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A Perspective of the Role of Tanzanian National Courts in Commercial
Arbitration

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LIST OF ABBREVIATIONS

IAA	International Arbitration Act
ICC	International Chamber of Commerce
PCA	Permanent Court of Arbitration
POA	Power Off Agreement
UNCITRAL	United Nations Commission on International Trade Law

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DEDICATION

To my dad Dr Aggrey KLJ Mlimuka and my mum Mrs Anne Thecla Mlimuka. You are the best parents any child could ask for. I am forever indebted to you!

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CHAPTER 1: INTRODUCTION

1.1 Introduction

Arbitration has been an efficient mechanism for settling disputes for centuries. The use of arbitration as a means for dispute resolution can be traced as far back as ancient Greece, Egypt and Rome. Ironically, the reasons that gave rise or in other words necessitated the existence of arbitration as a means of dispute resolution, which among others include the backlog and congestion of cases, unnecessary delays as well as the high cost of court litigation are still as evident today as they were back then.¹

Arbitration in Tanzania and the world as a whole has now become a permanent fixture in the resolution of commercial disputes. It has been increasingly sought by people in the business fraternity ranging from local enterprises to foreign investors as a preferred mechanism for dispute resolution. It is now common practice in Tanzania for commercial contracts to include arbitration clauses in them since the liberalization and privatization of the Tanzanian economy in the 1990's.²

Arbitration is a reference of a dispute or difference between not less than two persons for determination after hearing both sides in a judicial manner by another person or persons, other than a court of competent jurisdiction.³

The definition above lays the ground and basis for what arbitration really is. It is a means of alternative dispute resolution that is done outside the court. This simply means that it does not in anyway involve court litigation. It is this divergence of arbitration away from the watchful eyes of the courts that forms the crux of arbitration.

Despite the fact that arbitration is an out of court dispute settlement mechanism, the courts are very much involved in the arbitration process as a whole in Tanzania playing

¹ GB Born, *International Commercial Arbitration* (2009) 15.

² Nuhu S Mkumbukwa, Is the Commercial Court Jealous of Arbitration? (2009) 1, available at http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Mkumbukwa-Nuhu-S.-Is-the-Commercial-Court-Jealous-of-Arbitration_-Commercial-Court-Roundtable-#8th-Oct.-2009.pdf

³ EA Marshall, *Gill: The Law of Arbitration* (2001) 1.

a rather supervisory role. This is a role that courts' play over all other inferior judicatories that fall under it and guard jealously.⁴

It is thus not a fallacy to claim that the arbitration process in Tanzania is court annexed. Since the court plays a vital role in arbitration in general. The court is involved in arbitration even before arbitration commences, during the arbitration proceedings as well as after the arbitration award is issued, as will be displayed in the chapters that follow.

Tanzania like many other developing countries faces a myriad of problems in the area of dispute settlement. Commercial dispute settlement and contract enforcement were identified as problematic for investors in Tanzania. The laws were considered outdated and inconsistent, and were found to have gaps with regard to modern business organizations, modern practices, modern business systems and technologies.⁵

Despite the fact that arbitration is now widespread and recognized as a means of dispute resolution, Tanzania has not in any way developed its arbitration laws to ensure that it aligns with Tanzania's current economic growth and the commercial hub that it is now growing into.

The arbitration laws that are currently in use in Tanzania have been applicable since the 19th century. Since the Arbitration Act was promulgated in 1931 it has only been amended once in 1971. This is a time period of more than 40 years till today. This clearly shows that Tanzania is not in tune with the developments that arbitration has undergone during this time frame.

While Tanzania has seemingly been on a hiatus, not taking into account the development that arbitration has been going through, the field of arbitration has gradually evolved and made significant changes and developments that Tanzania has not taken into account.

The most significant development has been the introduction of the UNCITRAL Model Law that is a product and convention established by the United Nations Commission on

⁴Lord Dervaird, Scotland and the UNCITRAL Model Law: The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law (1990) 6 *Arbitration International* 1, 65, available at <http://www.kluwerlawonline.com/document.php?id=ARBI1990003&PHPSESSID=s0uekn6idfitek5qpgpr3vmo27>

⁵ http://unctad.org/en/docs/diaepcb201006_en.pdf.

International Trade. The UNCITRAL Model Law was first introduced in 1985 with the sole aim of establishing a standard and reliable system of international arbitration.⁶

It is the need to resolve the problems that were arising in relation to commercial arbitration and the various technological advancements made by its member states, that inevitably required the UNCITRAL Model Law to undergo a series of changes to cater for the growing need of today's technological advancements which led to the 1985 version being amended and the formulation of the UNCITRAL Model Law of 2006.

One of the central and key elements of the UNCITRAL Model Law is the limitation of the court's intervention and involvement in the arbitral process. As explained by Lord Dervaird,

*'Central to this system is a limitation in the extent to which the courts may exercise control over the process of arbitration... Broadly, while an arbitration is a going arbitration, resort to the courts is not permissible except to obtain assistance in such matters as the obtaining of evidence. At the conclusion of an arbitration, resource to the courts may be made (within a limited timescale) in order to have the award set aside on what may generally be classed as procedural and jurisdictional grounds.'*⁷

Lord Dervaird's writings were the driving force behind Scotland's adoption of the UNCITRAL Model Law and summed up the two main twin pillars of the UNCITRAL Model Law.

The pertinent ideas behind the importance of the UNCITRAL Model Law not only at the international commercial arbitration level but also at a national level are its twin pillars. These twin pillars are focused on the principle of maximization of the court support for the arbitral process and curbing the uncalled for intervention of courts in the arbitration process.

⁶ The United Nations Commission on International Trade Law was established in 1966 by the General Assembly of the UN. The Commission aimed at promoting unification and harmonization of international trade law. It first drafted the UNCITRAL Model Law of 1985 and adopted it on 21 June 1985 with the aim of curbing problems that were arising in the field of commercial arbitration that had not been extensively covered and addressed by the New York Convention. It aimed at establishing an integrated legal framework for the fair and efficient settlement of disputes that were a result of international commercial relations. See: S Brekoulakis & L Shore, in LA Mistelis (ed), *Concise International Arbitration, UNCITRAL Model Law on International Commercial Arbitration, 1985/2006*, (2010) 581.

⁷ Lord Dervaird op cit (n4).

It is hence a truism that it is imperative to reduce or eradicate in its entirety the tensions that exist between arbitration and judicial adjudication to ensure a boost in commercial confidence and enable arbitration to function as a distinct and efficient means for the resolution of commercial disputes.⁸

Since arbitration is a private process it needs and depends upon the support of the court to render the process effective. Despite this fact, the degree and extent of the court's involvement in the arbitral process should be kept to the minimum in order to enable arbitration to be the distinctive and independent mechanism of dispute resolution it seeks to be. The unwarranted involvement of the court in arbitration is posing a threat to the attraction of arbitration as an effective and independent means of resolution of disputes.

The tensions that evidently exist between arbitration and the courts have been there for ages. These hostilities can be traced as far back as the 16th century England, where the judges and courts animosity and contempt for arbitration was raging.

The most infamous case of that era is the *Vynior's Case* of 1609. Lord Coke's decision is still to date regarded with notoriety and gave little precedential support of the court for arbitration based on the unfair treatment of agreements to arbitrate. In this case Lord Coke denied to accord a contractual effect to an arbitration agreement.⁹

Lord Coke's decision has been coined an ill-concealed distaste¹⁰ for the arbitral process by some scholars. This decision, as detrimental as it may have been to the existence and integrity of arbitration, only echoed the sentiments of the judges, the courts and the legislations that existed in that time period.

England has come a long way since then, and to rectify the mistakes made in the past it enacted the 1698 Arbitration Act which is commonly referred to as the world's first

⁸Christa Roodt, 'Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization' 25 *Tulane European & Civil Law Forum* (2010), 68, available at http://heinonline.org/HOL/Page?handle=hein.journals/teclf25&div=8&g_sent=1&collection=journals#69.

⁹ *Born op cit* (n1) 32-33.

¹⁰ *Idem*, 33.

extant arbitration statute which aimed at promoting trade and rendering the awards of arbitrators more effectual in all cases.¹¹

Lord Campbell in the case of *Scott v Avery*¹² gave out a rather cynical but persuasive reason for the alleged historic animosity and distaste of the common law judges towards arbitration,

‘This doctrine had its origin in the interests of the judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, on fees, and as they had no fixed salaries there was great competition to get as much as possible of litigation into Westminster Hall and there was a great scramble in Westminster Hall for the division of the spoil...And they had great jealousy of arbitration whereby Westminster Hall was robbed of those cases.’¹³

This explanation may shed a light on the historic hostilities that judges and courts in general have towards arbitration. Although it is a glimpse into 18th century England it is still of relevance today even in Tanzania.

This is so because the courts’ involvement in arbitration is an issue that is causing a conundrum even to date. Begging for the question as to how much court intervention is necessary and if this intervention is not posing a threat to the existence of arbitration.

1.2 Research Question

This research paper aims to look at whether the legislated role of the courts in the arbitration process is sufficient to support arbitration as an effective and distinct dispute resolution process.

This research paper also seeks to look at to what extent does the Tanzanian law supply the twin pillars of the UNCITRAL Model Law on International Commercial Arbitration as propounded by Lord Dermaid where focus is put on the minimization of court interference and the maximization of court support for the arbitral process.¹⁴

¹¹ *Idem*, 33-34.

¹² (1856) 5 H.L Cas 811, 853 (House of Lords)

¹³ *Ibid*.

¹⁴ Lord Dermaid op cit (n4) 65.

The Constitution of the United Republic of Tanzania obligates the courts to ensure that they promote and support the resolution of disputes without recourse to the courts. This is to say that the courts have the responsibility to support alternative dispute resolution. As seen here,

‘In delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say- (d) to promote and enhance dispute resolution among persons involved in the disputes.’¹⁵

The courts have a substantial role in arbitration especially so far as the enforceability of arbitration agreements and awards is concerned but only in a limited context.¹⁶

In Tanzania the national court that is involved in arbitration is solely the High Court. It is the only court that has been vested with the power to entertain all matters pertaining to commercial arbitration. The High Court alone is competent to try all matters that are submitted to arbitration and form the subject of the suit.¹⁷

In addition to that it is the High Court that has jurisdiction over arbitration- related court proceedings as provided for under S.6 of the Arbitration Act.¹⁸ It thus makes the High Court the only court of law in Tanzania with exclusive jurisdiction to entertain matters pertaining to the arbitration process.

The UNCITRAL Model Law both in versions of 1985 and 2006 offers a guideline as to the extent the courts can get involved in arbitration. It is clear that under the auspices of the Model Law, court intervention in the arbitration process is under all circumstances limited and minimal. This allows for the arbitral tribunal to assume a bigger portion of responsibilities than the courts. This at the same time enables arbitration to exist as an efficient mechanism for dispute resolution.

¹⁵ Article 107 (A) (2) (d) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

¹⁶ Kenneth Davis, ‘A Model for Arbitration: Autonomy, Cooperation and Curtailment of State Power’ (1998) 26 *Fordham Urban Law Journal* 2, 166.

¹⁷ S.3 of The Arbitration Act , Cap 15 of the Laws Principal Legislation [R.E. 2002]

¹⁸Karel Daele, Tanzania in Lise Bosman (ed) *Arbitration in Africa: A Practitioner’s Guide* (2012) 239.

Under the Model Law the roles that the court plays are clearly specified and elaborated. The Model Law of 1985 has provisions that offer a glimpse into the court's role; it is however the 2006 version of the Model Law that has extensively covered the level to which the court may get involved and under what circumstances it may do so.

Under the UNCITRAL Model Law courts play a relatively small role; this is evidenced by the fact the court will only intervene where so provided by the law.¹⁹

Article 9 of the Model Law reiterates that it is not incompatible with an arbitration agreement for a party to request from a court an interim measure of protection before or during the arbitral proceedings and for the court to grant this request to the party. This article deals with the matter of interim measures granted by the court in commercial arbitration. This provision indicates that it is not in conflict with the submission for a court to grant an interim measure.²⁰ This Article empowers the national courts to grant interim relief in regards to arbitration, in spite of the arbitration seat of the arbitration proceedings not being determined at that point regardless of whether it is in their state territory or not.²¹

It should be noted that these interim measures should not be confused with the ones that are provided for under Article 17 of the Model Law and granted by the arbitral tribunal. The range of measures covered by Article 9 is considerably wider than that under Article 17.²²

*'Some courts have held that such pre-award attachments were not consistent with the arbitration agreements and the purpose of the 1958 Convention because they would in fact impede expeditious arbitration proceedings. Yet, other courts have granted such attachments on the ground that these would rather make the latter award meaningful by preserving the subject matter or assets intact within the jurisdictions.'*²³

Article 9 refers to the jurisdiction of national courts to grant interim reliefs while Article 17 exclusively empowers the arbitral tribunal to grant these reliefs. In a succinct it can

¹⁹Article 5 of the UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006.

²⁰Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 2ed (2005) 98.

²¹Stavros Brekoulakis & London Shore, in Lukas A Mistelis (ed), *Concise International Arbitration, UNCITRAL Model Law on International Commercial Arbitration, 1985/2006*, (2010) 605.

²²A/CN.9/246

²³Binder op cit (n20) 99.

therefore be argued that under the Model Law both the arbitral tribunal as well as the national courts will have the power to grant interim measures in the same arbitration.²⁴

Article 9 however is mostly used in arbitrations where parties do not honour the arbitral tribunal's orders; this does not exactly support or promote dispute resolution by arbitration.²⁵ Although the fact that the tribunal will at the end decide the fate of these parties may be enough to instill fear in the parties opposing and defying the tribunal's orders, relatively compelling the defying party to follow the orders set forth.

It has been argued that once the arbitral tribunal is in place, national courts should only have subsidiary jurisdiction to grant interim measures unless the arbitral tribunal in itself has failed to do so.

Article 17 H of the Model Law deals exclusively with the recognition and enforcement of interim measures that are ordered by the arbitral tribunal. It states that an interim relief made by the arbitral tribunal shall be recognized as binding and should be enforced upon application to the competent court unless otherwise provided by the arbitral tribunal.²⁶

This goes to show that the court has to enforce the interim measure granted by the arbitral tribunal in order for it to be binding on the party it was sought against.

‘Accordingly, the tribunal’s power to issue an order of an interim measure only applies if the parties haven’t agreed otherwise.’²⁷

Article 17 I deals with the grounds for refusal of recognition and enforcement of interim measures. These grounds are subject to the discretion of the court. Here again the role of the courts is at display. Despite the fact that these injunctions have been issued by the tribunal, the court still has power to decide whether to enforce them or not.

²⁴ Brekoulakis & Shore op cit (n21) 606.

²⁵ Binder op cit (n20) 153.

²⁶ UNCITRAL Model Law.

²⁷ Binder op cit (n20) 151.

Article 35 deals with the recognition and enforcement of awards. As argued by Dr Stravros Brekoulakis, recognized arbitral awards carry the same weight as domestic court judgments bearing the same legal consequences.²⁸

This Article regulates the enforcement of valid arbitral awards by a court and is therefore not directed at the arbitral tribunal. The expectation is that the losing party will automatically comply with the award. For an arbitral award to be secured by enforcement through the local courts, it is necessary for the local arbitration law to have detailed provisions regarding this issue.²⁹

The Tanzanian Arbitration Act on the other hand showcases a totally different milieu as far as the involvement of the courts in arbitration is concerned.

