation in the value of currency. Pursuant to the Arbitration and Conciliation Act[102], the government of Uganda accepts binding arbitration with foreign investors. The Arbitration and Conciliation Act, which incorporates the 1958 New York Convention, also authorizes binding arbitration between private parties. Ugandan courts enforce foreign arbitral awards from courts in nations that are party to the 1958 New York Convention.

3.3 The Center for Arbitration and Dispute Resolution

The Center for Arbitration and Dispute Resolution (CADER) was established in 1998 as a private partnership through the joint effort of the donor community, the government and business community. Initially it was intended to be a private corporation but it did not work properly and thereafter the government statutorily re-established it, after realizing that the failure to resolve disputes on time, fairly and cost effectively hindered the business community.[103] For these and other reasons Parliament deemed it necessary to statutorily establish a formal institutional framework and a national formulating body for alternative dispute resolution in Uganda.

With promulgation of the Arbitration and Conciliation Act[104] CADER was reestablished also as statutory corporation and a body corporate,[105] with an executive director and secretariat for its administrative functions and governing council for its governance.[106]

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[102] Section 73, Cap 4 of Laws of Uganda.
[103] CADER Report of October, 1999

[104]Cap 4 of Laws of Uganda,2000, Section 67(1)

[105] Ibid, section 67(2)

The Centre for Arbitration and Dispute Resolution (CADER) devises rules for the implementation of arbitration, conciliation and ADR processes; establishes a code of ethics for, and maintains a list of, qualified arbitrators, conciliators and experts; sets fees for arbitrators; and facilitates certification, registration and authentication of arbitral awards and conciliation settlements. In addition, the Centre for Conflict Resolution (CECORE) also provides ADR services[107].

CECORE is an initiative of Ugandan people working to seek alternative and creative means of preventing, managing and resolving conflicts. CECORE implements the practice of Conflict Resolution applying alternative and creative means; researches, documents and disseminates information on traditional African methods of conflict resolution, healing, forgiveness and reconciliation; shares knowledge and experience through networking; and designs and shares information on early warning and preventive mechanisms on conflicts.

3.3.1 The Role of Center for Arbitration and Dispute Resolution

In Uganda, arbitration is one of the dispute resolution mechanisms offered under CADER. In the judicial system CADER operates as an alternative dispute resolution centre providing services alternative to court litigation. It is responsible for appointing the arbitrators and conducting arbitrations. It has the mandate to play impartial role in the initial stages of arbitration process

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[106] Ibid, section 69 and 70

[107] Ibid section 60

especially when parties fail to act as required under the Arbitration Rules. The centre also regulates fees structure for both arbitration proceedings and the arbitrators.[108]

The administrative functions of CADER also extend to circumstances where a party or parties to arbitration proceedings challenge any appointment of an arbitrator or procedure to be followed during the arbitration process.[109] In such situations CADER may terminate the mandate of such an arbitrator upon proving grounds of disqualification and substitute him/her accordingly.[110]

Further more, the role of the centre is to ensure that the processes for arbitration are quick, fair, confidential and cost effective.[111] Also plays a role of establishing and maintaining a comprehensive roster of competent and qualified arbitrators covering a broad spectrum of individuals and drawn from a broad range of fields and professionals.[112] Arbitrators are drawn from a CADER roster of arbitrators which includes, judges, advocates, accountants, auditors, doctors, consultants and bankers who act in appropriate cases. The rest of arbitrators include both local and foreign experts and professionals drawn from a wide range of background and experience. In insuring this, CADER has set appropriate qualifications for persons eligible for the appointment.[113]

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[108] Ibid section 68(1)

[109] Ibid section 9

[110] See, general obligations under Rule 1 of the Rules of Procedure for Arbitration Proceedings.

[111] Ibid

[112] Section 68 (g & h) of Cap 4 of the Laws of Uganda

[113] Ibid, section 68 (g)

CADER is further mandated to establish and enforce a code of ethics and standards for arbitrators to be followed throughout the arbitration proceedings.[114] This code is there to ensure fair, impartial, expeditious arbitration proceedings, which give credibility to the entire proceedings. It also promotes the use of ADR mechanism such as arbitration to all the stakeholders[115] promoting, increasing understanding and a culture of resolving dispute through alternative resolution mechanisms such as arbitration.[116]

However, the above role has not been fully executed by CADER. According to CADER,[117] plans are underway to establish training centre managed by CADER itself where stakeholders will be invited to register for special training in alternative dispute resolution techniques such as arbitration. The plans target people such as judges, lawyers, businessmen and any other individuals who may be interested.

It seems the function of CADER in Uganda has not been fully undertaken. CADER and ADR in Uganda's judicial system are not popular institutions or common practices. Lack of sensitization

is a major setback still hampering the full assimilation of mechanism such as arbitration. Previously CADER had undertaken sensitization campaigns whereby the public was informed about the dispute resolution mechanism available at CADER, through printing and the media. However, these campaigns did not last longer. To date CADER undertakes to advice individual

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[114] Ibid, (d)

[115] Ibid.

[116] Ibid, section 68 (l)

[117] CADER Comprehensive Programme of 2003

companies and different groups of people to include arbitration clauses into their agreements and contracts as a means of promoting arbitration in Uganda.[118]

4. Conclusion

The growth and development of mediation and arbitration in Uganda is a success story in the making. This argument is supported by the fact that Uganda passed a seemingly excellent modern Arbitration and Conciliation statute in the year 2000 and established a national dispute resolution center which is now in effective operation in Kampala. Also the Commercial Division of the High Court introduced a program of court-annexed mediation that promises to be one of the best in the developing world.

With the introduction of the new Act and CADER in Uganda, it has been observed that commercial arbitration has systematically gained a certain degree of recognition by the members of the public, especially stakeholders. For example in his report Justice Platt[119] encouraged the increased use of arbitration in dispute resolution. Other judges in Uganda have also attempted to write articles, papers and journals in connection with arbitration law and its status in that country. Indeed, this is a positive move towards promotion of ADR by the bench, and inevitably a laudable attempt on the part of the court given the fact that it is not common to see judges encouraging such mechanism of dispute settlement other than court litigation.

