

Arbitration practice in Zambia: The process and its legal impediments.

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ABSTRACT

Arbitration as a process of dispute resolution has been pivotal in addressing a lot of business needs to have the dispute resolved within a short period and with less inconveniences to their business. The principle of confidentiality gives impetus to the process. The skill of the arbitrators and the general party autonomy has made the process and awards to be fully complied.

Despite the monumental progress made in the field of arbitration as a means of dispute settlement, the process has been beset by reversal which is inherent in the Arbitration Act itself thereby whittling down the advantages ascribed to the process. To this end, the study therefore highlights the historical development of arbitration in Zambia. The process of arbitration and its role in enhancing access to justice will also be examined. The advantages and how the same have been weakened by the Arbitration Act, other legislations and indeed the interpretive impositions by the court will be investigated. Among other provisions which fly in the teeth of the entire process is its usually unqualified attachment to the court system without cognisance of the aspiration of the entire process of arbitration. To redress these weaknesses in the Act and the rules which guide the arbitration process, this study will spur reforms so as to bring the law into conformity with the expectations of the end users.

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Section One.

1.1 INTRODUCTION.

Disputes have been associated with society from generation to generation. It has been between individuals and groups. The nature of interests making the subject of disputes also covers a wide range of spectrum which includes commercial matters. Thus, dispute settlement mechanisms ranging from litigation, negotiation, mediation, conciliation and indeed arbitration have been developed to respond to those disputes.

Besides the main stream traditional method of resolving dispute which is litigation, Zambia has also adopted arbitration process. While arbitration has been on the Zambian statute books, its real advocacy and implementation gained prominence at the beginning of the twenty first century. It is this legal regime which needs to be investigated so as to ascertain its advantages and the impediments to its full realisation.

In so doing, section one will deal with the arbitration in general, its historical development from the pre-independence era. The changes during the independence period to current position will also be discussed. This will show the shift which has been made from the court annexed arbitration system of the pre independence times to that which is more modern and largely styled after the model law.

The second section will look at the concept of access to justice in the context of arbitration. It emphasise the role arbitration plays in enhancing access to justice particularly in our clogged court system.

Section three will tackle the process of arbitration from the commencement of proceedings to the handing down of an award. The purposes of the pleading in the context of arbitral process are also examined. The form which an award takes, effect and steps to set it aside are equally scrutinised.

The section preceding the recommendations and conclusions will appraise the whittling away of arbitration in Zambia. The same will review the advantages of arbitration and the drawbacks which are inherent within the statute. How the courts have been interpreting the

legal issues relating to arbitration will be examined. The study will end with proposed reforms and recommendations.

1.2 Arbitration in general.

In this section, a brief discussion of the deployment of the arbitration clause and agreement is made. The genesis of arbitration as a mode of dispute resolution is anchored on the recognition that parties have decided to have their difference resolved through the process of arbitration. In that regard, disputants do not wish to utilize the traditional courts systems. Disputants choose to go to arbitration through the arbitration clause or indeed the arbitration agreement.

The arbitration clause is the guiding instrument as far as the referring of the matter to arbitration is concerned. Thus, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration.¹ The said arbitration agreement may take the form of an arbitration clause or the form of a separate agreement.² The importance of this provision is that a contract which was concluded without an arbitration clause can still be referred to arbitration upon the subsequent agreement by the parties to submit their disputes to arbitration. The allowance of entering into on an arbitration agreement after the conclusion of a contract from which a dispute is borne comports well with an understanding that an arbitration clause is independent from other main contract. This position of law was aptly stated when Lord MacMillan expressed the matter as follows:

I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other ... but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the other party has undertaken to the other such dispute shall be settled by a tribunal with their own constitution the arbitration clause survives for determining the mode of their settlement. The

¹ S. 6(1) of Arbitration Act No. 19 of 2000. The provisions of the subsisting Act has been cited so as to give context to the discussion.

² Ibid; S.9 (1).

purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.³

Though the arbitration clause requires consensual expression of both parties, the law as it stands is that it has to be in writing. It is thus, ‘in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegram or other means of communication which provide a record of the agreement.’⁴ The extension of the “writing” form to include other means of communication makes the definition more modern and captures the technological advancement of our times. However, despite the agreement being in writing, ‘where parties agree otherwise than in writing by reference to the terms which are in writing, their agreement shall be treated as an agreement in writing.’⁵ It is therefore mandatory for the parties to have the document in writing if their matter is to be competently referred to arbitration.

The significance of section 9(3) lies quite in contrast with the demand of an arbitration agreement to be in writing. It seems to suggest that if both parties orally refer to a document which has an arbitration clause, there is a possibility of the dispute being resolved. The provision lacks practicability to expect parties with tensioned relationship to engage in oral discourses of referring the matter to arbitration.

Though arbitration can apply in different circumstances, the law has reserved some aspects to be the domain of national courts. Thus, the below stated disputes are not be capable of determination by arbitration:

- (a) an agreement that is contrary to public policy;
- (b) a dispute which, in terms of any law, may not be determined by arbitration;
- (c) a criminal matter or proceeding except insofar as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;
- (d) a matrimonial cause;

³ Heyman and Another v. Darwin’s Limited (1942) 1 ALL ER 337.

⁴ Subsec 9 (2) of Arbitration Act No. 19 of 2000.

⁵ Ibid; Subsec 9 (3).

- (e) a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration;
- (f) the determination of paternity, maternity or parentage of a person; or
- (g) a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.⁶

Arguably, in the light of the above, the law has ring-fenced some matters which cannot come within the purview and competence of arbitral tribunals. This means therefore that the rights of the parties, by operation of the law, become paralysed

Though there is a rigid restriction for some matters to be arbitrated, there seems to be openness and some degree of allowability with matters incidental to matrimonial causes. Thus, the available escape route, so to speak, to actualise the settlement by arbitration of matters relating to matrimonial cause lies in seeking leave of the court. Normally, this is predicated on the exercise of discretion by the court.

Despite the agreement of the parties to arbitrate, the Arbitration Act does not in any way restrain any party from commencing a suit in court. The only option available to the party sued is to request the court to stay proceeding and refer the matter to arbitration. The enabling law for a party to refer the matter to arbitration provides that:

A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.⁷

In exercising its mind on this provision, the court has reasoned that:

Since the application for leave was before the court and in consideration of the respondent's application for the stay of the proceedings under section 10 of the

⁶ Ibid; Section 6(2).

⁷ Section 10 of the Arbitration Act No 19 of 2000.

Arbitration Act No. 19 of 2000, the trial judge had no choice but to refer the dispute to arbitration as provided for in the Hunting Concession Agreement.⁸

In the context of the decision of the court as stated above, it will be noticed that a stay is not a dismissal of an action. It is a suspension of all or parts of the judicial proceedings.⁹ The effect of suspension of proceedings is to provide an avenue for a dissatisfied party to set aside an award¹⁰ under the same cause. In the event that all the parties are satisfied with the award, the active matter before court would be discontinued.¹¹

It must be, however, noted that the filing of an application to refer the matter to arbitration is a substantive defence to the matter before court. This position was aptly put *where the court held, inter alia*, thus:

.... the appellant made his application for stay of the proceedings in the superior court under section 6(1) of the Act as is outlined above. Having thus made that application, as long as the same remained, undetermined, its effect was to suspend the filing of defence by the appellant to the respondent's claim against him with the result that the default judgment entered against him cannot have been regular.¹²

Although the provision to stay and refer the matter to arbitration contains a word "shall" the court seems not to enforce the said provision as mandatory. This is particularly so where the court forms a view that what a party lacks is the means to meet a monetary debt. In elucidating this position, Plewman JA noted as follows:

I conclude that before there can be a reference to arbitration, a dispute, which is capable of proper formulation at the time when an arbitrator is to be appointed, must exist and there can not be an arbitration and therefore no appointment of an arbitrator can be made in the absence of such a dispute. It also follows that some care must be exercised in one's use of the word 'dispute'. If, for example, the word is used in a context which shows or indicates that what is intended is merely an expression of

⁸ Leopard Ridge Safaris Limited v. Zambia Wildlife Authority (2008) Vol. 2 ZR 97.

⁹ Black laws Dictionary page 1453 8th edition.

¹⁰ S. 17 of the Arbitration Act No. 19 of 2000.

¹¹ Ibid.

¹² Joab Henry Onyango Omino v. Lalji Meghji & Co. Ltd [1995-1998] 1 EA 264.

dissatisfaction not founded upon competing contentions no arbitration can be entered upon.

I would merely emphasise that a failure to pay does not without more imply that there is a dispute as to liability.¹³

It therefore follows that the right to refer the matter to arbitration is a qualified right. However, the bringing of the matter to court should have been evidence of a dispute to be resolved through arbitration. A similar approach was adopted by the Zambian courts where it guided that, 'We agree that having regard to the fact that this matter has already been through Court hearing on an appeal before this court, arbitration proceedings can serve no useful purpose.'¹⁴

Evidently, as a result of this legal interpretation, the court seems to have taken extraneous issues outside the will of the parties to have their matters adjudicated by arbitration. It can be argued that the position assumed by the court is that of intrusion into the rights of the parties. The proper approach would be to defer to the will of the parties and refer the matter to arbitration.

From the aforesaid and as noted below, the philosophy of arbitration clauses or indeed arbitration agreement has been reduced to merely facultative one and its judicial character has ceased. This is evident where a party initiated an application and sought to set aside proceedings due to an arbitration clause, yet the court rejected the application and opined that:

Where a party bound by an arbitration agreement commences an action in the High Court for the determination of the substantive dispute which ought to be referred to arbitration, the other party to the agreement may make an application to stay proceedings and refer the parties to arbitration pursuant to section 10 of the Arbitration Act. Only then is the court mandated to grant the application unless it is found that the agreement between the parties is null and void, inoperative or incapable

¹³ Telecall (PTY) Limited v. Logan 2000 (2) SA 782 (SCA).

¹⁴ Townap Textiles Zambia Ltd And Chhaganlal Distributors Ltd V Tata Zambia Ltd (1988 - 1989) Z.R. 93 (S.C.).

of being performed. Section 10 is couched in permissive terms in that it envisages a situation where the parties to an agreement with an arbitration clause may choose to ignore or abrogate the arbitration clause so as to have the dispute between the determined by the court.