The national courts -that is in this case the High Court have been conferred with excessive powers that may be regarded by many as being intrusive and posing a threat on the efficient existence of arbitration.

According to the Arbitration Act of Tanzania, the court has a very significant role to play, corresponding with the ones mentioned in the Model Law, namely:

Firstly, the court in accordance with S.6 of the Act has the power to stay proceedings and compel parties to the arbitration agreement to honour their agreement by referring them to arbitration. This is done once a party to the arbitration agreement applies to the court to stay proceedings.

Apart from that, in Tanzania in practice it is only the courts that can order interim measures. This power is not even vested in the arbitral tribunal. The courts have under numerous cases claimed that it is a power they have been assigned in accordance with S.3 of the Act, which states, ‘This part shall apply only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court alone would be competent to try.’

²⁸ Brekoulakis & Shore op cit (n21) 650.

²⁹ Binder op cit (n20) 280.

The fact that the court assumes greater powers than the arbitral tribunal could be said to undermine the arbitration process and make it difficult for arbitration to exist as an independent means of dispute resolution.

The court also asserted that there is currently no law whatsoever that provides for the issuance of interim reliefs pending arbitration proceedings. The court claimed that it would bring this issue to the attention of the respective minister.³⁰

S.17 of the Act corresponds to Article 35 of the Model Law it provides for the enforcement of arbitral awards. It provides that once an award is filed in the court according to the requirements of the Act, it should be enforceable as if it were a decree of the court.

This is yet another fundamental role that the court plays in the end of arbitration. It enforces the award by giving it the full force of law.

As stated above, the research question of this dissertation will involve an interrogation of the role of the court, assessing its support for independent arbitration and compliance with the Model Law.

1.3 Brief History of Commercial Arbitration in Tanzania.

As the renowned scholar Gary B Born points out, arbitration is the oldest method for the settlement of disputes.³¹ He attributes ancient Greece as having introduced and spearheaded the practice of arbitration as far back as 2550 BC.

In Africa, it is believed that arbitration has always existed according to ancient local customs. In African traditional communities it was the practice to take a dispute that arose- notwithstanding whether it was commercial or not commercial in nature -to a third party for determination as a means of recourse. When a dispute was considered to

³⁰ As per S.21 of the Act which states “*The High Court may make rules as to– (a) the filing of awards and all consequent or incidental proceedings; (b) the filing and hearing of special cases and all consequent or incidental proceedings; (c) the staying of any suit or proceedings in contravention of a submission to arbitration; and (d) the general conduct of all proceedings in court under this Act. See: Hodi Hotels Ltd v. Jandu Plumbers Misc. Commercial Application No. 15 of 2009. To be further discussed in the following chapter.*

³¹ Born op cit (n1) 9.

be grave it was referred to a council of elders which would in turn take testimony and sometimes hear the arguments of agents advocating on behalf of the disputants.³²

When tracing the history of commercial arbitration in Tanzania one must acknowledge the significant contribution and influence that the United Kingdom has had on Tanzania. This is so because Tanzania was once colonized by Great Britain, thus entwining Tanzania's history with that of Britain.³³

Tanzania just like many other countries that were formerly colonized by Great Britain has its arbitration law modeled after the English Arbitration Act of 1889 stemming from the colonial days.

The Tanzanian Arbitration Act came into force on 22 May 1931.³⁴ As is discernible from the explanations above, this Act has been modeled in line with the English Arbitration Act of 1889 that was applicable at that time.

The Tanzanian Civil Procedure Code Cap 33 Revised Edition 2002 is yet another source of arbitration laws since it contains arbitration rules and procedures that may be used in instances where during the course of court proceedings, the parties to the suit decide to refer their dispute to be determined by arbitration.³⁵

The Civil Procedure Code which is *pari materia* to the Indian Civil Procedure Code of 1809³⁶ was first introduced into the then Tanganyika from India by way of the British colonial rule.³⁷

³² *Idem*, 54.

³³ Tanzania which was during the colonial era called Tanganyika was colonized by the British Empire from 1919 until 1961 when she attained her independence.

³⁴ Daele op cit (n14) 239.

³⁵ *Ibid*.

³⁶ Hon. Mr. Justice Robert Vincent Makaramba, Arbitration as a Mechanism to Speed Up Delivery of Justice, A paper presented at the Round Table Discussion, 20 July 2012, 13.

³⁷ Tanzania mainland which is the focus of this research paper was formerly known as Tanganyika. Tanganyika and Zanzibar formally joined together on the 26th of April 1964 and merged into what is now known as the United Republic of Tanzania.

1.4 The Legal Framework for Arbitration in Tanzania

1.4.1 Brief Overview

The legal foundations for arbitration in Tanzania are governed by two main pieces of legislation, the Civil Procedure Code (Cap 33 RE 2002) and the Arbitration Act (Cap 12 R.E 2002).³⁸ These two pieces of legislation coupled with the Arbitration Rules³⁹ govern all matters relating to arbitration in Tanzania except for land and labour matters that have a separate set of laws governing them.

The Tanzanian laws on arbitration are contained in the Arbitration Act. This is the principal national legislation that governs both domestic arbitral proceedings as well as the enforcement of foreign arbitral awards,⁴⁰ applicable so far as domestic and international arbitrations that are conducted in Tanzania are concerned.

The current Tanzanian Arbitration Act has its origin in the colonial Arbitration Ordinance, and was a direct product of the British colonial government and proclaimed as law in 1957. One must however acknowledge the presence of two separate legal regimes on arbitration in Tanzania which are the Arbitration Act and the Civil Procedure Code (Arbitration) Rules, this duality being attributed to the historical origins of these two fundamental instruments of law that were adopted from India.

The Civil Procedure Code is responsible for the enforcement of arbitrations that are domestic in nature, while foreign arbitral awards are regulated by the Arbitration Act.

1.5 Advantages of Arbitration

The basic reason for the preference of arbitration as opposed to court litigation in developing countries such as Tanzania is the belief that arbitration can to a large extent contribute to the aspirations of the pressing needs of developing countries and their citizens for the much needed socio-economic development as well as the prosperity of

³⁸ Makaramba op cit (n36).

³⁹ GN No 427 of 1957.

⁴⁰ Wilbert B Kapinga & Eric S Ng'mariyo, 'Registration and Enforcement of Arbitral Awards in Tanzania', *The European, Middle Eastern and African Arbitration Review* 2013, 94, available at <http://globalarbitrationreview.com/reviews/50/the-european-middle-eastern-african-arbitration-review-2013/>

the country, while at the same time postulating the requirements and expectations of their developing partners and emulating fairness and justice to the parties concerned.⁴¹

It is believed that if arbitration will be embraced it will enable countries such as Tanzania to finally reach their full commercial potential. This will be the result of these countries being able to attract a bigger number of foreign investors, who are drawn to these countries due to a reliable system of dispute resolution. This will in turn contribute to the development of the economy.⁴²

Tanzania, like many other growing economies has seen the important role that the creation of a suitable legal environment plays in ensuring the smooth operation of commercial transactions and attracting foreign investors to trade.

In the business world many people prefer to address their disputes to arbitration rather than resorting to judicial adjudication because of cost, time and expertise considerations. It is thus important for a country like Tanzania to showcase to its nationals as well as the world in general that it has a reliable and efficient system of alternative dispute resolution with arbitration at the forefront.

The growing embrace by the business fraternity and parties to commercial transactions of arbitration in Tanzania has been caused by a number of factors, particularly the perceived advantages arbitration has as an alternative means of dispute resolution.

These reasons therefore act as the factors that necessitated and hence precipitated the need for arbitration in Tanzania.

⁴¹ Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (2001) 26-33.

⁴² Antonius Rickson Hippolyte, *Examining Newfound Tolerance for International Arbitration in the Developing World: An Illustration of the Nexus Between Law And Development* (2011), 1, available at www.academia.edu/109776/EXAMINING_NEWFOUND_TOLERANCE_FOR_INTERNATIONAL_ARBITRATION_IN_THE_DEVELOPING_WORLD_AN_ILLUSTRATION_OF_THE_NEXUS_BETWEEN_LAW_AND_DEVELOPMENT, accessed on 1 September 2014.

Abraham Lincoln⁴³, who was an advocate for arbitration neatly summed up the advantages of arbitration over court litigation. He said:

‘Discourage litigation; persuade your neighbours to compromise whatever you can. Point out to them how the nominal winner is often a loser in fees, expenses, cost and time.’⁴⁴

In the first place, arbitration potentially offers speedier delivery of justice. It is often a faster means than court litigation in the resolution of a dispute. The time taken by the judicial processes in Tanzania has been a constant complaint raised by business people and ordinary people who have sought the courts for redress to their disputes. The unwavering and consistent complaints made against the courts are that of unnecessary delays in the dispensing of justice.⁴⁵

The large body of both substantive and procedural laws that exist in court litigation gives great room for adjournments and objections, causing delay in proceedings.⁴⁶

Apart from that, there has been a suggestion that some judges lack specialized knowledge in the business field, contributing further to delays. The average time judges take to write their judgments is long; the length of their judicial terms and the working hours of the judiciary negatively impact on the delivery of justice.⁴⁷

Under some circumstances it has been alleged that the courts bailiffs or brokers have failed to serve summonses and /or orders or other court processes on parties to court actions. It has also been averred that the archaic means and equipment as a whole used

⁴³Abraham Lincoln was the 16th President of the United States of America. Born in 1809 and assassinated on Good Friday April 14th 1865. He is credited for building the Republican Party into a strong national organization and as a crusader for liberty and freedom.

⁴⁴ Collected Works of Abraham Lincoln (1850), available at <http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm> accessed on 10 February 2014.

⁴⁵ The former Chief Justice of Tanzania, Hon. Augustino Ramadhani expressed that unnecessary delays caused by adjournments result in frustrating the people that have been denied their rights and the lack of faith of these people in the justice system. See: Speech by Hon. Chief Justice Augustino Ramadhani presented on the Law Day, 4 January 2008, available at www.judiciary.go.tz/index.php?option=com_content&view=article&id=92:law-day-speech-by-honc-hief-justice-augustino-ramadhani&catid=22:speeches&itemid=98, accessed on 1 September 2014.

⁴⁶RV Makaramba, ‘Commercial Disputes in Tanzania: Challenges and Prospects’ (2009) 3 The Tanzania Lawyer 2, 19-20.

⁴⁷Ibid.

to record court proceedings especially so far as the decoding of evidentiary matter is concerned causes delays.⁴⁸

The limited number of judicial officers staffing the courts is a significant problem which effects court litigation all over the country. The number of cases filed does not in any way correspond with the small number of judicial officers and staff at the court's disposal. It is estimated that there are 62 High Court judges and 16 Court of Appeal judges the Chief Justice inclusive.⁴⁹

The number of courts in the country is also small, especially when considering that it is the High Court alone that has jurisdiction to entertain commercial disputes. There are only 49 High Courts all over the country⁵⁰ catering for a population of 45 million Tanzanians⁵¹.

Responding to the number of judges and court personnel, arbitration is seen as a faster means of dispensing justice, particularly as there may be a reduction in over- complex and complicated procedural aspects allows for it to be speedier.

It is a private and confidential process, away from the glaring eyes of the public. Although the pieces of legislation regarding arbitration have no specific requirements for confidentiality in Tanzanian law, it is an implied principle that is widely recognized, valued and honoured. Although Tanzanian laws have not expressly provided for this, it is an element that can be incorporated into any arbitration agreement if the parties wish to do so. Regardless it observes a higher degree of confidentiality than court litigation which by nature is in the public domain and serves a public interest.

The element of parties being able to choose their own arbitrators leaves room for the parties to choose arbitrators that possess expertise in the given field that may form part or subject of the matter in dispute. It also allows for the principle of party autonomy to

⁴⁸ Ibid

⁴⁹ http://www.judiciary.go.tz/index.php?option=com_content&view=article&id=44&Itemid=67, accessed on 29 May 2014.

⁵⁰ The Consolidated Annual Reports of the Judiciary, 2008-2009, 4.

⁵¹ <http://www.nbs.go.tz/> accessed on 29 May 2014.

In 2012 Tanzania conducted a nationwide census; the estimated population is 44,928,923 people.

be adhered to. On the other hand this also ensures neutrality, since the arbitrators may be selected because of their impartiality.

Arbitration is preferred because it can be conducted anywhere. The flexibility as to the venue is attractive to the parties. It enables arbitration to be conducted in any place that may be convenient to the parties.⁵²

Moreover it is believed that arbitration is relatively less costly than court litigation. It must however be recognized that the parties have to pay for arbitrator(s) (whereas judges do not charge for their fees) and parties may choose as expensive legal representatives as in litigation, and on top of this the parties have to pay for the venue at which at which arbitration will be held. Only if the quality of the award and the speed at which the arbitration takes place, will the extra costs outlined above be off-set.

The finality that is attained through arbitration is another advantage of arbitration. It is known that parties to an arbitration seek redress through this method knowing that at the end of the process they will get an outcome that is final and binding on the parties. Unlike court litigation an aggrieved party can not appeal; an award can only be reviewed with the hopes of it being set aside for reasons that are very circumscribed.

⁵² Jean R Sternlight, 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (1996) 74 Washington University Law Review 3, 638.

CHAPTER 2

2.1 Introduction

At the center of arbitration are the arbitration proceedings and arbitration procedures. The procedural conduct of arbitration coupled with other desirable factors is what persuades parties to choose arbitration to serve as a means to settle their disputes. The promise of arbitration is accessing procedures that are flexible, neutral and fair which are decided by experts, that are efficient, having the ability to cater to the specific needs of their particular dispute, without being confined to the inevitable formalities and technicalities of procedural laws that are applied in national courts.⁵³

Arbitration by itself is a private method chosen by consenting parties as a means to settle their disputes. The fact that it is a private process does not insulate arbitration from court scrutiny, as the public interest places certain disputes beyond the powers of arbitrators. But for arbitration to function as a relatively informal, flexible procedure, courts should be reluctant to intervene with this process of dispute settlement.

But, it is arbitration's very nature of being private that necessitates the involvement of the courts in this process in order to enable it to be executed, since arbitration can not do so by itself. Arbitration is dependent on the courts' coercive powers before, during and even after the arbitration process to ensure its efficacy.⁵⁴

⁵³ Gary B Born, *International Commercial Arbitration* (2009), 1233.

⁵⁴ Samuel Marful Sau, 'Can International Commercial Arbitration be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration', 11.

As was illustrated in the case of *Coppée Levalin NV v Ken-Ren Fertilisers and Chemicals*⁵⁵ where Lord Mustill stated,

“Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organisation which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award.”