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[118] Commercial Justice Reform Programme: First follow-up Survey April 2004

[119] The Ugandan Judicial Report Reform of 2004

Furthermore, laws in Uganda such as the Conciliation and Arbitration Act,[120] the Civil Procedure (Amendment) Rules of 1998,[121] have been encouraging the use of ADR mechanisms and give powers to judges to stay such proceedings and as well limit courts' intervention in arbitration proceedings unless otherwise provided by the Act.

Despite the above mentioned successes there have been some setbacks and political uncertainty in supporting the growth of ADR in Uganda. This situation was also observed and discussed by Lord Justice Geoffrey Kiryabwire of the High Court of Uganda in his presentation at the International Law Institute. He was discussing the future of ADR in Uganda and East Africa in general. Lord Justice Kiryabwire has been a leading actor in the development of ADR in Uganda.[122]

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[120] See section 68

[121] Order X (b)

[122] As a Justice of the Commercial Division of the High Court, he now oversees the Court's fledgling program of court-annexed mediation. As a private attorney, he assisted in drafting the new Arbitration and Conciliation Act and in enlisting support for the new law. Justice Kiryabwire's views on lessons learned in Uganda is of help to anyone interested in the development of ADR regimes in Africa.

CHAPTER FOUR

COMPARATIVE ANALYSIS

This chapter endeavors to examine and discuss the information and data which were collected during field study and identification of practical problems facing the development of arbitration in Tanzania and Uganda. Also an analytical survey and comparison of the state of arbitration in both countries is carried out in this chapter.

4.1 Reasons for Comparisons.

In this work, legal comparative study is very important for a number of reasons. First, the world has become a 'global village' through developments in various social aspects. No country exists on its own or in total isolation of other countries any more. Second, legal comparison is necessary for the development of the countries' legal system and third, internationally accepted ideologies, such as the protection of human rights when widely adopted, encourage countries to conform to or move closer to international norms.

The study focuses on Uganda and Tanzania because both are Eastern African countries and prior to independence were conducting arbitration under the legislation enacted by British colonialist. The Arbitration Ordinance[123] was in place in the then Tanganyika (now Tanzania) while the Arbitration Ordinances[124] were applicable in Uganda. There were also arbitration rules made under these legislations. The two pieces of legislation were enacted with more or less similar provisions corresponding to the English Arbitration Act of 1889 and India Arbitration Act of

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[123] Cap 15 of Laws of Tanzania
[124] Caps 21 and 22 of Laws of Uganda

1899. This resemblance is not hard to explain, since the two states were under the same colonial administration.

4.2 Tanzania Experience.

Advancement of economic activities in Tanzania went hand in hand with the increased areas of arbitration. Tanzania like many other countries in the world has had her share in the development of the nature of arbitration matters both locally and internationally. In Tanzania today, arbitration is emphasized in almost all forms or trade. More development has come in following the opening up or doors for private investments as against the public investments.

It would have been expected that these advancements would, equally, bring along with them, the development of arbitration law. This has not been the case in Tanzania. As a result parties who opt for arbitration do prefer international arbitration instead of local arbitration. They also prefer rules and foreign law and institutions. Rules of institutions like ICC[125], ICSID[126], LCIA[127], UNCITRAL[128] just to name a few are some of the preferred institutions.

4.2.1 Level of Awareness

Speaking of arbitration in Tanzania may not sound popular among the citizens. It has been observed that members of the public and stake holders are not much aware of the arbitration law and rules which govern arbitration. The reason behind is that, whenever disputes arose and parties approached their respective advocates for legal advice or representation, more often than

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[125] International Chamber of Commerce (International Court Arbitration)
[126] International Centre for Settlement of International Dispute
[127] London Court of International Arbitration
[128] United Nations Commission on International Trade Law

not the advocates have been advising them to take the matters to the courts of law. Such legal advices have in effect denied the parties an opportunity to solve their dispute through arbitration. So very little is known about arbitration procedures in Tanzania.

Such situation has contributed to the majority of Tanzanians being aware and more familiar with only one mechanism of settling their disputes, which is litigation. In view of the fact that majority of town dwellers do prefer to consult lawyers/advocates when faced with disputes before taking any step, it is important for their lawyers/advocates whom they choose to seek for legal advice to let them know of arbitration mechanism as an alternative to litigation because all lawyers/advocates know well about it together with its advantages.

On interviewing members of public/ stakeholders in Dar Es Salaam, Tanzania, it was realized and confirmed that the level of awareness in arbitration is very little compared to litigation. The interview involved ten business men who volunteered information provided they remained anonymous. Mr. Andrew Masawe who is one of the said stakeholders in Tanzania, when asked whether he was aware of arbitration as another form of dispute settlement had this to say;

> *".....I have been attending in court for many years either suing or being sued. My advocate has never advised me to go for arbitration as alternative to litigation. He usually said that arbitration is a complicated procedure and waste of time since most of the time the opposing parties might not be ready to settle amicably then we will have to go back to court..."*

It appears from the above quotation the interviewee confused arbitration to mediation, and that is why he made reference to going back to court in the event the other party was unwilling to settle.

However, he was unconsciously very positive about arbitration when he suggested that for stakeholders like him, it was better to solve disputes amicably for the reasons that after court litigation, always parties leave the courts as enemies and in some cases there is no more hope to work together in future and that in effect it destroys the countrys' development especially on the part of businesses.

When ten advocates were interviewed, seventy percent of them expressed the view that they were not encouraged to advise their clients to go for arbitration as doing so would go against their interests. They believed that through court litigations they would be paid much because the fee was well settled by the Act[129] (i.e it is three percent of the total amount claimed). It also came to light that many of their clients do not know much about court procedures to be followed during the whole period from filing a case to the final judgment. Thus many advocates keep on adjourning their clients' cases for different reasons most of them being flimsy. One of the common reasons that is often cited while seeking for adjournment in lower courts is that they are appearing before higher court on the same day and time. Interesting enough they are paid by their clients for every appearance in court whether the matter proceeds or is adjourned. You can therefore find a case in the court taking so long to complete, sometimes ten years while under arbitration if parties agree and cooperate it can take even one month.