However, no such request or application has been made in the matter. The only application before court is for order to set aside originating process for irregularity.¹⁵

Notably, what was not denied is that the arbitration clause exists. However, the court did not deal with it on account of there being no request before it to pass the case to arbitration. It leaves an indication of the court's availability, despite the choice of parties to arbitrate, to thwart and deny the said right.

The implication of arbitration agreement also extends to the specification of a dispute to be decided. Thus, the arbitration clause defines the jurisdiction of the arbitral tribunal. Arising from the aforesaid, yet within the provision of the arbitration clauses, the question of jurisdiction has to be determined by the tribunal itself by virtue of the provision that :

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.¹⁶

However, despite the above provision, a practice has emerged where the court has decided to allocate itself the said jurisdiction. In an act which can be described as court's intrusion into arbitrator's jurisdiction to determine its own jurisdiction, the Supreme Court after examining the arbitration clause reasoned that:

¹⁵ Inyatsi Construction Limited Vs. Pouwels Construction Zambia Limited and Pouwels Hotel and Resorts Limited 2013/HPC/0530 (unreported)

¹⁶ Article 16 of the first schedule to the Arbitration Act No, 19 of 2000.

Whilst we agree with counsel for the respondent that an arbitration clause is separate and independent, and survives the agreement embodying it, and the words of Lord MacMillan in *Heyman & another v Darmins Limited*, are apt, as counsel for the appellant has rightly submitted, the learned Judge should have first considered the wording of the arbitration clause as opposed to its severability....¹⁷

The meaning imparted by this holding is to withdraw the authority of the arbitral tribunal to investigate whether the arbitration clause embraces the contestation it can attend to. The mandate vested in the tribunal to determine its own jurisdiction vanishes when considered in the perspective that the court assumes the determination whether the matter can be settled through arbitration or not.

Thus, if the courts would want to determine the arbitration clause in as far as jurisdiction is concerned, away from the tribunal; they should seek the consent of the parties. Any default renders the idea of arbitration as being party driven illusory. It also makes the tribunal's power to determine its jurisdiction notional.

Moreover, the granting of the power to the arbitral tribunal to determine its jurisdiction in the context of an arbitration clause was meant to give the process efficacy and reality in as far as party autonomy is concerned. The assumption of this power by the courts has left the whole arbitral process in a conundrum as all its power has been mutilated by the courts.

Below is the historical development of arbitration in the context of the definition for arbitration.

1.3 The historical development of arbitration in Zambia.

In this section of the thesis, a historical development of arbitration in Zambia is discussed, albeit, briefly. First, a definition of arbitration is provided in order to situate the discussion within the specific legal context. It may be well to stress at the outset that arbitration is consensual process. Thus arbitration has been defined as, 'A process used by the agreement of the parties to resolve disputes. In arbitration, disputes are resolved with binding effect, by

¹⁷ Audrey Nyambe v. Total Zambia Limited SCZ Judgment No. 1/2005 (unreported)

a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for agreement of the parties to exclude it.’¹⁸

Arising from this definition, arbitration seems to be situated within the confines of individual disputation rather than the national court of law. This would entail therefore that arbitration foregrounds individual legal privileges predicated on consensual process (agreement) by the parties aggrieved. Put another way, the actual contours and content of what arbitration is extends to the exclusion of the national courts at the behest of the parties. The courts are only left with option effecting what the parties would have agreed.

The law regarding arbitration in Zambia has graced the statute books since 1933. The Act was enacted before Zambia obtained her independence in 1964. Thus, the Act is one of the colonial legacies bequeathed to the Republic, and as such the breadth of the Act is indispensably predicated on the English Statute of 1889 with minor departure, which departure are accounted for by the arbitration statute of other British Colonies and dominions in the region.¹⁹

Notably, the comprehensive guidance regarding arbitration under the Act of 1933 is found under part two. It will also be noted that unlike in the modern parlance where an arbitration clause is referred to as agreement and more so as an agreement to arbitrate after the rising of a dispute, under the 1933 Act it was referred to as submissions encompassing both situations. This however does not pose any immediate legal apprehension to the change in terms of the phraseology.

Though the Act accepts that arbitration is by agreement, it imposed an obligation on the parties who have decided to change course from arbitration to national court to seek leave of court.²⁰ This made the agreement to arbitration irrevocable. This flaw almost flows naturally from the failure to appreciate the freedom of contract which characterises the arbitration agreement. Thus, one would think of it as an egregious violation of the party’s desire in restricting them from opting out from an agreement whether they had earlier agreed.

¹⁸ Halsbury’s Law of England, 4th Edition reissue, Volume 2(3) paragraph 1.

¹⁹ K K Mwenda Principles of Arbitration Law (2003) 9.

²⁰ Ibid; s. 4.

The Act also placed a lot of issues into the hands of the court. Such issues include the power of court to enlarge time for making an award²¹ and power by the court to remit an award for the reconsideration of the arbitrator or umpire. The Act is permeated with the elevation of the court at every stage and diminishing the choice of the parties to arbitrate. Evidently, therefore, this Act is abhorrent to the spirit of arbitration anchored on a mast of the parties to choose a forum other than the national court to resolve their dispute.

Despite having the enabling provision under the Arbitration Act of 1933 to facilitate and conduct arbitral proceedings from its inception, the revitalisation of arbitration in the jurisdiction rose to prominence towards the end of twentieth century. The said activism culminated in the enactment of Arbitration Act No. 19 of 2000. In what follows, Arbitration Act No. 19 of 2000 is discussed.

1.4 The modernisation of arbitration: Arbitration Act no. 19 of 2000.

The repeal of Arbitration Act of 1933 in Zambia ushered in a new Act. The subsisting Arbitration Act came into effect upon its assent.²²The successful rejuvenation of arbitration is partly informed by the backlog of cases, which culminates in delayed justice and increased cost of adjudication. The desire to have the matters quickly dispensed with in a skilled forum of selected individuals also provided the impetus.

It is argued that, unlike its precursor, the subsisting Arbitration Act embraces innovations based on, ‘with modifications, the model law on international Arbitration.’²³ Additionally, the other cumulative improvements are reflected in the preamble which provides as:

An Act to repeal and replace the Arbitration Act with provisions for domestic and international arbitration through the adoption, with modifications, of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985; to provide for an arbitral procedure which is fair, efficient and capable of meeting the specific needs of each arbitration; to redefine the supervisory role of the courts in the arbitral process; to preserve the legal recognition and enforcement of foreign arbitral awards under the Geneva

²¹ Ibid; S.13.

²² Arbitration Act No. 19 of 2000.

²³ Ibid; S. 14.

Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); to provide for the recognition and enforcement of foreign arbitral awards under the New York Convention on the 'Recognition and Enforcement of Foreign Arbitral Awards(1958); and to provide for matters connected with or incidental to the foregoing.²⁴

The inclusion of other international instruments makes arbitration reliable and internationally efficient. Notably, the intrusion by the national courts has significantly been excluded. The decision of the parties on how their matter is to be resolved is no longer the preserve of the courts. The inclusion of international instruments also makes Zambia attractive as a seat of arbitration for international arbitration. This in turn has the effect of building capacity in terms of the expertise in arbitration at an international level as well as contributing to the economy.

²⁴ Preamble to Arbitration Act No. 19 of 2000.

Section Two.

2.0 ENHANCING ACCESS TO JUSTICE THROUGH ARBITRATION.

2.1 Introduction.

Access to justice is a characteristic of any legal system which has its tenets anchored on the rule of law. The concept does not only mean that the citizenry should have the freedom to walk into the courtroom to bring their actions to court. The idea encompasses the manner in which those who are given the judicial authority are appointed and more so how they conduct matters. The notion of access to justice is important and the process of arbitration facilitates in realisation of the thought. This chapter will look at the concept of access to justice, the appointment and the responsibilities of the arbitrators in the process of arbitration.

2.2 Access to justice in general.

Access to justice is a concept which embraces numerous facets, among them, quick disposal of cases, low cost, diminished adjournments and user friendly procedures. The idea of access to justice has been conceptualised as follows, ‘... the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.’²⁵

Further, the Supreme Court, after considering other international instruments, stressed the value and importance attached to access to justice by ventilating its thoughts as aptly as follows:

Therefore, although human rights are not hieratical, the courts have, in balancing and weighing between these fundamental human rights given an edge to fundamental human rights such as the right to access to justice. Therefore, using this approach, our country is under a duty by virtue of Article 18 of our Constitution read together with Article 10 and 16 of the UDHR to guarantee this fundamental human right of access to justice and to equality before the law to the appellants.²⁶

²⁵ Justice C Kajimanga ‘<https://www.ciarb.org/docs/default-source/default-document-library/abstract---enhancing-access-to-justice-through-alternative-dispute-resolution-mechanisms-the-zambian-experience.pdf?sfvrsn=2>.’

²⁶ Antinio Ventriglia and Manuel Ventriglia v. Eastern and Southern Africa Trade and Development Bank (2010) ZR 486 Vol. 1.

Though the above concept of justice envisages the idea of citizens approaching the courts, the concept of access to justice however goes beyond the boundaries of national courts. It has, and rightly so been observed, “Access to justice relates to providing every citizen the opportunity to address their issues of concern outside the formalities of the state provided justice system”.²⁷ It has further been suitably put that, ‘Access to justice system refers to the creation of paths to resolve conflicts that are within the preview of the formal legal structure by using differentiated strategies such as...arbitration and the many combination of other methodologies all designed to promote early swift resolution of conflict.’²⁸ In the Zambian judicial system, the actual contours and context of the concept find its expression through the arbitral process.

The value of arbitration in promoting access to justice has permeated the practice in the High Court, Industrial Relations Court and Lands Tribunal and Subordinate Court.²⁹ Access to justice is promoted by the insistence to refer the matters to arbitration for speedy resolution, where parties also choose the adjudicators. It is thus provided under that:

An application, under section ten of the Act to the High Court, Industrial Relations Court or the Lands Tribunal for the stay of legal proceedings which are subject of an arbitration agreement shall be made by summons in the same proceedings to the Registrar of the court or, if the proceedings are pending before a judge, to a judge.³⁰

In this context, the courts have been provided with the powers to refer the matter to arbitration as a way of enhancing the parties’ ability to have a quick disposal of their matters.