2.2 The Interface that Exists between Arbitration and National Courts

It goes without saying that it is necessary to consider the relationship that currently exists between national courts and commercial arbitration, because they must exist hand in hand.⁵⁶

The interface between arbitration and national courts is one that scholars have been grappling with through the years. This can be attributed to the tensions that were explored in the preceding chapter. Some scholars have gone as far as to refer to the relationship between these two as one of forced cohabitation and true partnership.⁵⁷

Although the relationship between arbitration and national courts is one that connotes elements of partnership between them, it is undoubtedly a partnership that is unequal in nature. Arbitration is dependent upon the agreement made between the respective

⁵⁵[1994] 2 Lloyd’s Rep 109 at 116 (HL).

⁵⁶Hefin Rees, Relationship Between National Courts and International Commercial Arbitration, Extract of a Seminar on International Commercial Arbitration delivered on 13 May 2010, available at hefinrees.wordpress.com/2010/06/14/where-international-commercial-arbitration-is-going, accessed on 8 June 2014.

⁵⁷ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 4ed (2004) 388.

parties, at the same time it is a system interwoven with law and which relies on law to reinforce it and make it efficient both at national as well as international level.⁵⁸

The inequality in the partnership that exists between the courts and arbitration can be seen in that arbitration can not stand on its own; it is dependent upon courts to make it effective. On the other hand, national courts do not need arbitration to exist as they are totally self-sufficient.

This was laid out by Lord Mustill,

“There is a tension that lies at the heart of the relationship of the courts and arbitration. On the one hand, the concept of arbitration as a consensual process, reinforced by the ideas of transnationalism, leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side, there is the plain fact, palatable or not, that it is only a court that possesses coercive powers which can rescue the arbitration if it is in danger of foundering.”⁵⁹

It is thus important to identify at what level and point in time arbitration relies on the national courts, and to what extent it does in order to be able to have a greater understanding of the role that courts play in arbitration and the interface that exists between these two fundamental components of this model of dispute resolution.

The quest to ensure that there is a healthy balance between autonomy of the arbitral process and legitimate court supervision has been an age old strive. Despite the fact that it is pivotal to maintain party autonomy, as well as autonomy of the arbitral process a blind eye can not be turned on the assertion that arbitration is dependent on the implicit

⁵⁸Idem, 389.

⁵⁹ [1994] 2 Lloyd’s Rep 109 at 116 (HL).

support of the courts to secure its effective existence and thwart away any forces that may sabotage or threaten arbitration.⁶⁰

Judge Mustill reiterated that,

*“There is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is the plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger or foundering.”*⁶¹

In Africa, just as in other counterparts in Asia, Latin America and the Middle East, commercial arbitration underwent a series of hostile encounters with the courts. This is rather surprising given the fact that Africa as well as the other mentioned regions has a rich history as well as a traditional experience with arbitration.⁶²

A number of the governments in these regions, driven by the doctrine of state supremacy made it a point to enact laws as well as implement policies that were not only furthering the inefficacy of commercial arbitration but also undermining its existence as a whole.⁶³

This unfavourable attitude of the courts, combined with state policy towards arbitration, went on for a lengthy period until these countries became signatories to the New York Convention of 1958. It is this convention that played a pivotal role in changing the hostile and repressive attitude that the states had towards commercial arbitration and set the benchmark for making commercial arbitration the respected mechanism for dispute resolution it is today.

⁶⁰ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 4ed (2004), 388.

⁶¹[1994] 2 Lloyd’s Rep 109 at 116 (HL).

⁶² Samuel Marful Sau, ‘Can International Commercial Arbitration be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration’, 9.

⁶³ Ibid.

The attitude of the courts towards arbitration has been changing through the years. At first the courts were seen as acting rather indifferently and hostilely towards arbitration. These sentiments were also echoed in the decisions the courts made when they were faced with cases that involved arbitration matters.

2.3 The Roles of National Courts in the Arbitral Process

The role of the national courts in the whole process of arbitration can be categorized into three broad periods. These periods are the role of the courts at the start of arbitration, the role of the courts during arbitration and lastly the role of the courts after the arbitration.

2.3.1 Role of the Court at the Start of Arbitration

At the beginning or the start of the arbitration process the only body that is conferred with powers to act on matters relating to arbitration is the court. At this specific stage in the arbitration process there are four instances or situations under which the court's involvement is necessary.

These are enforcing the arbitration agreement, establishing the arbitral tribunal, challenges to the jurisdiction and ordering interim relief.

2.3.1.1 Enforcement of the Arbitration Agreement

This is the earliest stage in the arbitration process in which courts get involved. At this stage in arbitration the role of the court is to enforce the arbitration agreement. The court does so by its refusal to take on any legal proceedings that may be instituted in court once it establishes that there is a valid arbitration agreement and refers the parties to arbitration instead.

This is an obligation that even the New York Convention has imposed on all its member states. It clearly states that the national courts shall refer the parties to arbitration once they have established the existence of a valid arbitration agreement.⁶⁴

As it is discernible through the definition of a submission, a submission which is popularly referred to as an arbitration clause, is a written agreement to submit present or future disputes arising out of a contractual relationship to arbitration, regardless of whether an arbitrator has been named therein or not.⁶⁵

The definition of a submission makes it clear that although parties to arbitration may have agreed to use arbitration to resolve their disputes, it is not essential for the arbitrators to be known or mentioned at this point.

This means that, if a dispute does arise at this point an arbitral tribunal may not have been composed since some submissions make no reference as to who the arbitrator is and can hence not assume any responsibilities because it lacks the powers to do so.

This is to say that if one of the parties decides to contravene the agreement to arbitrate and seek to have the dispute resolved through litigation, the only recourse the other party will have is to request the court to enforce the arbitration agreement that they initially agreed upon.

This is what happened in the case of *Mehar Singh t/a Thaker Singh v Tanzania Motor Services Ltd and Others*⁶⁶. In this case the petitioners had instituted a civil case before

⁶⁴ Article II (3) of the New York Convention.

⁶⁵ S. 2 of the Arbitration Act

⁶⁶ Civil Case No.20 of 2002.

invoking the arbitration clause in the contract and the respondent on his part filed the petition in order to enforce and bring into play the arbitration clause stipulated in the contract. The learned judge was indifferent to this and refused to enforce the arbitration clause.

The above mentioned case went to appeal. In *Tanzania Motor Services Ltd and Others v Mehar Singh t/a Thaker Singh*⁶⁷, the judges of the Court of Appeal held that, the decision of the learned judge refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in contracts for arbitration meaningless. The court stressed that they are meant to serve a purpose.

In the case of *Shamji and Another v Treasury Registrar- Ministry of Finance, Tanzania and Others*⁶⁸, a petition was brought forward where the particular issue at hand revolved around S.4 of the Arbitration Act which states, “Unless a different intention is expressed therein a submission shall be irrevocable, except by leave of the court...”

The learned judge averted that,

*“The mandate of the court to revoke a submission by the parties to arbitration is to be found in section 4 of the Arbitration Ordinance. This can be done either by the parties themselves in terms of the agreement or with leave of the court. As a matter of general principle, it has been stated that where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to the courts.”*⁶⁹

⁶⁷ Civil Appeal No.115 of 2005 [2006] TZCA 5.

⁶⁸ Miscellaneous Commercial Case No.14 of 2001 [2002] TZHC 12.

⁶⁹*Shamji and Another v Treasury Registrar- Ministry of Finance, Tanzania and Others* Miscellaneous Commercial Case No.14 of 2001 [2002] TZHC 12.

The parties in this case very clearly chose arbitration to be the modality of settling their disputes but the petitioners wanted to resile from what was previously agreed upon on the pretext that there was fraud and misrepresentation.⁷⁰

In this case the judge condemned the petitioner's haste in rushing to the courts instead of setting in motion the arbitration process. He held that he was unwilling to revoke the submission of the parties to arbitration.⁷¹

In yet another case, the court was asked to enforce an arbitration agreement. In the case of *Maunga Seed Company (T) Ltd v Secretary to the Treasury, Ministry of Finance and National Planning: Government of the Republic of Zambia and Another*⁷².

The plaintiff filed a suit against the defendants for breach of Memorandum of Understanding and for breach of Agreement. One of the contentions of the defendants was that the suit was improperly before the court; as the procedure to dispute settlement provided in the Memorandum of Understanding between the parties had not been exhausted. It should be noted that the chosen mechanism for dispute settlement was arbitration and that there was an arbitration clause present in the agreement.

Judge Shangwa held that,

‘As the Agreement gives room for Arbitration, it was unnecessary for the plaintiff to resort to court action, the suit is improperly before this court and I hereby dismiss it.’⁷³

⁷⁰Ibid.

⁷¹ Ibid.

⁷² Civil Case No.99 of 2003) [2004] TZHC 13.

⁷³*Maunga Seed Company (T) Ltd v Secretary to the Treasury, Ministry of Finance and National Planning: Government of the Republic of Zambia and Another* Civil Case No.99 of 2003) [2004] TZHC 13.

The power of the court to enforce an arbitration agreement takes different forms. One of these forms is the vested power of the court to stay proceedings where there is a valid submission. This occurs where a party to a submission commences legal proceedings be it against the other party to the submission or any other person who is claiming under him in regards to any matter that was agreed to be referred to arbitration.

Where this happens a party to the legal proceedings may at any given time after appearance but before the filing of a written statement of defence or before taking any other steps in the proceedings apply to the court to stay the proceedings. If the court satisfies itself of the fact that there are no reasonable grounds as to why the matter should not be referred to arbitration as was agreed, and that the applicant was at the time when the proceedings were set in motion and is still willing and ready to do all that is required to conduct a fair and proper arbitration make an order to stay the proceedings.⁷⁴

2.3.1.2 Establishing the arbitral tribunal.

At this stage the court has the power to appoint an arbitrator, umpire or third party arbitrator where the parties or institutions have failed to do so.

In accordance with S. 8(1) of the Arbitration Act, there are four circumstances under which the court may establish an arbitral tribunal. These circumstances are such as:

- (a) Where the parties have failed to concur on the appointment of a specified arbitrator despite having listed this single arbitrator in the submission before any differences had arisen.⁷⁵ This occurs when the parties to an arbitration agreement

⁷⁴ S. 6 of the Arbitration Act.

⁷⁵ S. 8(1) (a) of the Arbitration Act.

make a specific reference as to who they want their arbitrator to be in case future differences arise between them but once a dispute does occur the parties do not concur on their initial choice of arbitrator. This is where the court steps in and makes the decision for them.

This circumstance arose in *GK Hotels and Resorts v Board of Trustees LAPF*⁷⁶. This is a case where the petitioner was a tenant in the respondent's premises. Their relationship was subject to the lease agreement which they entered into on 22nd May 2003. They had a contractual relationship which became acrimonious and they were on the verge of severing their ties.⁷⁷

The respondent locked the petitioner out of the respective premises on 2nd November 2003, an incident that the petitioner saw as unlawful and in breach of the respondent's obligations under their agreed lease. Since this was a dispute that fell under the ambit of Articles that were incorporated in their Lease Agreement that stipulated that any difference arising between these parties as to the interpretation and construction of the Lease Agreement or rights, duties or obligations should be resolved through arbitration if they have failed to settle their differences amicably.⁷⁸

⁷⁶ Miscellaneous Commercial Case No 1 of 2008.

⁷⁷ What, Why and How You Can Use the Commercial Division in The High Court of Tanzania [Commercial Division] The Commercial Division: What It Is, How It Functions and How You Can Use It, (2011), 76, available at <http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Commercial-Court-Mannual.pdf>

⁷⁸ Ibid.

The petitioner sent the respondent a letter informing him of his intention to proceed with arbitration. In his letter he proposed that a retired judge of the court of appeal (Honourable Lameck Mfalila) be named as the arbitrator.⁷⁹

The respondent refused to go to arbitration, claiming that the petitioner had abrogated the agreement to go to arbitration once disputes arise under the Lease Agreement. The respondent did not however reject the proposal made by the petitioner in reference to the nomination of the arbitrator.⁸⁰

The petitioner responded to this claim by petitioning the court under S.4 and 8 and Paragraph 1 of the First Schedule of the Arbitration Act and Rules 5 and 6 of the Arbitration Rules, requesting for the court to appoint an arbitrator since they had failed to agree upon one. The court granted the petition by appointing Honourable Justice Lameck Mfalila as an arbitrator.⁸¹

- (b) Where the arbitrator can not assume his/her responsibilities due to neglecting or refusing to act, the arbitrator's incapacity to act, death or removal of an arbitrator, and the submission does not indicate that the parties intended that the vacancy be left open and the parties fail to fill the vacancy.⁸²

According to s.8(1)(c) of the Arbitration Act where the parties to a submission or the other two arbitrators are at liberty to appoint an umpire or third arbitrator and do not do so then the court has the power to appoint one instead.

⁷⁹Ibid.

⁸⁰Ibid.

⁸¹Idem, 88.

⁸² S.8 (1) (b) of the Arbitration Act.

- (c) Where the appointed arbitrator or umpire has refused to act, is incapable of acting, has died or has been removed and the submission does not state that the vacancy should be left open yet the vacancy has not been filled by the parties or other arbitrators the court steps in.⁸³

In scenarios where a submission provides that an arbitral tribunal be constituted by three arbitrators, where one arbitrator is appointed by each party and the third one by the already two appointed arbitrators of both parties and one of the parties fails to appoint an arbitrator within seven days after the other party has already appointed theirs and has even served the party making default with a notice to appointment, the party that has made an appointment may appoint their chosen arbitrator to act as sole arbitrator in the reference and the award of this arbitrator will be binding on both parties as if the arbitrator had been agreed upon by them both.⁸⁴

If after each party has in fact appointed their two arbitrators and the two appointees fail to appoint the third arbitrator within seven days after the service by any two of the parties and a notice to make the appointment has been served upon them, the court may appoint the third arbitrator if it is approached by the party that gave the notice to do so.⁸⁵

The court may appoint an arbitrator if either one of the arbitrators chosen by the parties , the third arbitrator or the court appointed arbitrator refuses to act, is incapable of acting or dies.⁸⁶

⁸³ S.8 (1) (d) of the Arbitration Act.

⁸⁴ S.10(1)(a) of the Arbitration Act

⁸⁵ S.10 (1) (b) of the Arbitration Act.

⁸⁶ S.10 (1) (c) of the Arbitration Act.

In addition to that it should be noted that the court has the power to set aside any appointment of a person to act as a sole arbitrator made under this specific section.⁸⁷

2.3.1.3 Ordering Interim Reliefs of Protection.

At the beginning of arbitration the court has the power to issue conservatory orders pending the commencement of arbitration. This is by all accounts a normal thing that the court can be called upon to do. In other jurisdictions, as will be shown in the following chapters, this is a power that even the arbitral tribunal assumes.

Despite the fact that the issuance of an interim relief is a normal cause, it is a matter that the national courts here in Tanzania have been struggling to entertain. This is merely so because if looked at closely the Arbitration Act has no express provision calling for the issuance of interim relief of protection pending arbitration be it by the court or the arbitral tribunal.

Although the Arbitration Act has not expressly granted powers to issue preservatory orders pending arbitration to neither the court nor the arbitral tribunal, in practice it is the court that has the power to order interim reliefs. The court asserted that S.3 of the Arbitration Act is what confers on the court the power to issue interim reliefs. S.3 states that,

‘This part shall apply only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try.’

⁸⁷ S.10 (2) of the Arbitration Act.