Ms Eliza Msuya a practicing advocate in Tanzania admitted and confirmed the above finding during interview that most of his clients were businessmen who owned big companies and paid him handsomely. Although he once tried to advise them about arbitration it was very difficult for them to buy the idea since the representatives/officials also wanted to make money out of that

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[129] Advocates Ordinance, Cap 341.

dispute and so it was not easy to convince such person to settle the dispute through ADR. In making his point clear the learned advocate said:

> *'.....It has been very difficult sometimes convincing a client for arbitration. We are here to make money and that money comes out of litigation and not from arbitration. Unless the fees chargeable to litigation is also charged in arbitration then we can't take that route...so we are forced sometimes to take advantage of their ignorance in arbitration.....'*

However, some few advocates[130] who attempted to advise their clients to pursue arbitration path, faced resistance and it turned out to be a very difficult task to convince them. It is all about ignorance. As earlier noted many Tanzanians are not well aware of arbitration and especially the procedural aspect of it. Indeed to convince a client it needs time. Since Tanzanians are very used to court litigation, they keep demanding for assurance from their lawyers whether arbitration has legal force and many other things they do not know from arbitration. Lawyers feel that the Government has not given enough attention to arbitration, such as to amend the law of arbitration, providing training through seminars and short courses. In expressing his views about ignorance as a factor, one learned advocate said:

> *"There is a need for improving the institutions by providing proper knowledge of the mechanism and once there are enough trainees then the society at large can be educated and becomes aware of the system and there is need also for disseminating that mechanism to villages were most people resides"*

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[130] Including Mr. Joseph Tadayo, Francis Mgare and Benjamin Mwakagamba

It is therefore impossible for ignorant people in Tanzania to pursue their disputes through arbitration unless they are well informed about the whole procedure together with the advantages of it. In the absence of that it is only the wealthy ones who can litigate their cases to courts since litigation is expensive compared to arbitration which arguably even poor people can afford.

On the same matter, advocate Lukwaro from Lukwaro & Company (Advocates) and also a private arbitrator, observed that;

> *"..... there is a great need to increase public awareness through television, radios, newspapers, seminar and workshops since public has not been sufficiently informed about the advantages of arbitration over litigation....."*

The foregoing information collected from the field study, demonstrates the effect of ignorance of the people about arbitration. In Tanzania therefore as may be the case elsewhere, an ignorant person who is unaware of the existence of arbitration cannot be expected to settle or to submit his dispute for arbitration. It should be noted that arbitration is an amicable procedure where majority especially the business community would like to go for settlement. Therefore it should be a place where everybody can be free to go for redress whenever he/she is injured or deprived of his right. It is the finding of this study that unawareness is a problem which can make a party who really wanted an amicable settlement resort to litigation and leave out arbitration with all its advantages. Unless the government intervenes, courts will be loaded with bulk of cases while arbitrators remain redundant or underutilised.

4.2.2 Law and Rules Governing Arbitration

The arbitral legislation in Tanzania like most other legislation appears to carry the attributes of statehood. It is also a legislation of former colonial territory. The contents of the Act and Rules are to a large extent, an imprint of the legislation of either England or India. Yet unlike other jurisdictions, they have remained unchanged ever since they were enacted. Despite the advantages for arbitration domestically and internationally, in the modern economy, there are no strong efforts to revise and improve the law on arbitration.

For instance the Arbitration Act was enacted in 1931 but it has remained the same to date. Although in 2002 the government revised the Act, there were not any amendment to the provisions which can adequately meet today's need. What was done was mere rearrangement of sections. Taking the England situation as an example, the English Arbitration Law has changed about four times since 1931 in order to meet the prevailing needs. This is very important since the economy has been changing. For instance in Tanzania soon after independence in 1961 most industries including the construction industry, which until today takes a large part of arbitration disputes in Tanzania, was in the hands of the government. With the liberalization of the economy most of these industries in which disputes are likely to occur are in private hands and the industry has grown up in proportions that cannot be attended to adequately under the existing laws and rules.

When the researcher visited the Tanzania Law Reform Commission to find out whether there was any plan to amend the Act, since there were rumors that the Commission had in the recent past been conducting research/study about the arbitration legal regime in Tanzania, the response was very negative. The officials just confirmed that there was such plan but it was still

confidential information and they could not readily reveal it to the public yet as it was pre-mature to do so.

This kind of reaction is unusual and rather strange because there is nothing secret or confidential in what the Commission was doing with a view to amending or improving on the arbitration legislation. The Commission needed to obtain the information from the members of society and find the ways in which such views could be accommodated in the new Act. Inevitably, the public would like to know the reasons why Tanzania since independence has not been fairing well in arbitration and how the Commission has dealt with this situation and if possible to give out their comments. It is therefore not proper for the Commission to hold and treat such information as private and confidential, not capable of being shared with anybody outside the Commission. It was unfortunate that the researcher could not get any assistance from the Tanzania Law Reform Commission on ground of confidentiality of information which is otherwise supposed to be public. Such reaction raises a very fundamental question as for whom and in whose interests are the amendments supposed to be made?

While the Law Reform Commission continued with the attitude of confidentiality of information, our interaction with one arbitrator by way of questionnaire was largely dominated by the urge for the Commission to review the country's arbitral legislation. One arbitrator Mr. Emmanuel Kimambo lamented;

> *".....There is a need for the Commission to review the Law and Rules and if possible to visit other countries to see how far they are doing with their arbitral legislature and get views from the stakeholders about what they want in the new Act...."*

Responding to the same issue Mr. Joseph Tadayo of Tadayo and Company (Advocates) went a step further and added that;

> *".....once the Act is amended the arbitration institute should be given power to enforce all arbitration awards. Reference to High Court for enforcement takes us back to the popular delays found in courts and this discourages the stakeholders a lot ....."*

He went on to identify the weaknesses of Tanzanian arbitration legal regime which should be urgently addressed when he said that;

> *".....There are many omissions in both the basic laws and in the rules which make it difficult for the arbitrator to command full respect from the parties for example that of discovery and inspection...."*

The above quotations show that the public in Tanzania is not happy with the arbitration laws and rules. Further that they need to be consulted during the process to amend the Arbitration Act, since they feel that there might be other major omissions if they are not given opportunity to contribute and give their input.

It appears that the Commission is not serious on amending the arbitration laws in Tanzania in view of the fact that, most senior advocates/lawyers, arbitrators and stakeholders who were interviewed are not aware of this plan. This means that they were not even consulted and that explains the Commission's response to the researcher that they could not disclose any information with regard to the plan to amend the Act.