This rule of access to justice, by going to arbitration, has also been taken a step further under the Industrial Relations Court. The parties, in the absence of arbitration clause, but before judgment, can by consent ask the Judge to refer the matter to arbitration.³¹ This provision, however, can only be helpful when both parties notice that the court’s appreciation of the said

²⁷ W Davis and H Turku ‘Access to Justice and Alternative Dispute Resolution’ (2011) 1 J. Disp. Resol. 50.

²⁸ Ibid.

²⁹ Rule 3 of the Arbitration (Court proceedings) Rules 2001, statutory instrument No. 75 of 2001.

³⁰ Ibid; Rule 4.

³¹ Rule 3 of The Industrial Relations Court (Arbitration and Mediation Procedure) Statutory Instrument No. 26.

issues is lacking. To choose to refer the matter to arbitration when costs have already been incurred renders inutile the concept that arbitration is less costly and quick. This is so because referring a matter to arbitration at a later stage does not sit well with such attributes of speedy resolution and less costs.

2.3 The arbitrator: his appointment and his role in arbitration as a means of access to justice.

The concept of an arbitrator is a borrowed idea from the traditional national court. Thus, an individual in the form of an arbitrator stands between the opposing parties to adjudicate their dispute. However, the appointment and how to appoint an arbitrator is the concern of the parties to the arbitration agreement.³² The parties in their agreement to arbitrate can list the qualities of a prospective arbitrator. The power of appointment can also be ceded to an institution designated by the parties³³. Thus, an arbitration clause apart from being relevant in referring the matter to arbitration, it also feeds into the appointment of an arbitrator. The processes of appointing an arbitrator and the number can be spelt out in an arbitration agreement.

However, where the parties are unable to resolve the appointment of an arbitrator or indeed where the arbitrators are unable to resolve the appointment of an empire, the court, at the instance of a party, would help to resolve the impasse.³⁴ It is clear therefore that the parties are at the centre of driving the process of appointment of the arbitrator. The court is an avenue of the last resort. The parties' involvement extend to the replacement of an arbitrator who has been, by consent of the parties, relieved of his duties or indeed who is unable to proceed for whatever reason.

Thus in agreement with the an argument that the appointment of an arbitrator is at the heart of the parties' consent, an arbitrator has been defined as a neutral third party who is appointed by the parties to an arbitration agreement.³⁵ It becomes clear from the definition that it envisages a neutral third party whose appointment is prospective on the occurrence of a

³² Section 12(2) of Arbitration Act No 19 of 2000.

³³ Ibid; Subsec 12 (3) (b).

³⁴ S. 14(4) of the Arbitration Act, 2000.

³⁵ Rule 2 of The Arbitration (Code of Conduct and Standards) Regulation, S.I No. 12) of 2007. There is however no definition for arbitration orders.

dispute. The aspect of a neutral party is one quality which an arbitrator shares with an adjudicator in a form of a Judge.

The appointment of an arbitrator is not a unilateral exercise but consensual. The spirit exuded by this provision is that of inclusiveness and provides parties a large pool from which an arbitrator can be appointed without a hindrance of nationality or indeed creed.³⁶ The non-discriminatory nature of the provisions in the appointment of arbitrators brings with it an international aspect into the arbitration proceedings. This enables parties to appoint arbitrator who will induce into the process innovations from other jurisdiction and therefore improving the quality of justice.

The party's right to choose a procedure on the appointment of an arbitrator is a valuable tool. Parties should not take casually the process of appointing an arbitrator. An arbitrator would eventually determine the quality of the process and award. The power of the parties in the appointment of arbitrator puts into the hand an opportunity to select an arbitrator who has the technical competence in the subject matter.

The qualities of an arbitrator are cardinal because arbitrators considerably exert considerable amount of influence in the quality of the process and the award rendered. In this connection, 'It has often been said that the quality and success of arbitration is as good as the quality of the arbitrator involved in it. The arbitrator is the *sine qua non* of the arbitral process. The process cannot rise above the quality of the arbitrator.'³⁷

An arbitrator's quality and credibility is therefore crucial to maintain the parties' faith in the overall arbitration process.³⁸ The confidence deposited by the parties in arbitration is far less in the forum itself but in the individuals that are entrusted with the process. This of course is an aspect which is lacking in litigation where a party has no choice of a judge.

It is ideally important that the appointment or the procedure for appointment of an arbitrator is agreed upon way before any dispute has arisen. The good which goes with this approach is

³⁶ Section 12(1) of Arbitration Act No. 19 Of 2000.

³⁷ DS Rajoo 'Importance of Arbitrators' Ethics And Integrity in Ensuring Quality Arbitrations' (2013) 6 Contemp. Asia Arb. J. 330.

³⁸ Ibid.

that parties are usually in good terms, and thus, the level of corporation would have not been put in jeopardy by the pending proceedings.

In the failure by any party or indeed any institution to appoint an arbitrator, the court will be requested to appoint the said arbitrator³⁹ The resigning of the appointment of an arbitrator to the court process does not only increase costs but more so it delays the matter as the said application would join the already clogged court system. It would therefore be prudent for parties to provide clear mechanism and indeed qualification for the intended arbitrator so as to make the disposing of the matter less costly and with quick dispatch.

In an event that the mandate of an arbitrator is terminated, the law in replacing the said substitute arbitrator provides the means through which the earlier one was appointed.⁴⁰ The law does not state whether or not the substitute arbitrator has to be appointed by the court if the previous arbitrator was appointed by court. However, the law does emphasis the need to follow the process used in appointing the predecessor. This brings into the spotlight the diligence with which the process of appointing the arbitrator requires as it may have future repercussions.

2.4 The arbitrator and the arbitral process.

The arbitral process by its nature produces an award which is final. Thus, an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.⁴¹

Thus, by virtue of an arbitral award being final, the arbitrator becomes a mast to hold and carry sail the whole process of arbitration. It has aptly been said that:

Because of the finality and binding nature of the decisions which are often significantly shielded from judicial review, transparency and trust in the conduct of the arbitration proceedings are necessary to ensure legitimacy of the process and the award rendered. The parties must have confidence that the arbitrator has the

³⁹ Ibid; SS 12 (3) (4) (5) (6). The procedure in approaching the Court for the appointment of an Arbitrator is provided under Regulation No. 10 of The Arbitration (Court proceedings) Rules, S.I. No. 75.

⁴⁰ Section 13(1) Arbitration Act No. 19 Of 2000.

Ibid; S 20 (1).⁴¹

experience, is impartial, independent, possesses relevant qualifications, is fair minded and will be able to effectively dispense justice in awarding a fair and just award.⁴²

Essentially, the attributes and manner in which the arbitrator is encouraged to possess and practice are basic to the principle of access to justice. In view of the responsibility of the arbitrator and the far reaching consequences of the decision; a code of conduct has been put in place.⁴³ The code provides for the fairness and impartiality in the conduct of the arbitral proceedings.⁴⁴ The duty is equally placed on the arbitrator to disclose prior interests or relationship which may affect impartiality and or independence and this burden rests on the Arbitrator.⁴⁵ The arbitrator is also to refrain from establishing the relationship which may give raise to conflict of interest.⁴⁶ In conducting proceedings the parties must be given an opportunity to be heard.⁴⁷

The independence and fairness in the arbitral proceedings echoes throughout the code which regulates arbitrator(s). In capturing the thought of independence, impartiality and ethics by arbitrator in relation to the parties, it has been stated that:

Parties to arbitration are entitled to expect from an arbitrator complete impartiality and independence both as between themselves and with regard to the matter left to the arbitrator to decide. They are also entitled to expect from him a faithful, honest and disinterested decision.

Lack of impartially or bias will be a ground on which objection may be taken against an arbitrator.... The arbitrator must not only be free from bias but there must not even be an appearance of bias.

An arbitrator must always act judicially with a detached mind with patience. He must not at any time descend into the arena or take an adversarial role. His response and

⁴² Rajoo op cit (n37) 330.

⁴³ The Arbitration (Code of Conduct and Standards) Regulation, S.I. No. 12 of 2007. Before this Statutory Instrument came into effect, the arbitrators were regulated by a Judicial (Code of Conduct) Act, 1999 by virtue of section 29 of Arbitration Act No. 19 of 2000.

⁴⁴ Article 1 of the first schedule to the Arbitration Act No. 19 of 2000.

⁴⁵ Ibid; Art 2.

⁴⁶ Ibid; Art 3.

⁴⁷ Ibid; Art 4.

words used must always be measured and circumspect... He must rule only after hearing the parties. He should always maintain the dignity and impartiality of the appointment.⁴⁸

This is an ethical invitation to an arbitrator to import his values into the process. The thought that ought to weigh on him is not the personal exigencies of the moment but those of his profession and his reputation. The attributes of trust and the reputation of arbitrator once fractured the whole arbitral process and principle of access to justice is fractured with it. This became apparent in a case where the Chairman of the tribunal accepted to serve as a member of another tribunal at the request of one of the parties' advocates appearing before him. In this case, the Chairman did not disclose his interest. Upon discovery, the court framed him as biased. In fact, in commenting on the acceptance of the appointment without declaring his interest, the court reasoned that, 'The Chairman's failure to disclose the fact that he had been appointed to another arbitral tribunal by one of the advocates in the proceedings under review raised the question of perceived bias against him.'⁴⁹

In the above case, the Supreme Court observed that there was only a perceived bias and not a proven bias. Since an award was nullified for perceived bias, it can be argued that an arbitrator should always be on guard as to his professional interactions with regard to the matter. The relevant check list is that of avoiding "the appearance of evil" during the entire process of arbitration.

The need for arbitrators to remain 'an arbitrator' and not to descend into the arena of a matter he is arbitrating was analogously expressed in a matter before the Supreme Court. Though this authority deals with a conduct of a Judge, its application is relevant to an adjudicator sitting as an arbitrator. The court opined that:

Although trial Judge has the judicial discretion to ask questions during the trial, he should not use his discretion to insert himself into the substantive questioning during the trial. The trial judge should ask questions only to clear a point.

⁴⁸ Kuala Ibai Development Sdn Bhd v. Kumpulan Perunding (1988) Sdn Bhd & Anor [1999] 5 MLJ 137.

⁴⁹ Zambia Telecommunication Company Limited v. Celtel Zambia Limited (2008) ZR 44 Vol. 2.

The discretion to ask questions must be enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with calmness of mind, freedom from partiality, not swayed by sympathy, nor warped by prejudice nor moved by any kind of influence, save alone the overwhelming passion to do what is just.