This assertion was reiterated in the case of *Nor Consult A/S v Tanroads*⁸⁸ where the application for interim relief was struck out by the court because the applicant moved the court by way of a chamber of summons supported by an affidavit and because it was established that the applicant had referred to wrong provisions of the law in moving the court having referred to S.95 of the Civil Procedure Code, S.2(3) of the Judicature and Application of Laws Act⁸⁹ as well as Article 26(3) of the UNCITRAL Rules of Arbitration.

The other party raised a preliminary objection citing that the applicant had used wrong provisions of the law to move the court. A contention that the court agreed with and went on to endeavour to clarify that S.3 of the Arbitration Act should have been cited instead. In his quest to elaborate the significance of this section the judge said that, ‘This section is a bedrock on which a process to access arbitration is based, and that it can be used to grant interim reliefs of protection.’⁹⁰

Driven by the dissatisfaction of the outcome in the case above, the applicant filed yet another application⁹¹ this time making sure to cite the required provisions of law S.3 of the Arbitration Act and Rule 5 of the Arbitration Rules.⁹² The second time around the court was more than happy to entertain the matter and issued the interim relief.

⁸⁸ Miscellaneous Commercial Appeal No 10 of 2008.

⁸⁹ 1961 Cap 358 [RE2002].

⁹⁰ NS Mkumbukwa, *Is the Commercial Court Jealous of Arbitration?* (2009), 9.

⁹¹ *Nor Consult A/S v Tanroads* Miscellaneous Commercial Appeal No 16 of 2008.

⁹² GN 427 OF 1957. Rule 5 states, “Save as is otherwise provided, all applications made under the Act shall be made by way of petition.”

The decision of the court in this case signals that it is in fact the court alone that can in practice order the issuance of interim relief, a power that is not even reserved for the arbitral tribunal.

The court also enjoys the power to extend time for commencing arbitration proceedings pursuant to s.7 (1) of the Arbitration Act. Where the court is of the opinion that there are reasonable grounds that may cause hardship to the case may arise, it can make provisions as it may deem fit to have the time for the commencement of the proceedings extended.

2.3.2 The Role of the Court During Arbitration.

The court plays a rather active role during the conduct of arbitration proceedings in Tanzania. Under s.21 of the Arbitration Act the powers of the court among others are listed. This section provides,

'The High Court may make rules as to-

- a) The filing of awards and all consequent or incidental proceedings;*
- b) The filing and hearing of special cases and all consequent or incidental proceedings;*
- c) The staying of any suit or proceedings in contravention of a submission to arbitration; and*
- d) The general conduct of all proceedings in court under this Act.'*

This sums up the powers that the court is conferred with during the conduct of arbitration proceedings. The fact that the court is entrusted with the power to oversee the general conduct of all proceedings shows that the court assumes a significant role in the process.

The court is also involved in the procedures that pertain to the taking of evidence and the summoning of third parties for the examination of the arbitrators. Here the court is poised to issue any processes to the parties as well as the witnesses as it would in suits that are tried before it. Any person seen as contravening the processes set forth by the court and displaying an attitude of contempt to the court will incur the wrath of the court as would other offenders tried before the court for similar offences in suits.⁹³

Apart from that the court also has the power to extend the time for making an award regardless of whether the time for making an award has run its course or not.⁹⁴

Moreover the court has the discretion to remove an arbitrator or umpire if he is guilty of misconduct as per s.18 of the Act. Sadly enough, the Act makes no further reference as to what unacceptable behaviour of the arbitrator amounts to misconduct. It is thus the court that is left to determine whether the acts done by the arbitrator amount to misconduct.⁹⁵

2.3.3 The Role of the Court After Arbitration.

This is the last stage of arbitration, and even at this juncture the court still finds itself as having a pivotal role to play post arbitration.

⁹³ S.13 of the Arbitration Act.

⁹⁴ S.14 of the Arbitration Act

⁹⁵ Arbitration in Africa (2007), 12, available at www.nortonrosefulbright.com/tanzania/pdf

The powers that are entrusted to the court at this particular stage are such as the power to remit an award,⁹⁶ the setting aside of the award and the enforcement of the given award.⁹⁷ There are nonetheless other minor functions the court performs which include handling the requests for correction, interpretation and additional award as well as attending to post award minor remedies.

Where the court exercises its power to remit an award, in pursuance to s.15 (2) of the Arbitration Act, the arbitrator or umpire is required to make a fresh award within three months after the court has given out the order to remit the award.

An arbitral award is final and binding on the parties, it is thus impossible to challenge or appeal an arbitral award once it is made. The only recourse a disgruntled party to an arbitral award has is to ask the court to set it aside. This is a power the court has in accordance to s.16 of the Arbitration Act.

It must be noted that it is a power that the court exercises sparingly and under very limited circumstances, because it seeks to maintain the finality that arbitration signifies. There are only two instances under which an award can be set aside by the court, these are the apparent misconduct of an arbitrator or umpire and where an award has been procured improperly.⁹⁸

It is necessary for an arbitrator to be guilty of gross misconduct in order for a court to set aside an award. An award on the other hand is improperly procured if one of the parties

⁹⁶ The power to remit an award is provided for under S.15 of the Arbitration Act. This is commonly referred to as the review of an arbitral award in the practice of arbitration. Here the court may remit the award to the reconsideration of the arbitrator or umpire. See S.15 (1) of the Arbitration Act.

⁹⁷ Part IV of the Arbitration Act.

⁹⁸ S. 16 of the Arbitration Act.

to the arbitration proceedings did something illegal to influence the decision made by the arbitrator.

This means that one of the conditions to set aside an award has to do with the conduct of the arbitrator while the other has to do with the conduct of the parties to a submission.

It can be observed that an arbitral award can thus only be set aside under very limited circumstances. This goes to show that the courts give weight to and respect the distinct character that arbitral awards bear which have to do with the element of them being binding and final on the parties.

The court's stance on this issue was reiterated in the case of *DB Shapriya & Company Limited v. Bishint*⁹⁹, where the court made it clear that it can not interfere with an arbitral award that was made by an arbitrator.

Judge Hamisi Amir Msumi asserted,

‘All questions of fact are and always have been within the domain of the arbitrator... the general rule deducible from these decisions is that the court cannot interfere with the findings of fact by the arbitrator.’¹⁰⁰

The most significant power the court has at the end of arbitration is that of enforcing an arbitral award. An arbitral award is made by an arbitrator but needs the stamp of approval of the court to be enforceable at law. Under s.17 of the Arbitration Act the court is given power to enforce an award as if it were a decree of the court.

Upon filing the award in the court according to the conditions set forth in the Act, it is the court's responsibility to ensure the enforcement of the award.

⁹⁹ [2003]3 EA 404.

¹⁰⁰As was quoted by Justice Iciriyabwire in *Chevron Kenya Limited & Chevron Uganda Limited v. Daqare Transporters Limited* See [2009] UG ComC25 at paragraph 71.

2.4 Conclusion

In spite of the fact that Tanzania is only a signatory to the New York Convention, it is discernible that it does not wholeheartedly follow the basic principles that this instrument stands for.

One of the most significant basic principles that the New York Convention prides itself for is the principle of judicial non- interference in the conduct of arbitral proceedings.¹⁰¹ It is this principle that enables the whole arbitration process to carry on, in accordance with the agreement of the parties or as directed by the arbitral tribunal. S.21 (d) of the Arbitration Act which deals with the power of the High Court to make rules gives power to the court to make rules that pertain to the general conduct of all proceedings in court.

This provision is a clear indicator that the roles that the national courts of Tanzania play in relation to arbitration proceedings are extensive and intrusive.

When looking at the New York Convention which is deemed as the guide to the arbitration practices in Tanzania, the unwarranted court involvement exercised by national courts in Tanzania is by all standards in contrast to this esteemed instrument.

The only involvement of the court that is justified and called for under the New York Convention is Article II (3) which is a mandatory provision as well as Article V. The former obliges national courts to either stay proceedings that form subject of a valid submission and compel parties to refer the matter to arbitration or dismiss the claims

¹⁰¹ Gary B Born, *International Arbitration: Law and Practice* (2012) 154.

altogether, while the latter is confined to the role of the national courts so far as the recognition and enforcement of arbitral awards are concerned.¹⁰²

¹⁰² Gary B Born, *International Arbitration: Law and Practice* (2012) 154.

CHAPTER THREE

3.1 Introduction

In this chapter a comparative analysis will be made between Mauritius and the United Republic of Tanzania with regards to how arbitration is conducted in Mauritius paying special attention to the roles of the national courts in the Mauritian arbitral process.

Mauritius is a little island off Africa, located in the midst of the Indian Ocean; its population is mainly made up of Africans and Asians. Its geographical location, coupled with a rich diverse population is what has given root to Mauritius being termed an Afro Asian country.¹⁰³

This country has a unique set of laws that is a corollary of the two colonial powers (France and England) colonizing Mauritius during different eras. As a result the legal system of this country is a blend of the French civil law and the English common law.¹⁰⁴

3.2 Domestic Arbitration in Mauritius

In this jurisdiction domestic arbitration is governed by the *Code de Procédure Civile*.¹⁰⁵ This Code has governed arbitration for centuries. The Code consisted of Article 1006 which had far reaching negative consequences on arbitration as a whole. Under this Article arbitration would be rendered null and void if the arbitration agreement failed to specifically state the names of the arbitrators or specify the anticipated disputes that were to be arbitrated.¹⁰⁶

It is the independence of Mauritius and the growth of domestic as well as international trade that necessitated the reform of these laws inhibited arbitration. These reforms were

¹⁰³Danisha Sornum, An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham),(2011), 6.

¹⁰⁴Ibid.

¹⁰⁵The French colonized Mauritius from 1710 to 1810 and promulgated the French Codes also known as the *pandecte* of which the *Code de Procédure Civile* forms part of it which cohabits with the English Civil Procedure Rules and is still in force to date. See D Sornum, An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham), (2011) 7.Salim AH Moolan, A Brief Introduction to the Mauritian International Arbitration Act 2008 in The Mauritian Arbitration Act Text and Travaux Préparatoires (2008), 14.

¹⁰⁶ Salim AH Moolan, A Brief Introduction to the Mauritian International Arbitration Act 2008 in The Mauritian Arbitration Act Text and Travaux Préparatoires (2008), 16.

enforced through Act No 1 of 1981 based on the French Decree no. 80-354 of 14 May 1980 and Decree no.81-500 of 12 May 1981 of France. All provisions that have governed and continue to govern domestic arbitration in Mauritius were codified together in Book Three (Articles 1003 to 1028) of the Mauritian *Code de Procédure Civile*.¹⁰⁷

Article 1028 to 1028(11) have however been repealed by the adoption of the New York Convention into the Mauritian domestic arbitration law.¹⁰⁸

This country is a signatory to the New York Convention by virtue of signing the Convention on 2 June 1969 and her accession to the Convention on 2 July 1969. Mauritius's accession to the New York Convention was done subject to the reservation of reciprocity and not to that of commerciality as per the first and second sentences of Article I (3) of the New York Convention respectively.¹⁰⁹

The New York Convention was actually transposed into the Mauritian domestic arbitration law through Act no. 8 of 2001 which is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act of 2001.¹¹⁰

Since the reform of the Mauritian Code de Procédure Civile in 1981 the incorporation of arbitration clauses in domestic commercial contracts especially those that deal with construction are banal.

Domestic arbitration, unlike international arbitration, is believed to need a broader intervention by the national courts especially where the arbitral tribunals make errors in law.¹¹¹

¹⁰⁷ Ibid.

¹⁰⁸ Idem, 17.

¹⁰⁹ Sentence 1 of Article I (3) of the Convention states when signing, ratification or accession of this Convention is done, any State may assert that the Convention will be applied to the recognition and enforcement of awards that were only made in the jurisdiction of other contracting States based on reciprocity. Sentence 2 of Article I (3) A State may decide to declare that application of the Convention will be limited to disputes arising out of legal relationships, regardless of whether they are contractual in nature or not as long as they are considered to be commercial disputes under the national law of the country that is making this declaration. See Salim AH Moolan, A Brief Introduction to the Mauritian International Arbitration Act 2008 in *The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 17-18.

¹¹⁰ Salim AH Moolan, A Brief Introduction to the Mauritian International Arbitration Act 2008 in *The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 17.

3.3 International Arbitration in Mauritius.

Mauritius having seen the world's preference for arbitration versus court litigation, the changing world trend and with the aim of advancing and furthering international arbitration in Mauritius, enacted the International Arbitration Act (hereinafter IAA) on 25 November 2008 that came into force on 1 January 2009.¹¹²

The Mauritian International Arbitration Act is modeled on the UNCITRAL Model Law of 1985, having taken into account all the modifications of the 2006 version. This Act has also incorporated tailor -made modifications and advancements that stem from other countries that have adopted the Model Law particularly the English Arbitration Act of 1996, Singapore and New Zealand Arbitration Acts as well as the UNCITRAL's latest Arbitration Rules.¹¹³

This Act solely deals with international arbitration and has led to the creation of two sets of separate laws for arbitration in Mauritius. The International Arbitration Act governs international arbitration and was enacted so that the courts could focus on developing an international arbitration regime that is not obstructed by the rules of law that are borne by domestication and that come with having to consider the domestic policies of Mauritius.¹¹⁴

This country has established a sophisticated and modern arbitration system within less than 5 years after the enactment of the International Arbitration Act. It is proving to be a hub and centre for international commercial arbitration in Africa and beyond this continent.

This success can be attributed to the presence of the IAA together with the following factors:

¹¹¹ Danisha Sornum, *An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM* (University of Birmingham), (2011), 31.

¹¹² Salim AH Moolan, *A Brief Introduction to the Mauritian International Arbitration Act 2008 in The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 11.

¹¹³ The Honourable Navichandra Ramgoolam, *The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 88-89.

¹¹⁴ *Idem*, 6.

To begin with, Mauritius's strategic geographical position is a strength. Her location is easily accessible to countries within the African continent, China, South East Asia, India, and Europe. This allows it to become a hub and centre for arbitration for these places.¹¹⁵

Mauritius also has a panoptic network of Double Taxation Agreements with a wide range of countries, some of which are investor States while others are developing countries when disputes arise out of these Agreements, Mauritius is the perfect venue for alternative dispute resolution in form of arbitration.¹¹⁶

Moreover from both the developing nations as well developed nations standpoint it is perceived as a neutral State, hence making Mauritius a desirable destination for countries of different levels of economic status and political standing.¹¹⁷

The majority of Mauritians being bilingual and some even trilingual is an added advantage. This means this country can cater to nationals that originate from different places in the world.¹¹⁸

Furthermore, the legal and political stability of Mauritius creates a favourable milieu for arbitration to be conducted in this isle. Mauritius has been lauded for her adherence and observance of democracy and respect for the rule of law. It was ranked first in the Mo Ibrahim Index of African Governance, 20th in the world and number one in Africa in the World Bank's Doing Business report as well as ranking 12th in the Wall Street Journal's Economic Freedom index.¹¹⁹ This is an impressive track record that demonstrates just how stable this country is.

¹¹⁵ The Honourable Navichandra Ramgoolam, *The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 7.

¹¹⁶Ibid.