It is strongly argued in this work that if the Tanzania Law Reform Commission does not depend on public views, then there is not any reason for amending the law. It is not fair denying people's right to give out their view concerning their laws. There is also a need to think about other

businessmen/stakeholders who are located in the interior areas who have not been able to access arbitration services simply because of their ignorance.

4.2.3 Established Institutions

Having seen the status of law and rules governing arbitration in Tanzania, we now proceed to look at the established institutions whether they do accommodate the needs of the users and whether they are known to the public.

Besides the Tanzania Institute of Arbitrators there is National Construction Council (NCC)[131] which operates as a service provider and also there are other institutions which apply arbitration as a mechanism of resolving disputes in their respective specialized areas. Such agencies include Regulatory Authorities, the Executive Agencies Commission for Mediation and Arbitration which were established under the Labour Institutions

It has been revealed in this study that the established institutions are not well known to the Tanzanians. The Tanzania Institute of Arbitrators for example has been there for ten years but when people were asked about it, the majority of them did not know even what it was. Some of them who expressed a bit of knowledge about it did not know much or the type of services provided by the institutions.

It can therefore be rightly concluded in the strength of the foregoing that there have not been sufficient efforts to inform the Tanzanian public about existence of these institutions. This may partly be due to the fact that arbitration has not been sufficiently developed. With increased

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[131] It is the government institution started in 1981 to spearhead the development of the domestic construction industry in Tanzania.

liberalization of trade together with consequential commercial disputes it is only hoped that use of arbitration and perhaps awareness will also increase

It is evident that the state of arbitration by institutions in Tanzania is far below satisfactory level. There is serious failure on their part taking into account the number of cases that have been received by the Tanzania Institute of Arbitrators since 1997. The records according to the Chairman of the Institute as at December 2007 show that they received only eighteen cases for ten years. This number of cases is less than the number of cases usually filed in court registries per week.

4.3 Uganda Experience

The growth and development of ADR in Uganda is to some extent different from the Tanzanian one. In the year 2000 Uganda passed a seemingly excellent modern Arbitration and Conciliation statute to accommodate the demands of the changing world. A national dispute resolution center CADER is now in effective operation in Kampala, and the Commercial Division of the High Court put in place a program of court-annexed mediation that promises to be one of the best in the developing world.

Despite these great advancements, there have also been setbacks in supporting the growth of dispute resolution mechanisms alternative to litigation in Uganda as discussed in chapter three of this study.

4.3.1 Level of Awareness

In Uganda use of arbitration as an alternative mechanism to court litigation has been publicized and promoted by the engaged institutions such as CADER through newspapers, radios and television. The majority of our interviewees were relatively aware of it compared to Tanzanian scenario. However, merely knowing about arbitration is not enough unless such knowledge is translated into actions. It is a finding of this study that despite the fact that majority of Ugandans are aware of arbitration as alternative way of settling their disputes they still do prefer court litigation. When we compared during interviews the level of awareness between Uganda and Tanzania, it was found that Uganda's awareness is significantly higher than that of Tanzania as far as arbitration is concerned.

It may be of interest to know why Ugandans do not translate their awareness of arbitration into meaningful results. According to this study and the feedback obtained from stakeholders, the reason why in Uganda although the level of awareness is higher still the majority do prefer litigation, is that, their advocates have been very reluctant to initiate settlement through ADR, possibly for their own interests. One of the stakeholders interviewed in Kampala, Uganda on condition of anonymity, had this to say in relation to peoples' reluctance to invoke arbitration;

> *"..... My advocate always tell me that it is easier solving the dispute through arbitration, but it has always been a big problem when the other party refuse to honour the award, then we have to go back to court, and face the whole process we avoided earlier.... So this discourages me a lot....."*

However, several advocates differed with the stake holder's above statement which tend to suggest that advocates mislead them by giving the impression that an award is not binding on the party and that a party may choose not to honour it. They said that, they always encouraged their

clients to pursue settlement of disputes through arbitration. This view could not be empirically supported as records on ground show that the number of cases in the advocates' firms[132] were mostly settled through court litigation and only five percent of all cases went for arbitration.

4.3.2 Law and Rules Governing Arbitration

The Uganda Arbitration Act came into force for the first time in 1930 a year before Tanzania's Arbitration Act. In the year 2000 the Ugandan Arbitration Act was repealed and replaced by the Arbitration and Conciliation Act, Cap 4 of 2000. The New Act is much wider than the previous one whereby the former provisions were amended and it incorporated the law relating to conciliation of disputes. [133]

Furthermore most of the provisions in the new Act reflect the principles expressed in the UNCITRAL Model Law[134].

The New York Convention of 1958 as well was assented to by Uganda and became part of legislation in 1992. Uganda also became signatory to the ICSID Convention (International Centre for the settlement of Investment Disputes) 1966, which also provides for arbitration between states and nationals of contracting states.

This shows us that, Uganda has modernized its arbitration laws as we have seen amendments have been done frequently with a view to incorporating international law.

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[132] During research we perused records of five law firms in Kampala.
[133] For more changes that were introduced by Uganda's Arbitration and Conciliation Act, 2002 see our discussion in Chapter Three of this work at page 40.
[134] UNCITRAL Model Law on International Commercial Arbitration was developed to address considerable disparities in national laws on arbitration.

4.3.3 Institutions

In Uganda there are two well-known institutions that have been established in connection with the ADR. The Arbitration and Conciliation Act established a body known as the Centre for Arbitration and Dispute Resolution, (CADER) as statutory corporation and a body corporate.[135]

The centre promotes among other things the use of ADR mechanism such as arbitration to all the stakeholders by increasing understanding and a culture of resolving dispute through dispute resolution mechanisms such as arbitration.

There is another institute known as a Centre for Conflict Resolution (CECORE) which also provides for ADR services.[136]

CADER since its establishment has some plans for improving Ugandans' awareness in ADR through publishing various articles and papers. It has been observed that although CADER has not fully played its role as planned[137] there are some attempts to advertise its objectives and encourage Ugandans on the use of ADR through radios.