The judge part when evidence is being given is to listen to it; asking question, only when it is necessary to clear a point, to see to it that the advocates behave themselves; and keep to the rules laid down by law, to exclude irrelevancies and discourage repetitions; to make sure by wise intervention that he follows the points made by the advocates; and assess their worth; and at the end make up his mind where the truth lies.⁵⁰

This provides guidance that an arbitrator should have controlled zeal and tempered enthusiasm, which if unrestrained, has a tendency of annihilating the trust and confidence which parties deposit into the arbitrator.

The misconduct of the arbitrator in relation to the conduct of proceeding ‘can be found in respect of the technical handling of the arbitration and need not be a matter of bias or prejudice or other disreputable action on the part of the arbitrator.’⁵¹ It is enough for an arbitrator to be drawn into the confines of misconduct or misconduct of the proceedings where the parties are not afforded an opportunity to be heard. Thus, the arbitrator should not, in his word, his action or indeed lack of it or his handling of the case induce a sense that his ability to act judicially is impaired. In dealing with this point, Lord Denning MR had this to say:

I would not suggest -no one has suggested that the arbitrator misconduct “himself” But what is said is that he misconduct the “proceedings” it is as plain as it can be that he misconduct the proceedings. He decided a case against the party without having heard the submission in the case. He made a formal award against Modern

⁵⁰ *Gerrison Zulu v. Zambia Electricity Supply Corporation Limited* (2005) ZR 89.

⁵¹ *Koh Bros Building and Civil Engineering Contractor Plc. Ltd v. Scotts Development (Saraca) Pte Ltd* (2203) 3 LRC II.

Engineering without having heard counsel on their behalf. That is clearly a breach of natural justice.⁵²

The court further elucidated the test to be applied in considering a question of arbitrator`s handling of the proceedings. It was opined that:

This does not seem to me a most serious matter. The judge put this test to himself in his judgment. Are the circumstances such as to demonstrate that the arbitrator is not a fit and proper person to continue to conduct the arbitration proceedings? I do not think that was the right test. I would ask whether his conduct was such as to destroy the confidence of the parties or either of them in his ability to come to a fair and just conclusion.⁵³

In this regard, the confidence in the arbitrator is not only to be expressed by one party appointing the arbitrator but by both parties to the process. Invariably, the correct handling of the process epitomises and largely nature the confidence which the parties have in the arbitrator. The breach of this trust, would in turn lead to the removing of the arbitrator from office with its attendant consequence of delay and increase of the cost to parties. Undeniably, the reputation of the arbitrator is also left in tatters.

In entrenching the confidence of the parties in the arbitration proceedings, an arbitrator has been elevated above the partisan interest of a party appointing him. He is not an advocate of any party and he puts himself beyond the control of any party. This is more pronounced where each party nominates an arbitrator and in return the nominated arbitrators appoint a third one who usually becomes the chairman. The court in taking a view that an arbitrator is not in a relation of subordination with the person who appoints him guided that:

The arbitrator is in crucial respect independent of the parties. His functions and duties require him to rise above partisan interest of either party. As International Chamber of Commerce (“the ICC”) put it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the

⁵² *Modern Engineering (Bristol) v. C Miskin and Sons* (1981) 1 Lloyd`s Rep 135 and particularly at page 137.

⁵³ *Ibid*; 138.

contrary. He is in effect a “*quasi judicial adjudicator* “.... Once an arbitrator has been appointed at any rate in the absence of agreement between them, the parties have effectively no control over him.⁵⁴

In preserving this quality of the arbitrator of being the custodian and embodiment of the parties’ trust and confidence, the law has exempted an arbitrator from representing or acting as counsels or as witness in legal proceedings where he acted.⁵⁵ The arbitrator has also been insulated from liability arising out of the discharge of his duty.

It follows, and patently becomes clear, that an arbitrator becomes an integral player in the enhancement of access to justice through the arbitral process. For emphasis’s sake, this is the reason why it has accurately been said that, the quality and success of arbitration is as good as the quality of the arbitrator involved in it. ⁵⁶ Thus, the law in Zambia has not only laid the guidelines of improving the process of arbitration and eventually access to justice but have also put measures of ensuring that arbitration is viewed as a mode relevant in achieving the much sought after commodity - access to justice.

Section Three.

3. 0 THE ARBITRAL COMMENCEMENT, AWARD AND ITS FORM

3.1 Introduction.

Having looked at the concept of access to justice in the context of arbitration and more so having looked at the appointment and role of an arbitrator(s) in arbitration, this chapter will

⁵⁴ Jivraj v. Hashwani (2011) 1 WLR 1872.

⁵⁵ S. 22 of Arbitration Act No. 19 of 2000.

⁵⁶ Rajoo op cit (n38) 329.

look at the stages of arbitration from the commencement of the proceedings to the stage where the award is rendered and perfected through enforcement.

Mostly, before the appointment of an arbitrator, battle lines would have been drawn as to the position where the parties to the dispute stand. Demand letters would have graced each party's side. Whatever response would have been advanced to the demands exchanged, each party would have a view that the opposite end does not accede to their position. The natural consequence where parties do not agree and particularly where their agreement has an arbitration clause, is to seek the intermediary of the arbitration process.

3.2 Arbitration: The onset of actions.

When it has been resolved by the parties that an assistance of a third party in the form of an arbitrator is required, the parties will look to the dictates of the arbitration clause. This will provide as to how an arbitrator is appointed and also which matter is amenable to arbitration. In the event that no procedure is elucidated, the parties will either nominate an arbitral institution or indeed exchange the names of the arbitrators. Once the name has become common cause or is accepted by the parties concerned, that individual becomes the arbitrator. In the event that the tribunal is to be constituted by the three arbitrators, it is usually the case that each party will choose one arbitrator and ultimately the two would choose a third arbitrator.

Once the preliminary hurdle of appointing the arbitrator has been crossed and the arbitrator has accepted the appointment, the parties would then resign to the competence of the arbitrator who would be driving the proceedings. The context of the arbitrator being the driving force is found in what constitutes arbitration proceedings. The arbitral process has been defined to mean, 'the proceedings conducted by an arbitral tribunal for the settlement, by arbitration, of a dispute which has been referred to arbitration in terms of an arbitral agreement.'⁵⁷

It is clear from the definition that the manner of carrying out the process resides with the arbitrator. It would therefore be right to suggest that arbitration would start in earnest when

⁵⁷ D Butler and E Finsen *Arbitration in South Africa Law and Practice* (1993) 120.

an arbitrator would have been appointed and subsequently calling the parties and their representative, if any, to a preliminary meeting.

3.3 The preliminary meeting, the pleadings and other aspects of arbitration.

A preliminary meeting is usually called at the instance of the arbitrator. The purpose of such meeting would be to determine the procedure and rules to be followed to bring the matter to a hearing. It also attends to the form of the hearing itself, the arrangement concerning the dates and venues of the hearing.⁵⁸

A preliminary meeting, thus apart from building acquaintances with the parties, brings to bear the arbitrator's influence on the proceeding through which it can be termed to as orders for directions. During this scheduling, the arbitrator would give the parties benchmarks within which activities are carried before the matter is set down for hearing. In calling for the said preliminary meeting, the arbitrator would send a formulated agenda which would include among others, confirmation that there is an arbitration dispute between the parties; confirmation that there is a valid arbitration agreement; confirmation of the appointment of the arbitrator; acceptance of any conditions of appointment; form of hearing, date, time and venue of hearing and defining a dispute.⁵⁹

A meeting serves a cardinal point in that it offers an opportunity to the parties after defining the process to reflect whether it is indeed necessary to go beyond the preliminary point. It is possible that at the preliminary meeting the dispute would be resolved by the parties. It also gives an arbitrator an opportunity to see and determine whether there is dispute to arbitrate or not and in the event that there is no dispute, the matter ends there.

Another opportunity offered by a preliminary meeting is that the parties would agree on the procedure which should be used in the conducting of the proceedings. If there are institutional procedures adopted by the parties as rules within which arbitration will proceed, it has to be agreed whether such institutional rules will require modification. And because of the impact which a preliminary meeting may have on the entire arbitral proceedings, it is accepted that it must be convened at the earliest possible moment in order to agree upon the

⁵⁸ This is similar to orders for directions which are regulated by Order 19 of the High Court Act, Cap 27 of the Laws of Zambia.

⁵⁹ This also happens when the court calls for orders for direction.

precise form the procedure shall take and jointly to formulate a prescription for submission to the tribunal for its approval and confirmation.⁶⁰

Once the procedural implications and schedules within which to take steps are considered, it removes the element of surprise by any party to the proceeding. When the arbitrator becomes strict to any party to the proceeding in terms of the schedule given, the chances of the arbitrator's impartiality being questioned is minimised. This is so because the parties would have participated and agreed on the whole schedule of events. It also enhances compliance by the parties to the schedules agreed and eventually having the matter resolved speedily.

After the procedural rules would have been agreed, 'the claimant would state facts supporting his claim. The respondent shall equally file the defence. The parties may also file the documents to support their cases together with the pleading filed.'⁶¹ The supplementary statement may also be filed and subsequent amendment may be entertained with the leave of the arbitrator.

In the formulation of the claim which is sent to the arbitrator, it is the position of the law that for a claim to stand, it must disclose a cause of action. In commenting on what constitutes a cause of action, the Supreme Court reasoned that:

Pleadings serve the useful purpose of defining the issues of fact and of law to be decided; they give each party distinct notice of the case intended to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended;

A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other.⁶²

⁶⁰F Leonard 'Unrealised Expectations: The Root of Procedural Confusion in International Arbitrations' (1985) 2 *J. INTL ARB.* 12-13.

⁶¹ Art 23(1) of the first schedule to the Arbitration Act No. 19 of 2000.

⁶² William David Carlisle Wise v. E.F. Harvey Limited [1985] ZR.179.

It is therefore correct to state that for the statement of claim to be accepted it must rise to a standard of disclosing circumstances to attach liability. General statement would fall short of these requirements and serve for the flexibility of the arbitral procedure; such statement of claim would be amenable to be struck out. In fact the arbitrator would not have jurisdiction to entertain such a matter which does not disclose a cause of action as the reference of the matter to arbitration is predicated on there being a dispute.