¹¹⁷Ibid.

¹¹⁸Ibid.

¹¹⁹ Jean Meiring, *Mauritius launched as new international arbitral seat*, *The Mauritius International Arbitration Conference 2010*, 21, available at www.sabar.co.za/2011-april-vol024-no1-pp20-21.pdf.

Last but not least Mauritius, unlike its many other African counterparts, has a reliable and good infrastructure that enables it to be the centre and focus of international arbitration in Africa and beyond.¹²⁰

Just like in other jurisdictions the Mauritian national courts have a role to play in the arbitral process. Despite the courts' engagement in arbitration, the IAA makes it clear that no court shall intervene in any matter governed by this Act except where so provided.¹²¹ This provision is aimed at restricting the intervention of the court in arbitral proceedings, confining the involvement of the court as directed by the provisions of the Act alone.

This is the stark opposite to the Tanzanian Arbitration Act that does not clearly define the extent of the court's permitted involvement in arbitration. The Arbitration Act of Tanzania has several sections that bestow powers on the court in the arbitral proceedings but makes no mention of where these legislated power's boundaries lie.

The national court that has been conferred with the powers to entertain all matters that form the subject of international arbitration is the Supreme Court pursuant to s.42 of the IAA.

Mauritius is seeking to ensure neutrality and an efficient manner of disposing of cases that relate to arbitration, and to enable this any challenge made must be brought before the Supreme Court that is constituted by a panel of three judges who have received extensive training and knowledge in regards to international arbitration. There is also an automatic right of appeal to the Privy Council as an option to recourse.¹²²

The uniqueness of the IAA lies in the fact that all appointing powers and a couple of administrative functions that include the adjustment to fees and extension of the time limits are vested in the Permanent Court of Arbitration (hereinafter the PCA).¹²³ These

¹²⁰ The Honourable Navichandra Ramgoolam, *The Mauritian Arbitration Act Text and Travaux Préparatoires* (2008), 7.

¹²¹ S.3 (8) of the IAA.

¹²² S. 42 of the Mauritian International Arbitration Act of 2008.

¹²³ The Permanent Court of Arbitration was established by treaty in 1889, it is an intergovernmental organization that offers a number of dispute resolution services to states, state entities and international

are powers that are normally under other jurisdictions as well as traditionally conferred on the national courts.¹²⁴

This means that the Supreme Court together with the PCA have concurrent jurisdiction when it comes to matters that are associated with arbitration. Each of these bodies has their own legislated role to act in matters that pertain to the arbitration proceedings.

3.3 Roles of the Permanent Court of Arbitration in Arbitration Proceedings

The powers granted to the PCA come into play mainly during the arbitration proceedings and at the end of the arbitral proceedings.

The functions that the PCA performs during arbitration are the functions that are confined to matters relating to the appointment of the arbitrators as per s.12 of the IAA, the procedure for challenging an arbitrator as envisaged in s.14, and the matters relating to the inability or failure of an arbitrator to act as provided for under s.15 of the IAA. S.16 which deals with the replacement of arbitrators and contains two new provisions regarding truncated tribunals is also granting the PCA the power to decide whether to continue or not on a truncated basis. In all cases it is the Permanent Court of Arbitration which is the ultimate decider.¹²⁵

This is similar to the Tanzanian context where the High Court assumes these very same powers of acting as an appointing authority with the power to appoint arbitrators¹²⁶ as well as the power to remove arbitrators¹²⁷ while being able to extend the time limits

organizations. The headquarters of the PCA are in the Peace Palace at The Hague, Netherlands. See www.pca-cpa.org/showpage.asp/pag_id=363, accessed on 19 June 2014.

¹²⁴ Albert Henke, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), *The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat* (2010), 145.

¹²⁵ Albert Henke, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), *The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat* (2010), 145- 146.

¹²⁶ S.8 of the Arbitration Act Cap 15 [RE2002].

¹²⁷ S.18 of the Arbitration Act Cap 15 [RE2002].

within which to make an award.¹²⁸ It is also the High Court that can make any order as to costs or otherwise as it may deem fit.¹²⁹

It must be said that the PCA has been given enormous powers under the IAA. For instance in the event that the parties and or given institution has failed to reach an agreement and or where they have failed to perform their given functions, the PCA steps in, if one of the parties so requests and is permitted to take any necessary steps to render an appropriate solution to the matter.¹³⁰

In addition to that, even where an arbitral institution is involved (by virtue of the parties to arbitration choosing to use its arbitration rules) in any way in the arbitration proceedings and nonetheless fails to perform any function it has been empowered with under the specified procedures upon application by one of the parties pursuant to s.8 (4) (c) of the IAA the PCA is empowered to take any necessary measure as it may deem fit¹³¹.

The PCA is further empowered by being poised to be the ultimate decision maker in the event that a challenge under any agreed procedure including the procedures that involve any arbitral institution is unsuccessful, it is the PCA that is vested with the power to decide the challenge.¹³²

The decisions of the PCA are final and can not be subjected to any appeal and are not reviewable. If a disgruntled party has any complaints whatsoever that are a result of the decisions made by the PCA, it is the Supreme Court alone that can entertain these complaints against final awards as per s.19 (5) of the IAA.

¹²⁸ S.14 of the Arbitration Act Cap 15 [RE2002].

¹²⁹ S.19 of the Arbitration Act Cap 15 [RE2002].

¹³⁰ Albert Henke, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), *The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat* (2010), 146.

¹³¹ Ibid.

¹³² S.10(3) of the IAA.

3.4 Roles of the Supreme Court in Arbitration

3.4.1 Roles of the Supreme Court at Commencement of Arbitration

The national courts play a vital role at the start of the arbitration. Under s.5 of the IAA if a substantive claim is brought before any court in Mauritius that purports that an arbitration agreement exists, the court is automatically compelled to transfer the claim to the Supreme Court. If the Supreme Court satisfies itself that the arbitration agreement is valid then it will refer the parties to arbitration unless a party to the arbitration agreement on a *prima facie* basis furnishes evidence to the effect that the agreement is deemed to be null and void, inoperative or incapable of being performed.

Where the Supreme Court establishes that the arbitration agreement is null and void, inoperative or incapable of being performed it is under the duty to transfer the matter back to the respective court.¹³³

Regardless of the fact that an action to contest the validity of an arbitration agreement may be pending before the court, the arbitration proceedings may start, proceed and even more awards may be made all the time while the issue is still pending before any court.¹³⁴

Apart from that, in Mauritius courts have the power to issue court ordered interim measures of protection even before the commencement of the arbitral proceedings. Unlike in Tanzania where the court is still struggling to establish whether it does or does not have the power to even issue preservative orders at any given stage of the arbitration, in Mauritius this is provided for under s.6 of the IAA.

This section provides that it is compatible with the arbitration agreement for a party to arbitration to request for the issuance of interim measures and for the Supreme Court to grant the requested interim measure. However the court ordered interim measures are only ordered where there is an urgent need for them and the arbitral tribunal can not

¹³³ S.5 (3) of the IAA.

¹³⁴ S.5 (4) of the IAA.

issue these interim measures because of its inability to effectively act at that particular time.¹³⁵

Pursuant to sections 3(8) and (10) of the IAA, that provide for the delimitation of court interference in arbitration and the stipulations that domestic law rules and laws do not apply to international arbitration respectively, the court is not allowed to grant interim measures in accordance to its inherent jurisdiction or to any other statutory powers which can only be applied to domestic law.¹³⁶

This is a departure from the English Arbitration Act where the courts in England have in the past used their inherent powers to order interim measures even if the conditions set forth for the granting of such measures had not been fulfilled. The approach Mauritius has taken so far as the issuance of court ordered interim measures are concerned is in line with India and New Zealand.¹³⁷

The Mauritius International Arbitration Act has gone as far as to list the type of interim measures that arbitral tribunals are permitted to grant and have given detailed information about these permitted interim measures.¹³⁸ This means that the court ordered interim measures are only granted where it is proven that it is really necessary. This is again aimed at ensuring that the interference of the courts in arbitration is kept to the minimal.¹³⁹

The Supreme Court also has exclusive powers to recognize and enforce interim measures. The interim measures are enforced upon application by a party to the arbitration to the Supreme Court irrespective of the country in which it was issued.¹⁴⁰

The Supreme Court has the power to refuse the recognition or enforcement of an interim measure on various grounds. These grounds among others include, an application made

¹³⁵ Danisha Sornum, An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham),(2011), 40.

¹³⁶ Ibid.

¹³⁷ Danisha Sornum An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham),(2011) , 40-41.

¹³⁸ S.21 (1) of the IAA.

¹³⁹ Danisha Sornum An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham),(2011) , 41.

¹⁴⁰ S.22 (1) of the IAA.

by the party against who the interim measure is being invoked, where the interim measure has been terminated or suspended by the arbitral tribunal that issued it and if the interim measure sought is not compatible with the powers bestowed on the court.¹⁴¹

The power to issue interim measures is a power that the Supreme Court can exercise before and even during arbitral proceedings. It is noteworthy that the Supreme Court will only exercise this power under very limited circumstances. These circumstances are where an arbitral tribunal, arbitral institution or any person vested with the power by the parties in this regard is not able for the time being to act effectively or has no power to do so.¹⁴²

3.4.2 Roles of the Supreme Court during Arbitration

The functions that the Supreme Court performs during arbitration proceedings are as follows:

In the first place, the court has the power to recognize and enforce the doctrine of *competence competence*, which is covered under Article s.20 of the IAA. This deals with the power the arbitral tribunal has to rule on its own jurisdiction. Although the provision for this doctrine has its basis in the Model Law, the provisions of the IAA are far more extensive and sophisticated.

The distinction between the Model Law's version of the doctrine of *competence competence* and that of the IAA is cemented by two peculiar differences. Firstly, s.5 of the IAA places a mandatory obligation on the courts to refer disputes to arbitration when it has assured itself that a valid arbitration agreement is in place unless the arbitration agreement is null and void or inoperative or incapable of being performed. This provision has been enclosed in the law to make sure that the English law precedent is not espoused in this matter.¹⁴³

¹⁴¹ S.22 (4) of the IAA.

¹⁴² S.23 (5) of the IAA.

¹⁴³ Danisha Sornum An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham),(2011), 33.

Mauritius wanted to do away with the English practice where in effect the determination of whether an arbitration agreement is null or void, inoperative or incapable of being performed is contrary to belief actually left to the British court to decide the issue of jurisdiction.¹⁴⁴

To do away with this under Mauritian law, the Supreme Court is restricted to only assessing the issues on a *prima facie* basis during the early stages alone to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed. The arbitral tribunal assumes the power to engage itself in the matters that have arisen under the given circumstances.¹⁴⁵

It should be noted that the parties to the arbitration agreement have the right to seek recourse in the court once again, after the arbitral tribunal has handed down its decision in accordance to s.20(7) or s.39 of the IAA. The legislators intend to ensure an ultimate realization of the *competence competence* doctrine has surely been achieved here.¹⁴⁶

The second distinction is that, s.20 of the IAA also provides for the reviewability of negative jurisdictional decisions. This provision has its roots from New Zealand and is not provided for under the Model Law. The right to have a negative jurisdictional ruling reviewed enables the party that loses on the matter of jurisdiction to take the matter to court regardless of whether the arbitral tribunal has ruled that it has or does not have jurisdiction. Leaving the arbitral tribunal to give a final ruling where it decides that it does not have jurisdiction to arbitrate the dispute in question only to find out later that the tribunal erred in its decision would suffice to negate the agreement of the respective parties. As a result the plaintiff will be left with the option to abandon the arbitral proceedings or advance commencement of further arbitral proceedings till another arbitral tribunal takes over. The IAA has through its provision of allowing reviews to negative jurisdictional decisions taken a step forward in alleviating the scrutinized shortcomings of the Model Law.¹⁴⁷

¹⁴⁴Idem, 34.

¹⁴⁵Ibid.

¹⁴⁶Ibid.

¹⁴⁷Ibid.

Under s.29 of the IAA the Supreme Court renders its assistance in the taking of evidence during arbitral proceedings. In accordance with this provision the Supreme Court may perform this obligation pursuant to its own rules of taking evidence.

Here the Supreme Court has the power to summon any witness and compel their attendance before the arbitral tribunal for the purpose of giving out evidence or for the production of any relevant documents and or materials. The Supreme Court may as well order that a witness submit himself or herself before the arbitral tribunal or before an officer of the court as the case may be in order to submit to examination under oath.¹⁴⁸

In Tanzania the process to summon witnesses and compelling their attendance before the arbitral tribunal is also controlled by the High Court pursuant to s.13 of the Arbitration Act.

It is the Supreme Court that is the only body where an application for the exclusive recourse against an arbitral award may be made as per s. 39(1) of the IAA. The only way of challenging an arbitral award is by requesting to have it set aside.

The Supreme Court will only set aside an arbitral award on specific grounds. The circumstances under which the court may set aside the award where the party to the arbitration makes an application to set it aside are the following:

The arbitration agreement being considered invalid in accordance to the laws that the parties to the arbitration agreed to be governed by may result in the award being set aside or for failure to comply with Mauritian law. The party to an arbitration agreement being incapacitated in some way is another ground. Failure of a party to the arbitration getting notice of the appointment of an arbitrator or of the arbitration proceedings or was incapable of presenting its case.¹⁴⁹

An award may also be set aside if the award covers a dispute not contemplated by or not falling within the ambit of the terms to the submission to arbitrate or if the ruling exceeds the scope of the submission to arbitration. Apart from that if the composition of

¹⁴⁸ S.30 (2) of the IAA.

¹⁴⁹S.39 (2) (a) of the IAA.

the arbitral tribunal or arbitral procedure was contrary to the agreement of the parties to arbitration or failing the agreement was not pursuant with the IAA the award may be set aside.¹⁵⁰

Other instances under which the arbitral award can be set aside include disregard to the principles of natural justice during the arbitral proceedings or if in the making of an award the rights of any party to the arbitration have been or are bound to be prejudiced as per s.39(2) of the IAA.¹⁵¹

Lastly, the court is responsible for the recognition and enforcement of the arbitral award once it is made as per s.40 of the IAA. It is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards that deals with all the arbitral awards delivered under the IAA.

The IAA has ensured that the powers of the court in arbitration are limited this has curbed the problem of the judicial interference in the arbitral process. Mauritius has been able to observe, respect and maintain the principle of non judicial interference in the practice of arbitration.

In Mauritius the court plays a rather supervisory role; this ensures that autonomy of the parties is maintained while balancing the State's obligation to its people by ensuring objectivity.¹⁵²

The arbitral tribunals have far greater powers under the Mauritian laws than the arbitral tribunals in Tanzania could ever have. Placing a high regard on the arbitral tribunal also helps in delimiting the interference of the court in arbitration proceedings, this is because the arbitral tribunal assumes the responsibilities and powers to perform functions that are in Tanzania unnecessarily performed by the High Court.

¹⁵⁰ S.39 (2) (a) of the IAA.

¹⁵¹ The principles of natural justice must be observed and respected. The IAA accords the parties to the arbitration with reasonable opportunity to defend their rights. See Jean Meiring, Mauritius launched as new international arbitral seat, *The Mauritius International Arbitration Conference 2010*, 21, available at www.sabar.co.za/2011-april-vol024-no1-pp20-21.pdf.