4.4 East African Court of Justice Vis a Vis National Institutes of Arbitration

Both Uganda and Tanzania are Partner States out of five countries that form the East African Community. Other countries in that cooperation are Kenya, Burundi and Rwanda.

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[135] Functions of CADER are discussed at page 40 of this work. See also foot note 84 for an exposition of the reasons for establishing CEDAR.
[136] See page 47 for more discussion about CECORE.
[137] CADER Comprehensive Programme of 2003

The Treaty for the Establishment of the East African Community confers to the East African Court of Justice in addition to adjudication, powers to arbitrate disputes. The Treaty states that:

> The Court shall have jurisdiction to hear and determine any matter;
>
> a. arising from an arbitration clause contained in a contract or agreement which confers such jurisdiction to which the Community or any of its institutions is a party; or
> b. arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or
> c. arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.[138]

It is noted that the Partner States in an attempt to address one of the factors that contributed to the breaking up of the Community in 1977, established the Court of Justice as a forum where in case disputes arose between Partner States themselves or between institutions of the Community and other bodies, parties might present their grievances and finally reach an amicable settlement. Parties therefore were given two avenues through which they might pursue their recourse. These avenues included ordinary court litigation in the East African Court of Justice for all disputes arising out of the Treaty[139] and also through arbitration in the same Court for those who did not

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[138] See Article 32 of the Treaty for the Establishment of the East African community

[139] see Article 30 Ibid

want court litigation. Within East African Community structure, we witness the East African Court of Justice also functioning as regional arbitration institute.

It was against this background that the East African Court of Justice immediately after its inauguration in exercise of the powers conferred to it by Article 42 of the Treaty for the Establishment of the East African Community formulated a set of comprehensive rules of arbitration ready for use in case a dispute was filed.[140] The Arbitration Rules of the East African Court of Justice provide for, composition of the Tribunal and conduct of proceedings,[141] termination of arbitral proceedings and enforceability of awards,[142] among other things. A party wishing to have recourse to arbitration of a particular dispute by the Court, which for arbitration purposes is known as "the Tribunal",[143] has to notify the respondent in writing of his/her request for that dispute to be referred for arbitration and should thereafter submit the request to the Registrar.[144]

Unfortunately, to date, six years down the road no single matter has been referred to it for arbitration.[145] This unprecedented lack of cases for arbitration in the East African Court of Justice is experienced at a time when the very Partner States which established the Court as their regional institute for arbitration are presently attending to various arbitration proceedings

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[140] According to our interview with Dr. John Eudes Ruhangisa, the Registrar of the Court, the East African Court of Justice was inaugurated on 30th November 2001 by EAC Summit of Head of States.

[141] See Rules 11-19 of the Arbitration Rules of the East African Court of Justice

[142] See Rules 20-26 of the Arbitration Rules of the East African Court of Justice

[143] See Rule 1 (4) Ibid

[144] See Rule 3 Ibid.

[145] This fact was revealed during our interview with the Registrar of the Court.

abroad.[146] It means that even the Partner States themselves do not have confidence in their own regional institution such that they prefer referring commercial disputes involving them, to other arbitral bodies abroad despite the exorbitant costs involved and other inconveniences. Our own interpretation of this situation is that during drafting and subsequent signing of various commercial agreements involving the Governments of the Partner States, the Attorneys General do not consider proposing to their counterparts appointing the East African Court of Justice as arbitrator in case of dispute. It is only Uganda which seems to have broken the ice by successfully convincing their counter part during concessioning of the Uganda Railways by including an arbitration clause appointing the East African Court of Justice as arbitrator in case of dispute.[147]

4.4.1 Major Strengths

The East African Court of Justice as an arbitration tribunal boasts itself of the high quality of its arbitrators who are judges of proven integrity, impartiality and independence, and indeed jurists of recognized competence.[148] One of the Judges was awarded the coveted Chartered Arbitrator status by the Chartered Institute of Arbitrators, of the United Kingdom.[149] This is the ultimate

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[146] For example, the dispute between the Government of Tanzania and IPTL (Independent Power Tanzania Limited) has been going on for the past five years before the London Court for International Disputes.

[147] See Ruhangisa, J. E, "*Litigation in the East African Court of Justice*" A paper presented during the Human Rights Development Initiative (HRDI) Training Programme, 2nd July – 30th Nov. 2007, Pretoria, South Africa, (Unpublished).

[148] During our interview with Registrar, the researcher was informed that among the sitting Judges included Judges of the Supreme Court of Uganda, Courts of Appeal of Kenya and Tanzania, some of whom had served as Attorneys General, Ministers of Justice and Prime Minister.

[149] See p. 14, The Standard News Paper of Kenya, Monday, September 17th, 2007.

professional rank of the Chartered Institute of Arbitrators. The rest of the Judges were specifically trained in arbitration by special trainer appointed by the London Chartered Institute of Arbitrators.[150]

Internationally, one of the purposes for the introduction of arbitration as one of the dispute settlement mechanisms alternative to court litigation was the costs aspect whereby arbitration was relatively considered less expensive. However, to day we have started experiencing highly costly arbitration proceedings contrary to what it was introduced for, especially arbitrators' fees. For the East African Court of Justice, parties are not supposed to pay any fee to the arbitrators but they simply pay what is known as filing fees to cater for administrative expenses. The said filing fees are very low ranging between USD 100 to 1,500 plus 0.125 percent of the amount by which the total amount in dispute exceeds 250,000.[151] The Judges of the Court as arbitrators are employees of the Community and are therefore paid by the Community. This is a unique advantage that parties cannot find or enjoy anywhere they go for arbitration except in the East African Court of Justice.

4.4.2 Weaknesses

Much as the Court boasts of high quality of its judges, there is a very big problem regarding their appointments. The process leading to their appointment is not transparent and the criteria being applied is not known to the people but remains a total discretion preserved for the Summit of

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[150] A Fourteen days special tailored course in arbitration for EACJ Judges was conducted in Mombasa, June 2005 by Prof. Julian Lew QC, of St. Mary's College, University of London

[151] See Rule 28 and Schedule of Arbitration Costs of the Arbitration Rules of the East African Court of justice.