In describing the standards which a defence should meet, the court reasoned that, “a defence must not be evasive. A defence must answer all the allegations at the level of detail underlying allegation. Every allegation must be admitted frankly or denied boldly and half-admission or half denial is deemed to be evasive.”⁶³

Certainly evasive pleading is not good pleading at all. The defence is thus expected to make commanding position of acceptance or denial and no lukewarm response. However, the detriments which befall the statement of claim do not attend the defence. If the statement of claim does not disclose any cause of action, the matter would come to an end. However, if the defence is defective, tribunal shall continue the proceedings without treating such failure in itself as admission of the claimant's allegations. It appears that there cannot be judgement in default of defence.⁶⁴ When the arbitration proceedings go ahead in the face of a defective defence, it does so on the reasoning of the Supreme Court when it stated that, ‘A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.’⁶⁵ In the context of this holding, it becomes clear that the plaintiff has to discharge his burden of proving his case.

Notably, the importance of clear pleading has an effect on the evidence which is admitted. This is despite the flexibility of rules of evidence in arbitral proceedings. It can be argued that the flexibility of arbitration does not extend to infringing the provisions of the law. The effect of poor pleadings is that important evidence may be ignored on the basis that it is not backed by the pleadings. The court on this point guided that, ‘in cases where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be

⁶³ Chazya Silwamaba v. Lamba Simpito (2010) ZR 475.

⁶⁴ Section 15(b) of the Arbitration Act, 19 of 2000.

⁶⁵ Khalid Mohammed v. The Attorney General (1982) ZR 49.

precluded from considering it. The resolution of the issue will depend on the weight the court will attach to the evidence of unpleaded issues.’⁶⁶ The implication is that a party who has not pleaded his case well will depend on the lapses of the opposing side who may not object to the evidence. It is a perilous position for a party to depend on the weakness of the other party when he has an option of pleading his case well and move on into the hearing on the strong footing.

Having had the pleading closed and all the formalities attended to, the matter should be ready for hearing. However, despite the closure of the pleadings, even during the course of the hearing, any parties to the dispute still reserves the right to ask the tribunal for an interim injunction or other interim orders.⁶⁷ It is generally the practice in court that for matters of extreme urgency and the application being accompanied by the certificate of urgency, the court would grant an ex-parte order and endorse a return date for inter-parte hearing. This power seems not to be available to the tribunal as its exercise may have an undermining effect to the proceedings. It is aptly stated that, ‘issuance of the ex-parte order may contradict the underlying principles of arbitration notably, the principles of trust, of consensus and equal and fair treatment for both parties.’⁶⁸ The caution against ex-parte order is also anchored by the demand of the law⁶⁹ that equates the equal treatment of parties to that of giving them the same time to appear before the tribunal. This works well to discard any appearance of bias and thereby compromising the stand of the arbitrator in the eyes of one party.

There is equally doubt whether the arbitrator in the exercise of his authority can issue an interim measures which affect a third party’s interest, particularly that the party is not involved in the proceedings. The inability to direct an order on a third party who is not party to the proceeding emanates from the underlying principle that arbitration is by consent of parties. It follows that for a third party who did not consent to arbitrate, the arbitrator will not have any jurisdiction over that party. Though in straight forward matters, the interim

⁶⁶ Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General (2005) Z.R. 138.

⁶⁷ Ibid; S. 14(2) (a).

⁶⁸ J Lee ‘Court-Subsidiarity and Interim Measures in Commercial Arbitration: A Comparative study of UK, Singapore and Taiwan’ (2013) 6 *Contemp. Asia Arb. J.*230-1.

⁶⁹ Art 18(1) of the first schedule to the Arbitration Act No. 19 of 2000.

measures play an important role, it is however beleaguered by the limited scope it can be given particularly when a third party is involved.

When the matter would have been settled for the hearing of the substantive merit of the dispute, unless the parties agree otherwise, the matter can be heard through giving oral evidence and oral argument or indeed it can be conducted on the basis of documentary evidence.⁷⁰ Whatever mode is adopted, particularly the one for relying on the documents and other materials, a party cannot turn around and be heard that his right to be heard were breached because there was no oral evidence adduced. The court on commenting what it means to be heard had this to say:

The content of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right of a hearing simply because he had not adduced oral evidence.⁷¹

Another aspect which characterises the arbitral proceedings from the preliminary meeting is duty of confidentiality. Thus, unless agreed otherwise, the parties are prevented from publishing, disclosing or communicating any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.⁷² The provision seems to be directed at the parties to the proceedings.

However, the issue does not only end with the obligation to confidentiality restricting the parties from divulging the arbitral proceeding. The arbitrator or arbitrators, as the case may be, are prevented from disclosing to anyone who is not a party to the proceeding any information or document that formed party of the proceedings. The exception to the rule is when it is so disclosed with the consent of parties; order of court or as demanded by the law or the information discloses an actual or potential threat to human life or national security.⁷³ These exceptions to confidentiality would be satisfied if any one of the enumerated conditions is met.

⁷⁰ Art 24 of the first schedule to the Arbitration Act No. 19 of 2000.

⁷¹ *New Plast Industries v. Commissioner of Lands and another* (2001) Z.R. 51.

⁷² Section 27(1) of the Arbitration Act, 19 of 2000.

⁷³ Rule 7 of The Arbitration (Code of Conduct and Standards) Regulation, S.I No. 12) of 2007.

Though there seems to be a rigid list of exceptions, the English court⁷⁴ have extended the boundaries so as to relax the confidentiality rule by permitting the use of the materials from arbitration so as to prevent the courts from being misled where parallel court proceedings are conducted. It seems to suggest, therefore, that where it can be proved that the interest of justice would be achieved; the court would be willing to permit and derogate from the rule of confidentiality.

3.4 The termination of the arbitral process: award and its form.

The award, particularly the final one, is the capping of the arbitral proceedings. An award has thus been defined as, ‘the decision of an arbitral tribunal on the substance of a dispute and includes any interim interlocutory or partial award and on any procedural or substantive issue.’⁷⁵

The range of the definition of an award is quite exhaustive. Having touched on the other decision of arbitral tribunal i.e. procedural and interim measures, the focus here will be on the substantive or indeed the final decision which consequently terminates the whole proceedings.

On the rendering of an award, the law requires that an award should assume a particular form and content. It is a requirement that an award should be in writing and should be signed by the arbitrators. If there is more than one arbitrator, the majority would suffice provided the reasons are supplied for the omitted signatures.⁷⁶ The need to state the reasons as to why the other members’ signatures are missing is to instil confidence in the process. This prevents insinuation to the effect that other member of the tribunal has been side stepped because he had a contrary view, which view may support the losing candidate.

It is also the requirement that unless the parties opt out of it; an award should state the reason upon which it is based.⁷⁷ The supplying of the reason by an arbitrator is similar to that of judgment rendered by a judge. The Supreme Court, in explaining what constitutes a

⁷⁴ Emmott v. Michael Wilson & Partners Ltd (2009) 2 All ER 856.

⁷⁵ Section 2(1) of the Arbitration Act, 19 of 2000.

⁷⁶ Ibid; s 16(1).

⁷⁷ Ibid; subsec 2.

judgment, guided that, ‘every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.’⁷⁸

Thus, an award in which the parties have asked for the reason to be furnished should attend to the need of making findings of facts and the reasoning of the arbitrator on the facts should be apparent. The giving of the reason in an award by an arbitrator will reveal whether the tribunal is working within its terms of reference. It is important to ensure that a dispute which has been submitted for arbitration was still operative in the mind of the arbitrator when the decision was made. The going outside of the arbitration agreement would have the effect of either setting aside the award or indeed resist the recognition and enforcement.

The Court of Appeal, in Kenya, was called upon to pronounce itself on the effect of a circumstance where the arbitral tribunal came up with a “draw” award, by neither declaring a successful nor a losing party. This came to be by apportioning the land equally between the disputants without giving the reasons for such an award. The court reasoned that, “The basis of this award is unexplained and it is apparent on the face of it that the real issue in controversy between the respondent and the appellant was not adjudicated upon by the arbitrators.”⁷⁹ In vacating the said award, the court reasoned, ‘It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellant to have the application set aside.’⁸⁰

From the authority cited above, the reasons advanced in an award have the aid of arming a party with the desire to challenge the award. The desire to challenge the award may be motivated by the reason that the arbitrator went beyond his term or indeed that no dispute has been resolved and therefore opening the award to legal challenge. The short coming in the award can only be brought up with the requirement that an award be a reasoned one.

⁷⁸ In the case of *The Minister of Home Affairs, The Attorney General v. Lee Habasonda (Suing On His Own Behalf And On Behalf Of The Southern African Centre For The Constructive Resolution Of Disputes)* (2007) Z.R. 207.

⁷⁹ *Joseph Murage Miano and another v. Samuel Mwangi Miano and another Appeal No 26 of 1996.*

⁸⁰ *Ibid.*

Independent of the requirement of a reasoned award and other ground on which an award can be challenged, once an award is rendered pursuant to an arbitral agreement the same is final and binding on the parties and on any persons claiming through and under the parties to the proceedings.⁸¹ The award therefore has consequence both on the issues raised in the proceedings between the parties and on the arbitrator himself. The arbitrator, by rendering an award, becomes *functus officio* on the issues he has pronounced himself and the parties have no recourse for the issues determined by the arbitrator.

The consequence of an award as to the issue between the parties and on the jurisdiction of the arbitrator lies in the principle of *res judicata*. The court dealt with the issue of *res judicata* and held as follows:

In order that a defence of *res judicata* to succeed it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of *res judicata* must show either an actual merger, or that the same point had been actually decided between the same parties.⁸²

The rationale behind the principle of *res-judicata* is embedded in the interest of public policy that there should be finality to litigation. The Supreme Court expressed warm approval of this doctrine when it observed that:

English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed on the rights of citizens to open or to reopen disputes ... Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest

⁸¹ Section 20(1) of the Arbitration Act, 19 of 2000.

⁸² *Bank of Zambia v. Tembo and others* (2002) Z.R. 103.

solution compatible with human fallibility and having reached that solution it closes the book ... For a policy of closure to be compatible with justice.⁸³

In this regard any matter which has been determined by an arbitral tribunal cannot be subject to another arbitral tribunal or indeed to any other court for determination. On the part of an arbitrator, once an award has been rendered, the arbitrator becomes *functus officio* in that his office becomes paralysed and can only be resuscitated by the consent of the parties. This happens in the event that there is correction and or additional award which the arbitrator is called upon by the parties to render.