¹⁵² Albert Henke, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), *The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat* (2010) 150.

Mauritius has proved it is an exemplary model and has displayed a high level of commitment to the real meaning and potential of arbitration. Arbitration is an out-of-court dispute settlement mechanism, and due to the systematic, well defined and designated powers of the court in arbitral proceedings espoused by Mauritius, arbitration can exist independently and be an efficient means of solving commercial disputes without resorting to court litigation.

The laws that have been put in place by Mauritius do not allow for dilatory tactics and facilitate the expedient resolution of commercial disputes, tactics that are normally associated with court litigation. By doing so Mauritius has preserved the strengths that arbitration has over court litigation.

It is a country that has established a modern arbitration regime for both domestic arbitration as well as international commercial arbitration. The continuous efforts to elevate the practice of arbitration to even greater heights will continue to pay off.

The fact that the Permanent Court of Arbitration opened its first ever office outside The Hague in Mauritius in 2010 is a clear indicator that Mauritius strives to be Africa's go-to alternative dispute resolution centre. The PCA is dedicated to overseeing procedural aspects of the arbitration proceedings. The PCA office in Mauritius is responsible for the promotion of dispute resolution services in the African continent, while carrying out case management.¹⁵³

The presence of the Permanent Court of Arbitration in international arbitration in Mauritius is yet another way of reducing court interference in the arbitral process. This is the case because the functions that normally need the assistance of the court have been conferred upon the PCA. This reassures parties involved in arbitration that the decisions made are made by an institution that is neutral and esteemed.

¹⁵³ Brooks W Daly, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), *The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat* (2010), ix.

CHAPTER FOUR

4.1 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

4.1.1 Introduction

The United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 which is commonly dubbed the ‘New York Convention’ was adopted on 10 June 1958 in New York and entered into force on 7 June 1959.¹⁵⁴

The New York Convention is an international treaty that has been ratified by 150 States worldwide, up until May of 2014.¹⁵⁵ The United Republic of Tanzania acceded to the New York Convention on 19 October 1964.¹⁵⁶ She has been an active party to the New York Convention since 1 January 1965, despite this there were no express declarations made in accordance to Articles I, X and XI of the Convention.¹⁵⁷

It is widely applicable because its members stem from all continents of the world. This Convention is hailed as the backbone of international arbitration. This is generally because it is the principal source of law within the United Nations system as far as international arbitration is concerned. The New York Convention also facilitates arbitration amongst parties of different nationalities, places of business, cross border trade and enables the enforcement of agreements and awards across borders. This is why this particular international treaty is viewed as the backbone of international commercial and investment arbitration.

¹⁵⁴ www.newyorkconvention.org/contracting-states, accessed on 10 February 2014.

¹⁵⁵ Burundi on 09 May 2014 acceded to the New York Convention totaling the number of member States to 150. See www.newyorkconvention.org/contracting-states, accessed on 15 May 2014.

¹⁵⁶ www.newyorkconvention.org/contracting-states, accessed on 10 May 2014.

¹⁵⁷ Karel Daele, Tanzania in Lise Bosman (ed) *Arbitration in Africa: A Practitioner's Guide* (2013) 240.

The New York Convention focuses on two fields of application which are the enforcement of agreements to arbitrate and the recognition and enforcement of foreign arbitral awards. The Convention applies to foreign awards, awards that are made in another State or that are otherwise not considered as domestic arbitral awards as envisaged under Article I(1) of the New York Convention. It is not directly applicable to the setting aside of awards because this is regarded as a matter for national law.

The New York Convention is an instrument that has through the years gained a lot of popularity and prestige throughout the world. Since it is an esteemed instrument, other instruments should aspire to simulate it to ensure that arbitration in those respective places is done in an efficient manner.

The United Republic of Tanzania has adopted the New York Convention since 1964; it is only natural to expect that the principal legislations governing arbitration in this country are to be in conformity with the spirit of this respectable instrument.

Unlike the New York Convention in which involvement of the court is justified and only minimal, Tanzania on the other hand is showing an increasingly overbearing control of the courts over the arbitral process.

There is a clear manifestation of the freedom of the parties that are involved in arbitration that can be witnessed through the involvement of the parties in the nomination and the control of the arbitral proceedings. Despite this independence, it is unmistakable that courts have extensive oversight in all other stages of arbitration

especially in the composition of the arbitral tribunal, the general conduct of arbitral proceedings and the enforcement of arbitral awards is concerned.¹⁵⁸

The liberty that is bestowed on the parties at the commencement of the arbitration proceedings by allowing them to be free to choose the composition of the arbitral tribunal and the manner in which to conduct the proceedings, is overshadowed simply because it is given the force of the court decision by the small act of filing the arbitral award. Even executing an arbitral award will only go forward once it has been decreed by the court.¹⁵⁹

It is commonly accepted that getting the court involved in executing an arbitral award is beneficial, for without the coercive force of the court the arbitral award will be nothing but a privately made decision.¹⁶⁰

This has been demonstrated in the previous chapters by showing the involvement of Tanzanian national courts in this type of dispute resolution mechanism. In Tanzania the courts have enormous powers even overshadowing the powers of the arbitral tribunal.

In the New York Convention, the roles that the courts play in arbitration are very limited and clearly spelled out. This is in total contrast with the Arbitration Act in Tanzania in which most of the sections in the Act which deal with disputes that can be arbitrated in

¹⁵⁸ Wilbert B Kapinga & Eric S Ng'amaryo, 'The European, Middle Eastern and African Arbitration Review' (2014) 5, available at www.globalarbitrationreview.com/reviews/58/sections/201/chapters/2299/tanzania.

¹⁵⁹Ibid.

¹⁶⁰Ibid.

Tanzania is about court oversight as it has been illustrated in the chapters before this one.¹⁶¹

4.2 Roles of the National Courts under the New York Convention

When comparing the role of the court in arbitration in reference to the New York Convention, the court plays a minimal role. The New York Convention calls upon the courts under very limited circumstances.

4.2.1 Roles of the National Courts under the New York Convention at Start of Arbitration

At the start of the arbitration, the New York Convention calls upon the courts to enforce the arbitration agreement. Under Article II (3) of the Convention¹⁶² it declares that it is the court's obligation to refer the parties to arbitration once it has ascertained itself that a valid arbitration agreement does in fact exist. This is by all means a mandatory provision, where the court's obligation lies in dismissing or staying claims that form part of a valid arbitration agreement.¹⁶³

The New York Convention honours the principle of judicial non-interference in the arbitral process. Article II (3) of the Convention only requires courts to refer the parties to an arbitration agreement to arbitration, with any other involvement of the courts being

¹⁶¹Idem, 6.

¹⁶² "The Court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

¹⁶³ Gary B Born, *International Arbitration: Law and Practice*, (2012) 154.

limited to annulment or recognition proceedings. Courts are forbidden from supervising any procedural decisions that form part of the arbitration.¹⁶⁴

This evinces the fact that under the New York Convention courts are not involved in any shape or form during the arbitration proceedings. The convention makes no mention of the roles of the courts during the arbitral process. The involvement of the courts under the Convention is restricted to the start of the arbitration and end of the arbitration alone.

This shows that unlike in the New York Convention where the court has no role to play during arbitration proceedings, the Arbitration Act plays a very significant role during this stage of arbitration.

Where the New York Convention embraces a non-judicial involvement attitude, the Arbitration Act can not help but give power to the national courts to perform a number of functions as it has been shown in the other chapters.

4.2.2 Roles of the National Courts under the New York Convention at the End of Arbitration

At the end of arbitration the court plays a rather important part. It is responsible for the recognition and enforcement of foreign arbitral awards. The convention comprises of pro enforcement features which contain grounds for the refusal of enforcement which are quite exhaustive.

Under the New York Convention there are two sets of categories for the refusal of enforcement of foreign arbitral awards. The first category consists of the grounds that

¹⁶⁴ Ibid.

can mainly be raised by the party resisting enforcement.¹⁶⁵ The second category is the category that involves grounds that can be invoked by the court, '*sua sponte*' in its entirety.¹⁶⁶

The second category involves only the court, there is no need of the resisting party to raise the grounds or prove anything. The grounds that can be raised by the court include the dispute not being arbitrable under the law of the place of enforcement¹⁶⁷. Plus if the award violates public policy or the good morals of the country in which enforcement is sought.¹⁶⁸

It should be noted that refusal as to the enforcement of foreign arbitral awards is discretionary, hence subject to the court's decision.

The court is actively involved in setting aside the arbitral award once an application for the setting aside or suspension of the arbitral award has been made to it pursuant to Article V (1) (e) of the Convention.

The court, before which the party is seeking to enforce the award, may if it believes it to be appropriate adjourn the decision regarding the enforcement of the arbitral award and upon the application of the party seeking enforcement of the award; compel the other party to provide suitable security.¹⁶⁹

These are the only instances under the New York Convention where the court is involved so far as the whole arbitration process is concerned. Under this Convention the

¹⁶⁵ Article V (1) of the New York Convention of 1958.

¹⁶⁶ Article V (2) of the New York Convention.

¹⁶⁷ Article V (2) (a) of the New York Convention.

¹⁶⁸ Article V (2) (b) of the New York Convention.

¹⁶⁹ Article VI of the New York Convention.

role of the courts in arbitration is restricted to the minimal. There is vividly an aura of judicial non interference being observed by this esteemed instrument as compared to the Arbitration Act where too many powers are conferred upon the national courts of Tanzania.

This is detrimental to the independent existence of arbitration as a reputable means for alternative dispute resolution. The heavy dependency of the arbitral process on national courts does not allow for arbitration to exist independently. Arbitration can not freely exist or even survive without the support of national courts, as its dependency has been showcased in the previous chapters.

4.3 The UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) is the main legal body of the United Nations system in the field of international trade law, which focuses on the advancement of harmonization and the modernization of international trade law.¹⁷⁰

The UNCITRAL Model Law on International Commercial Arbitration which is popularly known as the ‘Model Law’ was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.¹⁷¹

In the General Assembly resolution that gave birth to the Model Law, States were urged to adopt the Model Law and regard it highly with the belief that this set of model

¹⁷⁰ A Guide to UNCITRAL, Basic facts about the United Nations Commission on International Trade Law (2013), 1, available at <http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>

¹⁷¹ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 23.

legislative provisions would bring forth uniformity of the laws that control arbitral procedures and cater to the needs of the international commercial arbitration practice of that particular time.¹⁷²

It is not a treaty like its counterpart the New York Convention but rather a model for national arbitration legislations. Among other things it regulates the treatment of international commercial arbitration which includes the recognition of arbitration agreements, enforcement of arbitral awards and the setting aside of these arbitral awards.

It has been adopted by over 90 States and territories some of which are developed countries and others of which are the developing countries. The membership thus comprises of diversified legal traditions as well as nations that have different levels of economic development.¹⁷³

The glaring fact that the United Republic of Tanzania has adopted neither of the Model Law versions (1985 and 2006) and that the principal arbitration legislations that are currently in force namely the Arbitration Act and the Rules pre-date both these versions only goes to show that Tanzania did not in any way take into account the significant changes that were brought about by the Model Law.¹⁷⁴

¹⁷² Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 23.

¹⁷³ A guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law (2013), 2, available at www.uncitral.org/pdf/english/texts

¹⁷⁴ Arbitration in Africa: Arbitration Case Study-Tanzania, 2, available at www.nortonrosefullbright.com/files/tanzania-25762.pdf

4.3.1 Roles of the National Courts under the UNCITRAL Model in Arbitration

The most significant change brought about by the UNCITRAL Model Law is the observance of the principle of judicial non interference exercised by jurisdictions that have adopted the Model Law.

It is Article 5 of the Model Law¹⁷⁵ that is the backbone and foundation that this fundamental rule of non interference of the court in arbitration is based upon. Under this provision it expressly provides that, “no court shall intervene except where so provided in this Law”. This provision lays down the permitted extent of court intervention.

It is after this specific provision that the UNCITRAL Model Law expounds circumscribed instances where the support of the courts can be sought in the arbitration process. These limited circumstances include amongst others, the resolution of jurisdictional objections, assistance in constituting an arbitral tribunal, the issuance of provisional relief as well as annulling arbitral awards.¹⁷⁶

Just like in the Tanzanian Arbitration Act, the courts have different designated roles to play in the UNCITRAL Model Law during the different stages of the arbitral process. All the roles that the courts play during the entire arbitral process are well defined and provided for under the Model Law. These roles have been categorized into three distinctive stages that exist in the arbitral process that include the roles the courts have at the start of the arbitration, during the arbitration and at last the roles they have after the arbitration.

¹⁷⁵ UNCITRAL Model Law (1985 with amendments as adopted in 2006).

¹⁷⁶ Gary B Born, *International Arbitration: Law and Practice*, (2012), 155.

The UNCITRAL Model Law has been hailed as an instrument and model that minimizes the control that courts have over the arbitral process, and maximizes the support of the courts for the arbitral process, to enable arbitration to exist as an independent and efficient out of court dispute settlement mechanism.¹⁷⁷

This notion can be attributed to the weight that the provision of Article 6 of the Model Law carries. Under this provision, the instances where the court can get involved in the arbitral process have clearly been spelled out. This provision averts that the functions that are provided for under this listed Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) are to be performed by the specific courts that have been vested with the powers to interfere in arbitration.¹⁷⁸

Even more striking and appealing is the fact that this provision stipulates that the respective courts will play their respective designated roles with due regard to the fact that the position and status that the courts carry in the arbitral process is that of assisting and supervising the arbitration only. This means that as far as the Model Law is concerned the court's capacity in arbitration is limited to that of rendering assistance to the arbitral process where it is necessary and acting as a body that is responsible in the supervision of the process ensuring the smooth and efficient flow of arbitration.

¹⁷⁷ Lord Dervaird, Scotland and the UNCITRAL Model Law: The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law (1990) 6 *Arbitration International* 1, 66, available at <http://www.kluwerlawonline.com/document.php?id=ARBI1990003&PHPSESSID=s0uekn6idfitek5qpgpr3vmo27>.

¹⁷⁸ UNCITRAL Model Law of 1985 with amendments as adopted in 2006.

4.3.1.1 Roles of the National Courts at the Start of Arbitration under the UNCITRAL Model Law.

At the start of the arbitration the court has the power to refer the parties to arbitration once it is determined that there is a valid arbitration agreement in place. The court may refrain itself from referring the parties to arbitration if it dissatisfied of the arbitration agreement in place and proves it to be null and void, inoperative or incapable of being performed.¹⁷⁹

The fact that the validity of the arbitration agreement in question may be questionable does not hinder the arbitration process from commencing or being continued, even an award may be made while during all this time the issue pertaining to the invalidity may still be pending before the court.¹⁸⁰

This is to say that the court plays an active role in ensuring the enforcement of an arbitration agreement and by all cost making sure that it protects the sanctity of the contract that the parties willingly entered into.

4.3.1.2 Roles of the National Courts during Arbitration under the UNCITRAL Model Law

Under the UNCITRAL Model Law the courts play a more limited role during the arbitral proceedings. The Model Law spells out specific areas of court supervision and areas of court assistance during this stage of arbitration.