Heads of State who are the appointing authority. It is not a condition that a Judge of the East African Court of Justice should have arbitration background or skills. What the Treaty says is that such persons should be "of proven integrity, impartiality and independence and who fulfill the conditions required in their countries for the holding of such high judicial office, or who are jurists of recognized competence, in their respective Partner State"[152]. There is no guarantee that at any given time the Court will be constituted of Judges who are familiar with arbitration proceedings whose conduct is very different from Court proceedings which most of the Judges are familiar with.

Assuming the Court has a comprehensive training programme for its judges in arbitration as explained by the Registrar, there is still another weakness arising out of their tenure of office. The maximum period that a Judge of the East African Court of justice can serve is seven years non renewable. It means after every seven years the Court will have to train the newly appointed judges in matters of arbitration. Taking the first six Judges as an example, four of them have already completed their tenure and retired before arbitrating any dispute. In addition, by any standards fourteen days training is not enough to make someone a knowledgeable arbitrator.

Arguably, dual functioning of the Court as an arbitration tribunal on the one hand and also as adjudicator on the other hand, may put the eminence of the Court and the judges to disrepute especially when one of the parties may call for withdrawal of the Judge from the proceedings for any reasons. This commonly happens in arbitration and sometimes awards are challenged in Court.

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[152] See Article 24 (1) of the Treaty for the Establishment of the East African Community

We should not loose sight of the possibility of the Court being overwhelmed by activities when it gets busier. The same six judges[153] who are supposed to preside over court cases are the same judges who are supposed to de-robe and assume another status of arbitrators. Also the East African Court of Justice is glaringly understaffed. I could not imagine or believe when I was informed by the Registrar that the Court has a total of nine staff including the driver, secretary and messenger. This may be too much for them to perform effectively and may in effect be a reason for inefficiency or delay of justice in both court cases and arbitral proceedings.

Like the national institutes of arbitration in Uganda and Tanzania, the East African Court of justice is not known to the people of East Africa whom it was created to serve. Due to under-funding coupled with traditional court self restraint, the court has not been able to mount a meaningful publicity programme to raise its stake holders awareness about its arbitral jurisdiction.

4.5 Conclusion

Both national institutions of arbitration in Uganda and Tanzania and the East African Court of Justice as a regional institute of arbitration have common problem of lack of disputes to arbitrate. In both countries Uganda and Tanzania as well as in the East African Court of justice there is a glaring lack of utilization of arbitration as a dispute settlement mechanism alternative to court litigation. These institutes have not been sufficiently used by stakeholders for almost the same reasons. They are all not known to the people that they are supposed to serve. They also compete for cases with private arbitrators most of whom are practicing advocates. One may even wonder

[153] Article 24 (2) Ibid provides that the number of the Judges of the Court shall be a maximum of six

whether there was need for establishing such inactive white elephants before doing ground work of sensitizing the users.

Absence of regular special training for arbitrators of these institutes is one of the challenges facing them. In Tanzania for example, out of ten arbitrators who were interviewed, only two had attended special training for arbitration. Others had just been attending in house courses conducted by TIA twice a year. These courses were not specifically for arbitrators only but were open to any body interested in the topics that is why the attendance was very poor. The arbitrators of these institutes are not recognized or registered by the Chartered Institutes of Arbitrators and they lack international recognition.

Court's intervention has also been identified as another big challenge facing these institutes especially at the stage of award enforcement. It appears such courts interventions discourage the parties since the process is too long and again parties are forced to face what they run away from, that is delay and expenses found in litigation.

The need for such institutions can not be overemphasized given the desire for speedy determination of commercial disputes and the need also for relieving our overwhelmed Courts some of the heavy burdens on their shoulders. In order to achieve this, governments and Partner States in the case of East African Court of Justice should be willing to invest in these institutions by properly funding them in terms of publicity and capacity building.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

It is our general conclusion in this study that arbitration in Uganda and Tanzania is in an unsatisfactory state. The unsatisfactory state of the said arbitration regimes of Uganda and Tanzania necessitates a plea for urgent interventions by both respective governments and civil societies as main stakeholders. It is against this background that an attempt has been made in this chapter to make some recommendations and proposals for reform of what has been found out and identified as impediments to arbitration regimes in these two countries. The recommendations have been developed on the basis of the stakeholders' concerns and the researcher's own analysis of the findings. The conclusion we draw from this study is that arbitration as one of the dispute settlement mechanisms still sounds unfamiliar to many stakeholders in Uganda and Tanzania despite the fact that it has been in their statute books since the colonial period to date.

5.1 Recommendations

5.1.1 Law and Rules

In order to improve arbitration as an effective alternative mechanism of settling disputes there is a need to review the laws and rules that govern arbitrations in Tanzania so as to bring them into conformity with the demands of the changing world. It is stunning to note that since 1931 when the Arbitration Ordinance was passed by the British colonial government, it was re-looked into

only once in 1957 by the same colonial master, otherwise it remains unchanged to date, almost fifty years after independence. It would have been expected that since there have been significant developments in trade and investment areas, the law governing arbitration ought to have also enjoyed development of similar magnitude. Unfortunately that has not been the case.

It is our argument in this study that if the government can seriously address this constraint then we should expect remarkable increase in settlement of disputes through arbitration and also rise in investors' confidence in these countries. Many investors would definitely prefer amicable way of settling their commercial disputes and go on with business as friends.

5.1.1.1 Party autonomy and Court Intervention

One of the most important elements in arbitration is to avoid court intervention over the arbitration proceeding. This approach is aimed at ensuring the party autonomy principle, which is the main objective of arbitration and arbitral jurisprudence. For instances, in an attempt to move away from court intervention towards party autonomy the UNCITRAL Model Law tried to reduce court intervention to what can be taken to be the minimum acceptable level.[154] The arbitral legislation in Tanzania appears to give too much power to the court to intervene both at the arbitral proceeding level and in the arbitral award.[155] It is recommended in this work that, there should be complete party autonomy where arbitration is involved in settling disputes. This is important as it will give them easy handling of their disputes and especially on the part of an arbitrator whereby he will have power as a judge in a court of law not to be interfered with the

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[154] Article 5 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006)
[155] See, Section 8,14,15,17 and 21 of the Arbitration Ordinance, Cap 15

national court on the whole procedure during arbitration. It will also reduce bundles of cases piled up in courts.