Despite the arbitral award being final, it is not immune from being set aside by the courts. The court would only be moved to set aside an award on proof that a party to an arbitration agreement was under some incapacity. Further that the said agreement is invalid under the law which the parties had subjected it or indeed the laws of Zambia. The court will also set aside if no proper notice as to the appointment of the arbitrator was given. When no sufficient notice of arbitral proceeding was given or a party was otherwise unable to present his case will render an award amenable to be set aside. When an award deals with a dispute un contemplated by or not falling within the terms of arbitration agreement or goes beyond the limits of the arbitration agreement, the court would set it aside. If the composition of the tribunal offends the agreement the award will also be set aside.⁸⁴ The above grounds will have to be advanced by a party seeking to set aside the award and the same should be done expeditiously.

The court will also set an award if the same is in conflict with the public policy. This would include when an award is tainted with fraud.⁸⁵ The grounds of public policy can be raised on the court's own motion. Thus, it does not need to be at the instance of the party to determine whether an award does violence to the principles of public policy.

Where a party desires to challenge an award, the application to set aside is not given without limitations. A party desiring to take such a step has to do so within a period of three

⁸³ *Muyawa Liuwa v. Attorney General* Appeal No. 213/2008 (Unreported). This Court cited with approval the English case of *Amphill Peerage Case* (1976) 2 All ER 411 at 417–418, (1977) AC 547 at 569.

⁸⁴ Section 17(2) (a) of the Arbitration Act, 19 of 2000.

⁸⁵ *Idid*; ss2 (b).

months.⁸⁶ The Supreme Court gave reasons why in arbitration the period is only three months within which an application to set aside an arbitral award can be made. The court opined that:

From the above case, it is clear that arbitration matters are to be dealt with and resolved quickly. We note that the issue that brought about the arbitration in the case before us is a commercial issue. We believe that arbitration is used in commercial matters to resolve matters speedily.

The parties in this case agreed to proceed through the arbitration so that the matter can be disposed of quickly. The application to set aside the arbitral award was made 2 years 5 months after additional award. We believe that allowing the application would seriously defeat the whole intention of parliament in coming up with the arbitration Act. The time prescribed by the Act for bringing an application is 3 months.⁸⁷

It is becoming clear that the decision of the arbitral tribunal which is final is well protected by the court. It has to fall outside the normal circumstances for the courts to intervene. It seems, by strictly adhering to the three months, the courts are shutting the doors of court to be patronised by the parties who chose arbitration as a forum to resolve their disputes.

Once an award has been accepted by the courts as being final and binding through the refusal of the court to set it aside, the task left in the hands of the successful party is the enforcement of the award.

3.5 Recognitions and enforcement of local and foreign awards.

Once an award has been rendered, the arbitrator's power would have expired by virtue of the task having been accomplished. The award can voluntarily be complied with by the losing party. In the absence of compliance by the losing party, an award can only be referred to as a "paper tiger" without the ability to offer any satisfaction to the successful party. To give value to an award which has not willingly been complied, another step ought to be taken by the successful party. The step involves the registering of the award.

⁸⁶ Ibid; S17(3)

⁸⁷ Paolo Marandola & others v. Gianpietro Malanese and others Appeal No. 130/2008

The rendering effectiveness of an award through the process of recognition and enforcement is so done irrespective of the country in which it was made.⁸⁸ It appears that the recognition of an arbitral award does not need to be registered provided that it exists. However, it is not enough to have it recognised but it is of vital importance to have it registered if it is to be effective in pursuing its satisfaction.

After the recognition of an award, an application in writing to the competent court shall render the award enforceable.⁸⁹ The issue of competent court is important. In the event that the issue involves a collective bargain matter, it will be incompetent to bring it under the High Court as collective bargain matters are the preserve of the Industrial Relations Court.⁹⁰ This also goes to the amounts which is too low as the Subordinate Court would have jurisdiction for such matter. The choice of a court where a party goes to register an award for enforcement is important as it goes to the root of whether such a court has jurisdiction. This brings to the fore where the court reasoned, as follows, with regard to the jurisdiction:

The term "jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognisance or to the area over which the jurisdiction extends, or both. Faced with a similar question of jurisdiction, two of their Lordships in *Codron v Macintyre and Shaw*, had this to say:

Tredgold, CJ, cautioned, at page 420.

"It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the latter of adjective or procedural law."

Briggs, F.J., said, at page 433:

⁸⁸ Section 18(1) (a) of the Arbitration Act, 19 of 2000.

⁸⁹ *Ibid.*

⁹⁰ Article 94 of the Constitution of Zambia confers the High Court unlimited and original jurisdiction. Although the High Court has the unlimited jurisdiction, it is not limitless as some matters have been carved out of its competence.

"Confusion may arise from two different meanings of the word "jurisdiction." On an application for mandamus in England the King's Bench division may, because of a certain fact proved say "There is no jurisdiction to grant mandamus in a case of this kind." That refers to an obstacle of substantive or procedural law which prevents the success of the application, but not to any limits on the general jurisdiction of the court to hear and determine the application."⁹¹

I think it is important to understand the various aspects of jurisdiction to which I have referred.⁹²

To this extent it has to be borne in mind that there is a difference between the right to relief and the procedure on how to approach the court to actualise the relief so sought. In making the said choice a party has to see to it whether this matter relates to industrial relations or indeed those matters which are generally under the jurisdiction of the High Court.

In the process of approaching the court, 'a party relying on the award or applying for its enforcement shall supply the duly authenticated original or a duly certified copy thereof.'⁹³ If, 'the award or arbitration agreement is not in the official language, the party shall supply a duly certified translation thereof into the official language.'⁹⁴ The necessary provision which stipulates the requirements to enable the execution of an award uses the word "shall". By its use, "shall" denotes that no discretion resides with the applicant when making the request. The Kenyan Court of Appeal in commenting on the filing of unauthenticated award resolved that, 'this is a statutory requirement couched in mandatory terms. Indeed the plaintiffs have not furnished a duly authenticated original arbitral award or a duly certified copy. Failure to comply with an express statutory provision cannot be cured....'⁹⁵

Since the Zambian Act is couched in the same manner, it follows that the breach of this section renders the application incompetently before court and it would earn a dismissal.

⁹¹ Codron v Macintyre and Shaw [1960] R.& N. 418.

⁹² Miyanda v. The Attorney General (1984) Z.R. 62.

⁹³ Section 18(2) (a) of the Arbitration Act, 19 of 2000.

⁹⁴ Ibid.

⁹⁵ David Chabeda and Truphena Chabeda Vs. Francis Ingangi (2007)eKLR Civil Appeal No. 593.

In approaching the court for the purpose of applying for the registration of an award for its enforcement, an application has to be made ex-parte by way of originating summons to the registrar of court.⁹⁶ It appears that since the rule provides a specific process, it would be perilous to employ another mode of commencement. The court in guiding which mode a party should take in bringing a matter before court reasoned that, 'It is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute.'⁹⁷ It is important to note, therefore, that since the rule provides for an originating process in the form of an originating summons, it would involve the commencing of an action. This distinction is worth the emphasis in particular where matters were referred to arbitration by an order of the court. It would appear that where a matter was referred to arbitration by the court, a dissatisfied party would still go under the same cause number to set it aside. This would not be the case when enforcing the award as the rule specifically requires the commencement of another action using an originating summons. This emphasis is particularly apt in view of what the Supreme Court has warned regarding deploying grievances in various forums. This was so observed where the court stated that:

The jurisdiction of the High Court is unlimited, but not limitless, since the court must exercise its jurisdiction in accordance with the law.

Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.

The plaintiff was guilty of abuse of court process and forum shopping. The conduct of the plaintiff was condemned and disapproved of.

The courts disapprove of parties commencing procedures, proceedings and actions over the same subject.⁹⁸

⁹⁶ Rule 16(1) of The Arbitration (Court proceedings) Rules, S.I. No. 75.

⁹⁷ See Note No. 71 for citation of the case.

⁹⁸ Kelvin Han`gandu and Company v. Webby Mulubisha (2008) ZR 82 Volume 2.

It would therefore not be forum shopping where a matter was referred to arbitration by court and the successful party commences another action to enforce an award. This is so because the law prescribes a process to be followed and the said process involves the commencement of another action. However, the same does not hold when wanting to set aside an award as you have to utilise the same cause number which was used to refer the matter to arbitration. The court confirmed this position by stating that:

...when an action has been referred to arbitration, it may pend before the court while arbitral proceedings are commenced and continued leading to an award being made. If an award is made and the parties are satisfied with the outcome, the pended action in court can later be discontinued. Conversely, if a party is dissatisfied with the award on any of the grounds set out in section 17 of the Arbitration Act, he or she may resurrect the pending action.⁹⁹

It is safe to say that the action before court is only kept alive with the view to setting an award aside on the appropriate grounds. There is absolutely no intention to maintain the action for the purpose of enforcement.

The consequence of breach of the procedure for the enforcement of an award was expressed by the court in the following terms:

No application was filed in the High Court in the course of arbitral proceedings. It follows that the arbitral award should have been filed as an independent cause with its own serial number in the civil register. The award cannot competently be filed in the original suit. The award has not in any case been filed in accordance with the rules.¹⁰⁰

It is therefore mandatory, in the matters involving arbitration, to comply with the need to file an independent action despite the caution by the court not to deploy actions in different forums against the same party.

⁹⁹Kenneth Van Der Westherzen v. Rota Rabels Limited Ying Duan Li Ling 2010/HP/387.

¹⁰⁰Iris Properties Limited and another v. Nairobi City Council Civil case No. 947 of 1997.

However, it must be noted that if the parties to arbitration proceedings still have issue arising out of the arbitral agreement or indeed out of the award rendered and which issue require the attention of the arbitrator, the said award cannot be registered. The court in holding this view reminded that, ‘the parties having agreed that the arbitrator had not completely resolved their dispute, it cannot be said that the award was complete. If an award is not complete, it cannot be registered.’¹⁰¹ The issues which an arbitrator may need to attend before an award is registered are not categorised. It suggested that the issue as trivial as proper description of parties would render ineffective any attempt to register an award until the arbitrator has attended to it.