¹⁷⁹ Article 8(1) of the UNCITRAL Model Law (1985 with amendments as adopted in 2006).

¹⁸⁰ Article 8(2) of the UNCITRAL Model Law (1985 with amendments as adopted in 2006).

The areas that deal with the vested powers of national courts so far as supervision and assistance during arbitration are concerned can be found under Articles 11, 13, 14, 16 and 27 of the Model Law.¹⁸¹

The Model Law permits involvement of the court in arbitration in limited circumstances. The first category outlines the powers that the national courts have in arbitration; these constitute matters that deal with the arbitral tribunal or the arbitrator (depending on the number of arbitrators involved in arbitration). Here the court has powers to appoint, challenge and terminate the authority of the arbitrator as per Articles 11, 13 and 14.¹⁸²

Under Article 11 of the Model Law, the court may act as an appointing authority by appointing an arbitrator if the parties to the arbitration have failed to do so within the prescribed time.

Article 13 of the Model Law on the other hand vests the court with powers to interfere in the process of challenging an arbitrator if the party challenging the appointment of an arbitrator has requested that the court decide on the challenge, the decision made by the court is subject to no appeal.¹⁸³

Article 14 of the Model Law deals with the arbitrator's failure or impossibility to act. Once the arbitrator fails to perform his or her functions due to a series of reasons, his or her mandate is terminated. In case doubt arises as a result of these reasons, any party to

¹⁸¹ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 26-27.

¹⁸² Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 27.

¹⁸³ Article 13(3) of the UNCITRAL Model Law (1985 with amendments as adopted in 2006).

the arbitration may call upon the court to decide on the termination of the mandate of this given arbitrator. The decision the court reaches here is also subject to no appeal.

The legislated role of the courts so far as the arbitral tribunal is concerned is hence to act as a check and balance authority on arbitrators by upholding the confidence and integrity of arbitration that the parties to this process sought for when they chose this process to resolve their commercial disputes.¹⁸⁴

This very same category among other things deals with the question of the jurisdiction of the arbitral tribunal. This can be referred to as the doctrine of '*competence competence*' and is covered under Article 16.¹⁸⁵ This doctrine has its basis from the concept of separability, which is key to the arbitral process. The power of the arbitral tribunal to determine its jurisdiction is recognized and enforced by the courts as per Article 6 of the Model Law.¹⁸⁶ It is aimed at repressing court involvement in arbitration proceedings.¹⁸⁷

The setting aside of an arbitral award as provided for under Article 34 of the Model Law also falls within this category. These mentioned instances where the court gets involved form part of the functions of Article 6 of the Model Law that makes reference to permitted court involvement. In accordance to this provision these functions are

¹⁸⁴ SM Sau, Can International Commercial Arbitration be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration. (2009), 14.

¹⁸⁵ This doctrine refers to the power of the arbitral tribunal to rule on its own jurisdiction. It should be noted that Tanzanian law makes no mention of this doctrine. There is an evident lacuna in regards to an arbitral tribunal having the power to do so since there is no provision in the Arbitration Act or any other Tanzanian arbitration legislation.

¹⁸⁶ SM Sau op cit (n184).

¹⁸⁷ Stewart R Shackleton (ed), Arbitration Law Reports and Review, Annual Review of English Judicial Decisions on Arbitration (2011), i, available at <http://www.srshackleton.com/assets/pdfs/Annual-Review-2006.pdf>

conferred on national courts with the intention of facilitating centralization, specialization and efficacy.¹⁸⁸

The second category is made up of matters that pertain to areas where the court renders assistance in arbitral proceedings. These areas are such as recognizing an arbitration agreement as per Articles 8 and 9 whilst ensuring its compatibility with court ordered interim measures under Article 17 J as well as the recognition and enforcement of preservative orders under Article 17H and 17 I and the taking of evidence as adduced in Article 27, without forgetting the recognition and enforcement of arbitral awards as provided for under Article 35 and 36.¹⁸⁹

The above mentioned instances are the only circumstances and areas under which the court has power to intervene in arbitration. Under no other circumstance may the national courts interfere with the arbitration proceedings. Any intervention of the court in arbitration is subject to Article 5 of the Model Law, which is the foundation upon which any intervention of the court must be measured against. This is to say that the involvement of the court in arbitration must be in line with this provision, and that the court may not get involved in the arbitral process beyond what has been prescribed in parts of the legislation that enacted the Model Law except in matters that are not controlled by it which include consolidation of the arbitration proceedings, the contractual relationship between parties to the arbitration and their arbitrators or arbitral institutions as the case may be, and fixing of the fees and costs.¹⁹⁰

¹⁸⁸ Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 27.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

4.4 Concluding Remarks

Arbitration is an out-of-court dispute settlement mechanism; this distinctive character must under all circumstances be maintained and protected. This can only be maintained if there are provisions in place that provide for the extent and level of court involvement in arbitral proceedings.

Both the New York Convention as well as the UNCITRAL Model Law have proven themselves to be effective instruments that protect arbitration from unwarranted and uncalled for court intervention except for specific instances where the involvement of the court is not only justified but is also necessary and essential for the survival and existence of arbitration as a whole.

Unlike in the Tanzanian Arbitration Act where the interference of the court is both unpredictable as well as disruptive to the arbitration process, these instruments depict a totally different picture when it comes to the intervention of the court in arbitration.

In Tanzania the courts have enormous powers mainly because the arbitral tribunals have very limited powers in arbitration. In the Model Law for instance there are many functions that are performed by the respective arbitral tribunals because they have been conferred various powers to deal with matters relating to the arbitration proceedings, which is in contrast to the Arbitration Act of Tanzania that depicts a very different scenario.

The roles of the arbitral tribunals in Tanzania are kept to the utmost minimal they are stated under S.11 of the Arbitration Act and include the power of the tribunal to administer oaths to the parties and witnesses appearing, stating a special case for the

consideration of the court on any questions of law involved and lastly the correction of any clerical mistake or error in an arbitral award that is a result of any accidental slip or omission.

The powers of the arbitral tribunal as provided for by the Arbitration Act of Tanzania are nothing short of mediocre and a disgrace to this type of dispute settlement. Tanzania is not in tune with modern arbitration legislations that call for the delimitation of court supervision and assistance in commercial arbitration.

While the current world trend is to move commercial arbitration away from the watchful eyes of the national courts, Tanzania is doing the complete opposite by entertaining the unnecessary intervention of the courts in commercial arbitration.

Despite the fact that the national courts do get too involved in commercial arbitration it is no fault of their own. The national courts legislated roles are disruptive to this process; they do not suffice to make arbitration an independent and efficient dispute settlement mechanism.

All the designated roles the courts play in commercial arbitration only make the process more susceptible to the dependency and the support of the courts. A good example is the issuance of interim measures, the Tanzanian Arbitration Act does not contain any express provisions relating to interim measures be it court ordered interim measures or ordered by the arbitral tribunal. Despite the lack of this, it is common knowledge in the arbitration field that it is the High Court alone that has the power to order interim measures in practice as was explicated earlier.

This begs the question as to why only the High Court has the power to issue interim measures, powers that do not even lie in the arbitral tribunal. For a dispute settlement mechanism that prides itself to be an out of court dispute settlement it falls short of its accolades and the expectations that the general public and stakeholders of arbitration have. The heavy dependency of arbitration on the national courts does not leave room or allow for arbitration to exist independently.

The national courts in Tanzania are involved in every single step in arbitration; there are functions that can and need to be assumed by the arbitral tribunal that are in the hands of the national courts.

There is no necessity for the national courts to possess more powers in commercial arbitration than the arbitral tribunals whilst this is supposed to be a process that is an out of court dispute settlement. The arbitral tribunal in place is appointed by the parties to the arbitration, these parties have entrusted the tribunal with the task of determining the matters at hand and resolving their dispute in a fair and unbiased manner.

It is by virtue of its appointment and the arbitration agreement that the arbitral tribunal is granted its powers, the most significant power of the arbitral tribunal is to issue an arbitral award that is both binding and final.

Other powers that the arbitral tribunals have are enormous under the UNCITRAL Model Law but sadly very limited under the Tanzanian Arbitration Act. This is contrary to the spirit of arbitration which calls for autonomy of the arbitral tribunal and minimal involvement of the national courts.

This means that the constant unneeded interference of the national courts deprecates arbitration and only trumps the effectiveness and efficiency of arbitration, it makes it next to impossible for arbitration to exist as an effective means for dispute settlement.

Tanzania's notoriety for having the courts interfere in the arbitral process is a known plague that became evident in Tanzania's most prominent case in arbitration to date. This is the case of *Dowans Holding SA and Another v. Tanzania Electric Supply Company Limited*¹⁹¹.

In this case the dispute which was resolved by the issuance of an arbitration award arose out of the enforcement and enforceability of the Emergency Power off-Take Agreement (POA). The POA was continuously performed without complaint as to its performance until the defendant stated it to be void *ab initio*. The defendant thus terminated the contract, which was treated as repudiatory to the claimant. Thus prompting the arbitration agreement to be invoked and was commenced in accordance to the ICC arbitration clause that formed part of the POA. The ICC Award found that the POA was valid, and that payment was due in debt to the claimants. The ICC Award was filed by the arbitrators via the ICC with the High Court of Tanzania for enforcement. A petition was filed by the defendants seeking to have the ICC Award set aside or remitted for reconsideration.¹⁹²

This was scrutinized by Justice Burton who denounced the unacceptable practice of the Tanzanian national courts interference in arbitral proceedings that was evidenced in this

¹⁹¹ [2011] EWHC 1957 (Comm).

¹⁹² *Dowans Holding SA and Another v. Tanzania Electric Supply Company Limited* [2011] EWHC 1957 (Comm).

case. In the wake of Tanzania's undesirable court intervention the judge expressed that despite her notoriety he had faith that his decision would construe finality,

*“ [He had] confident expectation that in applying that law, the Tanzanian court will have full regard to the international approach to undesirability of interfering with the careful decisions by arbitrators on issues which by virtue of an arbitration agreement such as in this case, have been referred to those arbitrators in order for them to make a final and binding decision. ”*¹⁹³

This is the stand that Tanzania needs to take in order to ensure that arbitration in this country becomes more effective, independent and free from the unwearied grasp of the court that only debilitates arbitration making it impossible for this form of dispute settlement to stand on its own two feet.

Tanzania needs to take a pro arbitration stance, where the court's role is to supervise and assist the arbitral process but only when called upon to do so under limited and justified circumstances to allow arbitration to thrive and achieve its esteemed status.

Arbitration in Tanzania and the world has through the years gained a lot of popularity in the business community this has been culminated by the growth in international trade amongst states as well as investments.

It is a desired means of dispute settlement because it is expeditious and believed to be cost effective, getting the courts involved in every stage of arbitration would defeat the peculiar characteristics of arbitration and all it stands for. Since delays and costs would erupt as a result of the courts involvement.

¹⁹³ [2011] EWHC 1957 (Comm), paragraph 42.

Arbitration is a mix of informal and formal procedures; the informal part is envisaged in the choice that parties have in the selection of the arbitral tribunal as well as the freedom to choose how to conduct the arbitral proceedings which results in the privately made arbitral award. The formal part comes into play when the privately made award has to be transformed into a decree by the high court¹⁹⁴; here life is infused into the award¹⁹⁵. It is the miscellany of the formal and informal procedures that arbitration incorporates that makes it desirable and a preferent in the out of court resolution of commercial disputes.¹⁹⁶

It is this distinct character that needs to be preserved and maintained for arbitration to be able to be an independent and effective means of dispute resolution, currently arbitration is not as independent as it should be it is flunked because of the constant intervention of the court caused by the court's legislated roles that do not allow arbitration to be an effective means of dispute settlement here in Tanzania.

As it has been established, involvement of the court in the arbitral process is necessary; however it is just as necessary to establish boundaries. A renowned arbitration lawyer Professor Alan Redfern posed the question, at what specific point does the involvement of the court become an intervention of the arbitration process and when does

¹⁹⁴ Wilbert B Kapinga & Eric S Ng'amaryo, *The European, Middle Eastern and African Arbitration Review* (2014) 5, available at www.globalarbitrationreview.com/reviews/58/sections/201/chapters/2299/tanzania

¹⁹⁵ Justice Thakkar in *Oil and Natural Gas Commission v. Western Company of North America* 1987 AIR 674 at paragraph 14.

¹⁹⁶ Wilbert B Kapinga & Eric S Ng'amaryo, *op cit* (194).

intervention transcend into interference while arbitration is supposed to exist independently?¹⁹⁷

When looked at superficially it looks like a question that can be answered at face value, this is however not the case. It is a question that may be regarded as being philosophical, but bears with it dire consequences.¹⁹⁸

This has a lot to do with the extent of the involvement of the court in arbitration proceedings. Minimum court intervention in arbitration is healthy and needed for arbitration to exist as has been displayed through the other chapters; it is the interference of the court in the arbitral process that suppresses the independence of arbitration.

Hence it is important to draw a line that will define the acceptable extent that the court should be allowed to get involved in arbitration, interference should be unacceptable.

¹⁹⁷ Alan Redfern op cit (n57) 393.

¹⁹⁸ Ibid.

CHAPTER FIVE

5. Conclusion and Recommendation

5.1 Conclusion

The United Republic of Tanzania is slowly warming to the practice of arbitration. Arbitration is increasingly sought by different people in the business community as a mechanism to dispose of their commercial disputes in an expedient and efficient manner.

In spite of the business community's enthusiasm for arbitration as a means of dispute resolution of commercial disputes, arbitration faces a myriad of problems making it difficult for arbitration to flourish.

It is arbitration's very nature of originating in private agreement that necessitates the courts' support to enforce the arbitration agreement as well as to enforce the arbitral award once it is made.

Without the support and assistance of the national courts, arbitration stands little chance of thriving. Despite the fact that arbitration needs the courts in order for it to survive and be effective there is a need for the level of the court intervention to be expressly outlined and provided for in the legislation.

There has to be a healthy balance of the court's involvement in the arbitral process, just enough support, just enough assistance- anything in excess to that would render the arbitration process ineffective.

5.2 Recommendations

5.2.1 The Reformation of National Statutes on Arbitration

It is recommended that Tanzania reforms its legislation that deals exclusively with arbitration. Simply put, the Arbitration Act needs to be subjected to reform.

The legislation that is currently in place governing arbitration in Tanzania is a relic of the past and displays traits of anachronism since it does not cater for the country's current economic development and thriving business hub. It does not promote confidence in the arbitral process, which impacts on the ability of the business community to resolve disputes effectively, efficiently and speedily.

As the Justice-in-Charge Robert Makaramba of the High Court, Commercial Division pointed out, the Arbitration Act is ancient thus rendering it useless in the resolution of contractual disputes.¹⁹⁹

The Honourable Justice went further and reiterated that the Arbitration Act as it stands today poses problems on the arbitration field and all its stakeholders. Among other pitfalls the Arbitration Act has led to confusion amongst lawyers who are actively engaged in arbitration with the most troubling aspects being the confusion encountered

¹⁹⁹ Alex Bitekeye, Tanzania Arbitration Laws Outdated, New Statutes a Must, The Citizen Newspaper of 30 April 2013 available at www.citizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html, accessed on 30 May 2014.

by the practising lawyers when it comes to the filing of the arbitral awards in the courts for recognition and subsequent enforcement.²⁰⁰

It has provisions that are not in line with the world's changing trend especially so far as the roles of the court in the arbitration process is concerned.