The majority (about 80%) of the interviewees and correspondents were not happy with the issue that the ultimate sanction for non performance of an award is enforcement by proceedings in a national court and that the arbitral tribunal has no role to play in the enforcement of its decision when it has made a final award. Its work is usually done by the court at execution level and the tribunal is considered *functus officio*. Taking the matter to court for enforcement of awards brings back all the delays which the parties were running away from, since the procedure in the court has to start almost afresh, from the filing of the award to the delivery of the ruling. Because of this long process, the losing party is by necessary implication encouraged to refuse to honor the award given by the arbitral tribunal so that the winning party can get the trouble of taking all the steps to enforce performance of it through the court.

However, it may be unrealistic to expect legislation to empower arbitrators to enforce their awards as they have no facilities. It is therefore the argument in this work that enforcement through courts is inevitable as long as courts do not reopen the matter at execution level but simply execute the award as if it was the court's own decree.

5.1.1.2 Interim and Conservatory Measures

These are orders given either immediately before or during arbitration proceedings. A party may wish to seek an interim measure of protection, to maintain a certain state of affairs until the dispute is resolved.

The problem with arbitration law in Tanzania includes also lack of provisions for interim measures. Furthermore the law does not even recognize an interim award. Not that Tanzania law does not recognize interim measure only but also it does not provide for agreement for interim award [156] even where the parties might have agreed. For instance under English Arbitration Act there are provisions for both interim measures and agreement of the interim award. The English law gives power to the Arbitral tribunal to issue interim measures.[157] Moreover the same position is found in the UNCITRAL Model Law[158]. The model law which has formed the basis for many countries' own arbitration statutes, authorizes tribunals to grant interim measures in respect of the subject matter of the dispute.[159] The law in Tanzania does not confer such powers to the arbitral tribunal; this causes a major weakness in arbitration by limiting powers the arbitral tribunal may exercise.

5.1.1.3 Consolidation

Another perceived drawback of arbitration lies in the fact that it is not possible to order consolidation of actions, even if it would seem to be necessary or desirable in the interest of justice. In court proceedings all the relevant parties would usually be joined in one action, and so any liability owed to one party may be passed down the chain of contracts and subcontracts to the party or parties ultimately responsible.

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[156] The ordinance under part iv recognizes final awards only
[157] See section 39 of the English Arbitration Act
[158] Article 17
[159] Ibid

This situation discourages people to make use of arbitration as well, since it is wastage of time once you are not allowed to make consolidation of proceedings. We as well recommend the Act to provide for possibility of consolidation of actions.

5.1.1.4 Arbitrators' Fees

An arbitral tribunal is entitled to payment of its fees and expenses, whether the amount thereof was agreed or not by the parties in an arbitration agreement. The parties are jointly liable for the fees and expenses of the tribunal; however this liability is limited to what a party had agreed to pay in the said agreement. There are no statutory prescribed fees and expenses whereby the amount chargeable is left to the parties and arbitrators to agree. In the absence of such an agreement, the parties will only be jointly and severally liable to pay to the arbitrators such reasonable fees and expenses as are appropriate in the circumstances of the particular case.

In enforcing the payment of fees and expenses, arbitrators usually assert their lien over the award. In the exercise of this assertion they retain the award by way of security for payment of their fees. The arbitral tribunal can also recover its fees and expenses by way of a suit against a defaulting party or parties.

The Ordinance is silent on the liability of the parties for the arbitrators' fees and expenses. So is the position in Uganda. In England, section 28 of the 1996 Act clearly provides for the parties' liability for the arbitrators' fees and expenses, save that it does not prescribe the procedure of assessing or fixing the same.

The silence of the law on the assessment and or fixing the arbitrators' fees and expenses exposes the parties and the arbitrator to uncertainty. Such silence gives some arbitrators an upper hand in

negotiating the fees after their appointment. As a result some arbitrators charge tremendously high amount of fees. Sometime they look on the financial position of a party instead of looking at the nature of the case itself. In effect, this could be one of the reasons that have contributed to arbitration being more expensive than even court litigation contrary to the world wide purposes for which the mechanism was introduced.

On the other hand, a party may, unnecessarily become difficult on the issue of fees to deliberately, frustrate the arbitral process. The law should prescribe the mode of assessing and fixing the arbitrators' remuneration expenses and costs as it does in ordinary litigation. Otherwise the object of making arbitration a less expensive mode of dispute settlement will be frustrated and/or very difficult to achieve.

Unlike in litigation where the remuneration paid to judges is clearly settled and even the fee charged by advocates is as well settled in the Advocates Ordinance. Due to this uncertainty and its potentiality for abuse there is a need for setting a fixed amount an arbitrator should be paid or a formula for that matter. Although in arbitration parties aim at cutting down costs, this does not mean that there is no need for fixing that amount, since it has been observed that many lawyers/advocates avoid arbitration for a reason that it does not pay when compared to payment made to them for court litigation. This might be because of the reason that they are not sure of what amount of money they are going to receive for pursuing arbitration mechanism. We hope that even if the fee will be less but it would be better to know it and this will make them arrange a fast arbitration procedure that can even take a week or two to conclude the matter, and this can measure to the amount of fees received. On fixing this fee the government should make sure that the fees should not be prohibitive and block the way to justice as has been the case with

litigation. There is need to consider the economic background of the majority, to see whether they are capable of paying, so that they are not denied access to justice.

It is our hope that after imposition of the above provision, then advocates will not have loophole of advising their clients to avoid arbitration on ground of cost and personal gain.

5.1.2 Arbitration Institutions.

It has been found that although there was a mention of more than one institute dealing with arbitration in both countries, the most known ones are TIA for Tanzania and CADER for Uganda. Also the level of public awareness was very poor as the majority of stakeholders demonstrated ignorance about the existence of these institutions. Even the isolated few who at least knew of their existence, could not tell the reasons for establishing these institutions.

It is suggested that the governments should start working hand in hand with these institutions and provide them with necessary support required to reach out to the people. The public should be encouraged through televisions, radios, newspapers and any other means to use this mechanism in solving their disputes. Regular training of arbitrators should be conducted with a view to winning international recognition in addition to local respectability.