Within the context of recognition and enforcement, there resides the idea of challenging an award. Firstly, it occurs when a dissatisfied party, in preventing enforcement, approaches the court.¹⁰² This can basically be described as a proactive step by mounting a challenge on the award before the successful party launches an application to enforce it. Thus, a successful party can launch his application to enforce the award in the face of an application to have it set aside. However, good order would demand that the enforcement application would be adjourned pending the resolution of an application to set aside. Once the application to set the award has been dismissed, it would give way to the registration of an award.

Secondly, a step which can be implemented by a losing party is what can be referred to as the reactionary response. The law thus provides, ‘grounds on which recognition or enforcement can be resisted at the request of the party against whom it is invoked.’¹⁰³ It is reactionary in nature because the losing party instead of applying to set aside an award, he will wait until the successful party launches an application to register an award for enforcement. To this end, a losing party will be reacting to the steps taken by the successful party to bring about the fruit of the award through registration.

Whatever step a losing party may adopt, be it that of being pro-active or reactive, the end result is to defeat the effectiveness of an award. The shared consequences of either applying to set aside an award or resisting an enforcement of award can be seen in the grounds for

¹⁰¹ Mobil Oil (Z) Ltd v. Malawi Petroleum Control Commission (2004) ZR 227.

¹⁰² See note 86 to 88.

¹⁰³ The ground to resist enforcement is provided under section 19 of the Arbitration Act No 19 of 2000 which ground are the same for setting aside award as found under section 17 of the same Act.

taking the said measures. The grounds for setting aside an award are the same as those for resisting enforcement. The two procedures are not mutually exclusive. The court in discussing the two principles of setting aside an award on one hand and resisting enforcement on the other hand guided that, ‘consequently in an international arbitration a party which objected to the jurisdiction in the court of the arbitral seat, and it could resist enforcement in the court before which the award was brought for recognition and enforcement. Those options were not mutually exclusive....’¹⁰⁴

It is made clear that when the court finds that the award would offend public policy then it would not be recognised or enforced. The court had this to say on the approach that a court must take when faced with a public policy consideration. The court reasoned that:

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur* action. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a Plaintiff.”¹⁰⁵

It is therefore important from the perspective of the above position of the law that the applicant or indeed the respondent need to be informed of the other provisions of the law which may impact on the enforcement of an award. The legal provisions may be away from the main arbitration Act. One such act is the Authentication of Documents Act, which citing only the relevant parts provides as follows:

¹⁰⁴ *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* (2011)1 All ER 383.

¹⁰⁵ *Holman v. Johnson* [1775] 1 Cowp.341 (cited in *Moor Stephens (a firm) v. Stone Rolls Ltd* [2009] UKHL, 39).

Any documents executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-

- (a) In the case of a document executed in Great Britain or Ireland it be duly authenticated by a Notary Public under his signature and seal of office:
- (b) ...
- (c) ...
- (d) In the case of a document executed in any place outside their Britannic Majesty`s dominions (hereinafter referred to as a “foreign place”) it be duly authenticated by the signature and seal of office-
 - (i) Of a British Consul General, Consul of or Vice- Consul of such foreign place in Zambia to be duly authorised under labour of the foreign place to authenticate such document.”¹⁰⁶

In interpreting the above provisions, the Supreme Court resolved that:

It is quite clear from section 3 that if a document executed outside Zambia is authenticated as provided, then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated then the converse is true that it is deemed not valid and cannot be used in this country... we would therefore agree... that if a document is not authenticated it cannot be used in this country for any purpose at all... it follows that a document needing authentication cannot be authenticated ex-post facto.¹⁰⁷

It therefore brings to the fore that when applying, particularly for foreign awards and arbitration agreements which were concluded outside Zambia, the party ought not only to look at the arbitration law but other statutes which might impact on the proceedings. In this instance, where the award is not authenticated, it would amount to transgression of a positive law in the form of Authentication of Documents Act and thereby caught by disqualification imposed by the public policy requirements.

¹⁰⁶ Section 3 (d) of the Authentication of Documents Act, Chapter 75 of the Laws of Zambia.

¹⁰⁷ *Lumus Agricultural Services Company Limited v. Gwembe Valley Development Company Limited (in Receivership)* (1999) ZR 1.

Having looked at the methods of challenging or resisting the enforcement of an award, there are however immediate consequences which are triggered by virtue of a dissatisfied party making an application to set aside. We discuss the consequences below.

3.6 Implications of making an application to set aside an award.

There is no doubt that any person or indeed a company has the right to access the court at any time. This happens even when the application is devoid of merit. It remains within the competence of the court in matters brought before it to either dismiss it or be sympathetic to the applicant's submission and uphold the reliefs sought. For both meritorious and ill fated matters the door of courts remain ajar for everyone.

When a matter is commenced in court and a judgment is rendered, a stay is neither a right nor is it automatically given. It has to be applied for and it remains in the discretion of the court whether to grant it, or, refuse or give a conditional stay. In the exercise of the said discretion the court would have to review the prospects of success. The court outlined parameters within which an application for a stay of execution must be evaluated by reasoning that, "in exercising its discretion whether to grant a stay or not, the court is entitled to preview the prospects of the proposed appeal."¹⁰⁸ It would eventually follow that if there are no prospects of success an application for a stay would not succeed.

The preview of success during the application for stay of execution in matters of arbitration proceedings should be apparent. This should be so because the arbitral process is designed to resolve the matter quickly and with finality accompanied with no right of appeal. The need to review the judgment so as to see whether it has merit is done to avoid prejudice that may visit a successful party.

The Supreme Court had an opportunity to comment in respect of a stay of execution emanating from arbitral proceeding. The court went on to also guide on the effect of a stay. It was thus put as follows:

¹⁰⁸ Sonny Paul Mulenga & Vismer Mulenga (Both Personally & Practising As SP Mulenga International) and Chainama Hotels Limited and Elephants Head Hotel Limited v. Investrust Merchant Bank Limited. (1999) ZR 101.

We have considered the submissions in ground three that the stay of execution will not prejudice the respondent, as judgment can still be levied after the full court has disposed off the substantive appeal. The argument in ground three flies in the teeth of our decision in *Sonny Paul Mulenga et al V Investrust Merchant Bank Limited supra*, where we reiterated the necessity of a successful party in litigation to enjoy the fruits of the Judgment. To say there is no prejudice when the successful party holds on to an unexecuted judgment, is a statement made without conviction. The third ground lacks merit.¹⁰⁹

It becomes patently clear that to hold on to a judgment which has not been inflicted on a losing party is a serious prejudice. This is due the fact that a successful party remains in lurches even to a position before the judgment was obtained.

The situation in arbitration should make it difficult to obtain a stay in the sense that an award delivered by a competent tribunal is a final decision. The final nature of award lies on the same footing as the judgment of the Supreme Court which cannot be stayed. The non availability of staying of the Supreme Court judgment was pronounced in the following terms, ‘as we see it, the question is not whether or not the High Court has jurisdiction to order a stay of execution of this court’s decision but whether or not there can be a stay of execution of a final judgment. Judgments of this court are final and there can be no stay of execution of a final judgment.’¹¹⁰

It would be right to contend that the arbitral awards by virtue of being final should not be subject of stay. Where a stay is sought it must be subject to stringent qualifications and not on casual grounds.

The stringent measure in application for a stay of execution would be motivated by the fact that arbitration is fronted as a mechanism for quick disposal of cases to facilitate the normal commerce of the participants. Analogous to the arbitration philosophy for need to quickly

¹⁰⁹ John Kunda (Suing as Country Director of and on behalf of the Adventist Development Relief Agency (ADRA) v. Karen Motors (Z) Limited SCZ/8/91/2011.

¹¹⁰ Trinity Engineering (PVT) Limited v. Zambia Commercial Bank Limited (1995-1997) ZR 166.

dispose of matters is found in the commercial rules whose purpose the Supreme Court expounded as follows:

The Commercial List, where the action was commenced, and Order 53 of the High Court Rules (1) which was introduced to regulate procedure in the Commercial List are not without history. The introduction of the Commercial List was a reaction to the business community's complaints that cases of commercial nature were taking too long to dispose of so that by the time judgment was rendered the parties had suffered economic ruin. The Judiciary's response was to introduce the Commercial List as a fast track. Of course, the Commercial List would have meant nothing if the dilatory procedures in the General List were made applicable to the Commercial List also. Hence, the introduction of Order 53 (1) to specifically deal with commercial cases. The sanctions in Order 53 (1) are meant to make parties move with all the speed required to dispose of the case as quickly as possible.

The Rules in Order 53 (1) are not peculiar to Zambia. In other jurisdictions, particularly in England and Wales where we adopted these Rules, the Rules are enforced with full vigour and breach of these Rules can have serious consequences. We will hate to have a situation where lax application of the Rules in the Commercial List will result in the Commercial List itself being just like the General List with a different name.

In the circumstances, the arguments that the rules will work injustice do not find favour with us. In fact, it is not in the interest of justice that parties by their shortcomings should delay the quick disposal of cases and cause prejudice and inconvenience to the other parties. Those who come to the Commercial List must strictly abide by the rules in that List. Everything has a price. Those who want their cases quickly disposed of must strictly abide by the rules of the Commercial List. Parties and advocates litigating in the Commercial List must take heed of this warning.¹¹¹

¹¹¹ Jamas Milling Company v. Imex International (PTY) Ltd (2002) Z.R. 79.

Indeed, the same purpose is given to arbitration so as to quickly dispose of and preserve the parties who would otherwise have suffered economic run if any delay was occasioned to the execution. This approach inclines to the non issuance of orders for stay.

Despite the philosophy behind arbitration i.e. that of finality and quick disposal of the matter, a stay of execution does not need to be applied for by a party who has launched an application to set aside an award. A stay of execution is, strangely, automatic by virtue of just applying to set aside an award. This is no matter how frivolous the application may be. The law as we find it provides as follows, 'If an application is made to set aside the registration of the award, execution shall not issue until the application has been disposed of.'¹¹²In considering this rule, the court directed that, 'It is clear from the foregoing rule that the stay is an automatic stay derived from the rules and not issued by either the arbitrator or the court.'¹¹³

It therefore follows that the complimentary role of the court in the process of arbitration is absent when it comes to the issue concerning applications for stay of execution. The rule triggers stay of execution without the involvement of the arbitral tribunal or the court. Its implication is that there is no preview of the prospect of success of the application for settling aside an award. The preview of the application as a pre condition for the granting of a stay of execution is not taken into consideration. Consequently, no matter how bereft of merit the application to set aside an award may be, a stay is obtained as a matter of right. This occasion delay in realising the fruit of an award and the successful party is left without a remedy. It also follows that for a vanquished defendant who desires time to dissipate the assets will resort to application to set aside as a way of getting time.