While the world is increasingly seeking to delimit the interference of the courts in arbitration proceedings and maximize court support for the arbitral process Tanzania is still stuck in its old ways.

As it has been expressed in the preceding chapters, the role of the Tanzanian national courts are too extensive thus clogging the arbitral process from being a mechanism of dispute settlement that does not entirely depend on the courts but that can exist independently.

This is a concomitant brought about by the legislated roles that the courts have been given under the Arbitration Act. This is to say that the national courts powers are derived from the Act because it is this Act that postulates interference of the court in arbitral proceedings.

This means that if amendments are made to the Arbitration Act, and provisions that give extensive powers to the court are removed, then arbitration in Tanzania stands a chance of thriving and becoming the reputable and preferred alternative dispute resolution mechanism it so has potential to be.

²⁰⁰ Ibid.

5.2.2 Sensitization of the National Courts to Support Arbitration

It is clear that although arbitration is an out- of- court dispute settlement mechanism, it can not independently exist without the support and assistance of the national courts. This has been discussed in the preceding chapters.

It is thus safe to say that arbitration needs the national courts although for specific and limited purposes.

In chapter two the interface between the national courts and the arbitral process has been extensively covered. In that chapter mention was made of some judges' disinterested and unsupportive attitude towards arbitration in the past.

Although we have come some way since the days where arbitration and the national courts had a relationship that was less than supportive, there are still judges who do not support the arbitral process and reflect these opinions and views through their rulings in cases that involve arbitration that come before them.

Knowing that arbitration can not survive on its own accord, there is a necessity to make the national courts aware of the importance of judges respecting the arbitral process and supporting it by all means. The support of the national courts for the arbitral process is central for in the absence of such support and assistance arbitration becomes ineffective especially in countries with developing economies.²⁰¹

²⁰¹ Samuel M Sau, Can International Commercial Arbitration be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration (2009) 16.

5.2.3 The Elevation of the Status of the Arbitral Tribunal

In arbitration the arbitral tribunal is normally an integral part of the arbitration process, it can be said to be the mover and shaker of this distinct dispute resolution mechanism.

Despite the fact that arbitral tribunals play a central role in the arbitration process as a whole, at least this is so in many other jurisdictions, Tanzania is showing rather atypical behaviour.

In Tanzania the arbitral tribunals actually play a less than significant role, for all the functions that should and could be performed by the arbitral tribunal have been undertaken by the national courts.

In other words, the national courts need to let go of the extensive powers they exercise in the arbitral process. The national courts need to appreciate that arbitration as an out-of-court dispute settlement mechanism; the arbitral tribunal must be given a wider discretion to be able to allow arbitration to exist without the constant interference of the courts.

This is the practice in many other jurisdictions where the arbitral tribunal is granted extensive powers to perform the wide range of functions it has been conferred with by virtue of being appointed by the parties to the arbitration.

It is regrettable that in Tanzania the powers of the arbitral tribunal have been confined to a single section in the Arbitration Act under s.11 where the tribunal is seen as having only three functions. The arbitral tribunal does not even have the power to order interim measures of protection.

The arbitral tribunal's status should be elevated and this can be done by making relevant amendments to the provisions relating to the powers of the arbitral tribunal, by doing so the problem of the court interfering in the arbitral process will have been dealt with accordingly.

5.2.4 The Adoption of the UNCITRAL Model Law

The recommendation that Tanzania adopts the UNCITRAL Model Law is one that should be adopted in order for Tanzania to be taken seriously in the field of arbitration to both the domestic users as well as the international commercial arbitration users.

The Model Law is a set of legislative provisions that states can adopt into their national laws by enacting it.²⁰²

The Model Law is a suitable medium geared towards guaranteeing the modernization and the harmonization of national laws.²⁰³

It would be wise and in tune with the current global trend for Tanzania to adopt the Model Law. The adoption of these laws would assist Tanzania in delimiting the persistent interference of the court in the arbitral process.

The Model Law advocate the minimization of the court's interference in the arbitral process and maximization of the court's support for arbitration. The principle of judicial non-interference in arbitration is a principle that Tanzania has seemingly ignored.

²⁰² Facts About the UNCITRAL, available at www.uncitral.org/pdf/english/uncitral-leaflet-e.pdf

²⁰³ A Guide to UNCITRAL, Basic facts about the United Nations Commission on International Trade Law (2013) 14, available at www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf

The adoption of the Model Law into Tanzania's national laws would mean that the roles that the courts play would have to be minimized. The courts would only intervene in arbitration under specific circumstances that are limited in nature and only when it is provided for under the Model Law.

The jurisdictions that have adopted the UNCITRAL Model Law without any reservations have seemingly shown the ability to undertake and do away with matters that are linked to the tensions that are exerted as a concomitant of the strained relationship that exists between the arbitral tribunals and national courts. This follows the model provisions that emphasize on independence of arbitration from national courts.²⁰⁴

It would be a move in the right direction and would bring back the faith that Tanzania does not currently possess of other jurisdictions that have adopted the Model Law. Adoption of the Model Law into the national laws would serve as an indicator that Tanzania is taking arbitration seriously and that she is making the effort to align her laws with the modern requirements that need to be in place for arbitration to be effective.

5.2.5 The Establishment of Two Regimes for Arbitration

The last recommendation has to do with the legal framework for arbitration. Currently the laws governing domestic and international commercial arbitration are all cramped up together. It is one Act that governs both spectrums.

²⁰⁴ Christa Roodt, *Conflicts of Procedure Between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court*, 236, available at www.heinonline.org/HOL/LandingPage?handle=hein.journals/afjinco/19&div=12&id=&page=.

The very same legislation which is the already flawed Arbitration Act governs both the domestic as well as the international commercial arbitration. The Act by itself is not fully equipped to deal with matters pertaining to the mere domestic arbitrations let alone international commercial arbitration.

Tanzania should consider adopting the approach that her counterpart Mauritius has taken. In Mauritius as has been discussed in chapter three there are two principal arbitration legislations governing domestic and international commercial arbitration respectively.

This simply means that there are two sets of different Acts that govern matters relating to domestic arbitration separately from matters relating to international commercial arbitration.

There is a notion that two regimes for arbitration are actually beneficial, it is advised for jurisdictions that are not familiar with arbitration to enact these two separate legislations to avoid confusion and curb the problem of the interference of national courts in arbitration.²⁰⁵

Unless Tanzania makes the appropriate changes that have been recommended to her, the legislated role that courts play in Tanzania will never suffice to make arbitration an independent and effective means of dispute resolution. All it does is cripple the arbitration process making it a mechanism of alternative dispute resolution that is undesirable and regarded as weak.

²⁰⁵Albert Henke, Rethinking the Role of the Courts in the Arbitral Process and Interim Measures, in International Bureau of the Permanent Court of Arbitration (ed), The Mauritius International Arbitration Conference Flaws and Presumptions: Rethinking Arbitration Law and Practice in a new Arbitral Seat (2010) 144-145.

BIBLIOGRAPHY

Primary sources

Statutes

The Arbitration Act Cap 15 [RE 2002]

The Civil Procedure Code Cap 12 [RE 2002]

Law of Contract Act Cap 345 [RE 2002]

The Arbitration Rules GN No of 1957.

Mauritian International Arbitration Act 2008.

Conventions

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

The UNCITRAL Model Law of 1985, as amended in 2006.

Cases

DB Shapriya & Company Limited v. Bishint [2003]3 EA 404.

Dowans Holdings SA and Another v. Tanzania Electric Supply Company Limited [2011] EWHC 1957 (Commercial).

Hodi Hotels Ltd v. Jandu Plumbers Misc. Commercial Application No. 15 of 2009.

GK Hotels and Resorts v Board of Trustees LAPF Miscellaneous Commercial Case NO 1 of 2008

Kobil Tanzania Limited v Mariam Kisangi Miscellaneous Commercial Application No 12 of 2007.

Maunga Seed Company (T) Ltd v Secretary to the Treasury, Ministry of Finance and National Planning: Government of the Republic of Zambia and Another Civil Case No. 99 of 2003) [2004] TZHC 13.

Nor Consult A/S v Tanroads Miscellaneous Commercial Appeal No 10 of 2008.

Nor Consult A/S v Tanroads Miscellaneous Commercial Appeal No 16 of 2008.

Oil and Natural Gas Commission v. Western Company of North America 1987 AIR 674.

R v Daye (1908) 77 LJK 659.

Shamji and Another v Treasury Registrar- Ministry of Finance, Tanzania and Others Miscellaneous Commercial Case No 14 of 2001 [2002] TZHC 12.

Tanzania Motor Services Ltd and Others v Mehar Singh t/a Thaker Singh Civil Appeal No 115 of 2005 [2006] TZCA 5.

Secondary Sources

Books

Asouzu AA, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (2001) Cambridge Press, London.

Binder P, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* 2ed (2005) Sweet & Maxwell, London.

Born GB, *International Commercial Arbitration* (2009) Kluwer Law International, vol 1.

Bosman L (ed) *Arbitration in Africa: A Practitioner's Guide* (2013) Kluwer Law International, The Hague.

Chukwumerije O, *Choice of Law in International Commercial Arbitration* (1994) Quorum Books, Connecticut.

Lew JDM, Mistelis LA, Kroll SM, *Comparative International Commercial Arbitration* (2003) Kluwer Law International, The Hague.

Marshall EA, *Gill: The Law of Arbitration* (2001) Sweet and Maxwell, London.

Mashamba CJ, *Alternative Dispute Resolution: Law and Practise* (2013) Mkuki na Nyota Publishers, Dar es Salaam Tanzania.

Mistelis LA (ed), *Concise International Arbitration* (2010) Kluwer Law International, The Netherlands.

Moses ML, *The Principles and Practice of International Commercial Arbitration* (2012) Cambridge University Press, New York.

Redfern A, Hunter M, *Law and Practice of International Commercial Arbitration* 4ed (2004) Sweet and Maxwell, London.

Park WW, *Arbitration of International Business Disputes* (2006) Oxford University Press, United Kingdom

Takaberry J, Marriot A, Bernstein's *Handbook of Arbitration and Dispute Resolution Practice* (2003) Sweet and Maxwell, London.

The Mauritian Arbitration Act Text and Travaux Préparatoires (2008).

Van den Berg AJ (ed), *International Commercial Arbitration: Important Contemporary Questions* (2003), Kluwer Law International, The Hague.

Wautelet P, Kruger T, Coppens G (eds), *The Practice of Arbitration: Essays in Honour of Hans van Houtte* (2012), Hart Publishing Company Ltd, Oxford.

Zekos G I, *International Commercial and Marine Arbitration* (2008), Routledge-Cavendish, Abingdon United Kingdom.

Journals

A guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law (2013), United Nations Office Vienna Austria.

'Arbitration Law Reports and Review, Annual Review of English Judicial Decisions on Arbitration' (2011) Stewart R Shackleton (ed), Oxford University Press, Great Britain.

'Arbitration in Africa: Arbitration Case study –Tanzania' (2007), 1-15.

Davis K, 'A Model for Arbitration: Autonomy, Cooperation and Curtailment of State Power' (1998) 26 *Fordham Urban Law Journal* 2.

Lord Dervaird, 'Scotland and the UNCITRAL Model Law: The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law' (1990) 6 *Arbitration International* 1.

Daele K, Kapinga WB& Mkono SS 'Arbitration in 47 Jurisdictions Worldwide: Tanzania' (2009) *Global Arbitration Review*, 297-301.

Kapinga WB, Ng'mariyo ES, 'Registration and Enforcement of Arbitral Awards in Tanzania' (2013) *The European, Middle Eastern and African Arbitration Review*, 94-118.

Makaramba RV, 'Commercial Dispute Resolution in Tanzania: Challenges and Prospects' (2009) 3 *The Tanzanian Lawyer* 2.

Roodt C, 'Conflicts of Procedure between Courts and Arbitral Tribunals in Africa: An Argument for Harmonization' 25 *Tulane European & Civil Law Forum* (2010) The Stellenbosch Papers, 65-102.

Sternlight JR, 'Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration' (1996) 74 *Wash. U. L. Q.* 637.

Papers

Hippolyte AR, Examining Newfound Tolerance for International Arbitration in the Developing World: An Illustration of the Nexus between Law and Development (2011).

Mkumbukwa NS, Is the Commercial Court Jealous of Arbitration? (2013).

Sau SM, Can International Commercial Arbitration be Effective without National Courts? A Perspective of Courts Involvement in International Commercial Arbitration (2009).

Reports

Makaramba RV, 'Curbing Delays in Commercial Resolution: Arbitration as a Mechanism to Speed up delivery of Justice 'A speech presented on 20 July, (2012) The United Republic of Tanzania the Judicial Round Table Discussion.

The Consolidated Annual Reports of the Judiciary, 2008-2009.

Theses

Sornum D An Analysis of Mauritius as an Arbitral Seat for International Commercial and Investment Dispute Resolution LLM (University of Birmingham) (2011).

Zaramba R Commercial Arbitration in Uganda: A Case Study of the Reaction/Attitude of the Business Community and the Legal Fraternity in Uganda LLM (University of Cape Town) (2010).

De Carolis D, The Process of Harmonisation of The Law Of International Commercial Arbitration: Drafting And Diffusion Of Uniform Norms School Of International Studies Phd In International Studies – Xix Cycle.

Websites

www.academia.edu/109776/EXAMINING_NEWFOUND_TOLERANCE_FOR_INTERNATIONAL_ARBITRATION_IN_THE_DEVELOPING_WORLD_AN_ILLUSTRATION_OF_THE_NEXUS_BETWEEN_LAW_AND_DEVELOPMENT

<http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/Commercial-Court-Manual.pdf>

www.globalarbitrationreview.com/reviews/58/sections/201/chapters/2299/tanzania.

www.nortonrosefullbright.com/files/tanzania-25762.pdf

www.sabar.co.za/2011-april-vol024-no1-pp20-21.pdf

<http://www.srshackleton.com/assets/pdfs/Annual-Review-2006.pdf>

<http://www.uncitral.org/pdf/english/texts/general/12-57491-Guide-to-UNCITRAL-e.pdf>

http://unctad.org/en/docs/diaepcb201006_en.pdf

<http://www.abrahamlincolnonline.org/lincoln/speeches/lawlect.htm>

www.citizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html

http://www.judiciary.go.tz/index.php?option=com_content&view=article&id=44&Itemid=67

[ww.judiciary.go.tz/index.php?option=com_content&view=article&id=92:law-day-speech-by-honc-hief-justice-augustino-ramadhani&catid=22:speeches&itemid=98](http://www.judiciary.go.tz/index.php?option=com_content&view=article&id=92:law-day-speech-by-honc-hief-justice-augustino-ramadhani&catid=22:speeches&itemid=98)

www.lawgazette.com.sg/2010-03/feature2.htm

<http://www.nbs.go.tz/>

www.pca-cpa.org