5.1.3 Special Training

There is a need to introduce special courses concerning arbitration so as to get competent people in this part, especially students who are studying laws should be trained in arbitration at law schools/universities. Tanzanian universities for example have not developed any courses in arbitration in their law degree programmes, and this might be one of the reasons for arbitration failure because the majority of the graduates are become advocates in private firms and/or

companies, and are the ones whom the public depend on in consultation when faced by commercial disputes. If they are not competent in arbitration then it becomes very difficult for them to advise anybody about the benefits of arbitration, which themselves do not know, instead of litigation which is very familiar to them and is well taught in all universities.

Lawyers, judges and others should get special training as well on arbitration, the training offered by the TIA in Tanzania twice a year is not enough and besides, the fee paid is very high compared to the majority of Tanzanians income. For example in 2007 every person who wanted to attend was required to pay Tanzanian Shillings 200,000 (about USD 200) as fees excluding accommodation and general upkeep for four days. It should be noted that the minimum monthly salary of Tanzanians is Tanzanian Shillings 80, 000/= (about USD 80) per month. This can help us see how difficult it may be for an ordinary Tanzanian graduate whose salary is about USD 200 to attend such courses if he wants to survive in one month. It was found during our field study that it was not more than 30 people who usually attended the course every year, while there were hundreds if not thousands of people in Tanzania who would have liked to attend such courses.

We would like to recommend that, TIA should reduce the amount of attendance fee chargeable to participants, and consider holding the training in less costly venues/premises instead of conducting them in five star hotels[160] where they have to pay a lot of money as well.

Furthermore arbitrators must be in a position to improve their levels of competence and ethical behavior for the benefit of users of their services and for the reputation of their practices. The

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[160] These hotels were mentioned by the Chairman of TIA. In 2005 the course was conducted at Royal Palm Hotel (now Movenpick Hotel), in 2006 at Golden Tulip and in 2007 at Holiday Inn.

arbitration movement as a whole needs to present the service in the best way, it also needs to be seen to respond to pressures from business protection and safeguards.

Finally, the arbitration Acts need to be reviewed and the above recommended provision should be added to improve the law and attract the users and most important to conform to the model law which is acceptable internationally. Although this task will of course take some time as it has so far been demonstrated, but if efforts towards searching for solution to the problem start soon we hope time will lessen.

Efforts should be made seriously. It has been observed that the plan to amend the Arbitration Act in Tanzania was there since 2002 when the government rearranged the provisions in the same Act, but it is now almost six years nothing has been done.

It is also our recommendation that mandatory provisions to parties in all civil matters to choose arbitration as a first step before going to court should be there and if any party breaches this provision he/she should be sanctioned. This, in effect, will give arbitration more power. Lawyers/advocates should advise their client to solve their dispute through arbitration first before going to litigation if they fail to do that they must be sanctioned as well. Apart from that, it brings sense also as it is well known that arbitration has a lot of advantages than court litigation and the courts in both countries are overloaded with pending cases to settle and it takes them years to settle them.

It is our hope and also hopes of those who appreciate speedy justice at low costs that after enactment of our arbitration law, arbitration will decide cases in conformity with parties' need. Lastly we hope that, the majority will take consideration of arbitration as the success mechanism that depends on them and indeed a forum for protection of their business.

5.2 Conclusion

This study was conducted from two major premises which formed the hypothesis that arbitration is not a popular dispute settlement mechanism in Tanzania because its stake holders especially lawyers do not give it prominence; and that the arbitration law and rules in Tanzania is imperfect, it does not accommodate the needs of the Tanzanians and also the institutions are not known to the Tanzanians. Indeed the results of the study have proved the two hypotheses in affirmative.

This study has revealed that the arbitration laws and Rules in Tanzania are imprints of the English Arbitration Act, 1889 and the Indian Arbitration Act 1899. They were enacted to suit the goals and objectives of the colonial administration. It has also been found that since their enactments in 1931 and 1957 respectively, they have not been amended to suit the present changing world. It is also the finding of this study that there are no known and well developed arbitration institutions in Tanzania. The Ordinance and Rules are designed in a Court interventionist model in arbitration. This approach is ill suiting both domestic and international commercial arbitration with its need for a well defined courts subsidiary model. Because of this shortcoming, it has been revealed that the arbitration law in Tanzania does not keep pace with Modern trends. As a result most of the business communities prefer foreign law and rules and procedures. The modern trends which are being followed by many countries, call for the adoption of the UNCITRAL Model Law. The UNCITRAL Model Law emphasizes on the free choice approach of party autonomy. Further that unlike the English and Indian positions which have been undergoing several changes and improvements, there has never been changes in the relevant Acts and Rules of arbitration in Tanzania. For Uganda, the study has noted the attempt

to modernize its laws including adoption of UNICITRAL Model law as reflected in the Arbitration and Conciliation Act of 2000.

In addition, both countries' institutions have no historical reputation as international arbitration centres and therefore no possibility of inconveniencing the international business community in the event the old laws are replaced by a Model Law. Indeed the existing law of arbitration in these countries is entirely unknown outside and would not be missed if it were replaced by a Model Law. Its replacement by Model Law would put the countries firmly in the competitive international market place to the extent that lawyers allover the world would be able to advice their clients that an arbitration would present no risks and would be conducted in accordance with the internationally approved framework which keeps expenses to the minimum.

As pointed out earlier on, arbitration in Tanzania and Uganda has been there for more than 70 years. Such period of operation is extremely big enough to allow evaluation of its success or failure. The study set out and examined the performance of arbitration in Tanzania. In its examination, it has been revealed that there are some problems including less knowledge and option by parties to choose mechanism they want.

Also it has been found that ignorance is a very big problem facing the majority of the businessmen, whereby they find themselves not able to access arbitration and as a result of this, they proceed to file the cases of arbitral significance in courts.

However, it is acknowledged in this study that at a certain stage the governments made some kind of efforts by attempting to reduce some of the problems facing the arbitration including the establishment of the arbitration institutions among other things. However, these efforts by the

governments only offered *ad hoc* solution to the problems since they did not address the basic causes of the problems such as ignorance of the majority in arbitration.

In view of the foregoing and some of the problems pointed out in chapter four, we do not expect to see them solved at once, but we think the above suggestions can contribute to the desired improvements and hopefully strengthen the role of arbitration in both countries.

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