It would further appear that no execution would occur if the High Court refuses an application to set aside and the other party appeals to the Supreme Court. This is so because the successful lodging of an appeal entails that the application to set aside is still active.

The backlog in the court system only severs to aid a party who is in need of time. By the time the application is heard through the court hierarchy, a successful party would eventually

¹¹²Rule 20(2) of the Arbitration (Court Proceedings) Rules S.I No. 75 of 2001.

¹¹³ Cash Crusaders Franchising (PTY) Limited v. Shakers and Movers Zambia Limited (2008/HP/ARB 0001 (unreported)).

be economically ruined. Consequently the entire philosophy of arbitration being a quick way of resolving disputes would have totally been vandalised.

Section Four.

4.0 THE WHITTILING AWAY OF ARBITRATION AS A MEANS OF DISPUTE RESOLUTION IN ZAMBIA.

4.1 Introduction.

Arbitration has indeed become of age. It is not unusual to find most contracts of commerce and indeed even other contracts of different scope choosing arbitration as a mode of dispute settlement. It is acknowledged that the success of arbitration is and cannot be reflected by a few numbers of cases involving arbitration which find their way to court. Instead, the few cases emanating from arbitration which go to court would be considered that most of the arbitral awards don't see their day in court. This is because they are complied with before they reach the courts.

4.2 Going into the future: the arbitration experience.

The experience and success of arbitration can only be anchored on the view of users of the arbitral process. To this extent, the outlook of arbitration into the future would be responding to a question of how the users are looking at the process. It would also be elucidating what inclines the users to continue having faith in the process. Below, we consider the aspect of arbitration that puts it in a favourable position as a dispute resolution mechanism.

One reason which renders arbitration an important tool of dispute resolution, even for the future, is the aspect of party autonomy. Thus, 'party autonomy is a paramount feature under the arbitration regime.'¹¹⁴ Party autonomy is the bedrock of the arbitration process. It has further been argued that, 'party autonomy extends to procedural matters. Thus the procedure adopted in individual arbitration reference can be tailor made to suit the dispute's specific features.'¹¹⁵ This principle of party autonomy arms the parties with the power of self governance in the entire proceedings of arbitration. Within the power of self governance in arbitration, the procedure of arbitral proceedings are not cast in stone. Parties formulate the procedure to suit the ends of their matter. This way, the dispute is resolved in the most efficient manner. The party formulated procedures improve the level of compliance by the

¹¹⁴ Martin Misheck Simpemba and Rose Domingo Kakompe v. Nonde Mukomba and Zambia Industrial Mineral Limited (2010) ZR 92 Vol. 1.

¹¹⁵C Esplugues and S Barona *Global Perspectives on ADR* 1ed (2014) 125. This principle of party autonomy is embedded under Article 19 (1) of the First Schedule of Arbitration Act which provides that, "Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."

parties. It also facilitates the matters to be determined on their substance and merit without being defeated by procedural technicality. Mostly, and in the interest of equal treatment of parties, the arbitrators are not swift in dismissing a party's claim on a technicality. This, of course, is not the position with litigation where the default in procedure would earn a dismissal of the case. The Supreme Court in showing the strictness of procedure in litigation directed and observed that:

The rules of court must prima facie be obeyed and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation.¹¹⁶

The above warning and the strictness with which the rules of court need to be adhered to was emphasised by the court when it observed that, "rules of the court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed."¹¹⁷ Of course what is being suggested is not that the arbitration rules can impertinently be disregarded without any repercussions visiting a nonchalant party. What is being advanced is that the ability to formulate the procedures makes the parties to design rules which fit their circumstances without having pre-set rules being imposed on them. Thus, the arbitral procedure prescribed by the parties is more suited and tilted towards the end of justice and not using the rules as a weapon of discipline to the parties.

Tied to the flexibility with which the parties would formulate their rules is an extension of latitude the arbitrator has in the proceedings. The arbitrator has the leeway, during the hearing of the matter, to use common sense when evaluating the evidence. The technical rules of evidence evaluation which accompany the court system are mainly not permitted to permeate the arbitral proceedings.

The arbitral process and the choice of the parties to determine the course the matter should go helps the parties to cooperate even during the proceedings. The corporation which is

¹¹⁶ D E Nkhuwa v. Lusaka Tyre Services Limited (1977) ZR 43.

¹¹⁷ NFC Africa Mining PLC. v. Techro Zambia Limited (2009) ZR 239

exhibited by the parties usually becomes the hallmark of arbitrations and this helps to preserve the relationship of parties. Litigation, unlike arbitral proceedings, can be described as having the tendencies of destroying the goodwill between the parties. The good will of the parties, at the risk of being destroyed, is what business community normally use as lubricant for their commerce. Thus:

Arbitration serves to lessen the danger of animosity between parties to a dispute. This is its greatest advantage. Lawsuits ordinarily cause considerable ill feeling between the parties concerned. That feeling is usually not lessened by the outcome, especially on the part of the defeated side, but a case tried and decided by arbitrators who exercise some tact in their conduct of the matter often may leave the parties friends instead of enemies.¹¹⁸

The ill feeling generated in litigation can be understood in that from the inception of the matter, the position adopted by the parties is that of adversarial nature. The matter is not helped by a judge whose focus is only the facts and the law. For the arbitrator, with the flexibility which he has, would determine the outcome with an eye on the continued relationship of the parties. The advantage of arbitration in contrast with litigation in as far as maintaining the relationship is concerned has aptly been stated as follows:

It is trite to say that a lawsuit is a battle, often more a campaign than a single engagement, degenerating into the situation where the parties seek to do each other the greatest possible injury regardless of individual benefit. Not so with arbitration. Where there is a submission made after the dispute arises the parties have voluntarily adopted the new type of judicial procedure, for arbitration deserves to be so understood. They seek a speedy and just determination with minds prepared to accept the decision and to conform to it. And when arbitration follows as the result of an agreement made before a controversy has developed there is even less opportunity for hard feelings to arise.¹¹⁹

The above understanding between the parties is enhanced where a particular sector i.e. construction sector, would have matured its customs of trade to a level where whenever they

¹¹⁸ PJ Thompson 'Advantages of Arbitration' (1933) 26 Law. & Banker & Cent. L.J. 300.

¹¹⁹ 'American Judicature Society' (1925-1926) 9 J. Am. Jud. Soc. 73.

have a dispute they know that their next avenue, failing negotiation, is arbitration. It is therefore discernible that the use of arbitration affords disputants an opportunity to look forward to a continued business. Hence the ill feeling between the parties usually diminishes. Further, in the process of arbitration a compromise may even emerge while the parties are preparing for a hearing. Additionally, the non adherence to technical rules by the arbitrator enables him to render an even handed award. This diminishes the ill feeling of the losing as every party's side would have adequately been resolved without it being short circuited by a procedural technicality. The arbitrator usually achieves this by successively taking into account the fact that each party could have acted unsatisfactorily in the business undertakings.

The power of the parties to choose an arbitrator is also one of the critical advantages of arbitration. The concept of party independence in choosing the arbitrator holds out even to the moments when an arbitrator is chosen by the institution. This is so because the parties would have participated in the choice of the appointing institution. When the institution is exercising its mandate to appoint the arbitrator, the institution would look to the arbitration agreement and also what the nature of the matter is.¹²⁰

The exercise of party autonomy in respect of the choosing of the arbitrator feeds into choosing an arbitrator who has the competence and expertise to understand the matter under consideration. The advantage of having the choice of nominating arbitrators has been stated as follows:

Business has always been technical and more or less a law to itself. When disputes involving business custom and they are numerous-get into court before a jury, the necessity exists not merely of proving the case, but of educating the jury to the point of understanding the relevancy of the facts. By expert witnesses under rules of evidence this education is accomplished in a most tedious and awkward manner.

¹²⁰ S. 12 (6) of the Arbitration Act No. 19 of 2000 provides that, 'The ... arbitral institution, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than any of the nationalities of the parties.'

Ordinarily a majority of the jury are actually disqualified in mentality or experience to grasp the situation. A verdict is notoriously suggestive of gambling.¹²¹

The elucidation above explains fully the natural consequence and advantage of an arbitrator who particularly understands the matter. The arbitrator who understands the matter will not only render a quality award but also the speedy delivery of the award. The speedy dispatch of an award is what makes arbitration attractive from its inception even into the future. Also, the fact that arbitrators can be appointed from any professional and not necessary lawyers¹²² ensures the bringing, to the matter, of arbitrators and indeed party representatives who understand the technical details of the matter. Accordingly, this helps to speed up the process. Further, the arguments deployed by the expert representatives also enhance the quality of an award.

The above advantage can be contrasted to litigation. The choice of adjudicator is absent in litigation. A matter is just allocated to a particular judge without considering whether the judge has the expertise to handle the matter. Thus, the parties appearing before a judge who is not conversant with an area of the subject matter will exert pressure on the parties not only to discharge their legal burden in the matter but also to educate the judge. This usually proves not only to be time consuming but also affects the quality of the decision. The court's decision which has no knowledge of the customs of a particular industry cannot compete for accuracy with the decision of an expert arbitrator with adequate schooling in a particular trade, custom or indeed a particular industry.

The arbitrator has the advantage of managing his diary and also he can moderate the number of cases that he has. By virtue of him having to manage his diary and also moderating the number of cases he has at a particular time, it puts the arbitrator in a position to devote enough time on the matters before him. Consequently, the arbitrator concludes the matters early. Additionally, arbitration can, 'take place at a venue and time convenient for the parties and their advisors.'¹²³ This affords the arbitrator the flexibility in handling the matters. The ability to sit at anytime and anywhere has the advantage of increasing the opportunities of having the matter move quickly and also makes arbitration to be convenient.

¹²¹ American Judicature Society' op cit (no 118) 75.

¹²² This is the position as provided under section 12 of the Arbitration Act. See note 39.

¹²³ Butler and Finsen Op Cit (no. 57) 20.

The above stated advantage with regard to the arbitrator can be contrasted against a judge presiding over matters in litigation. Unlike what obtains in arbitration, the court system has a particular time within which to sit and hear the matter. The trial in the High Court will normally take place at a particular place and on a date allocated by the court. The judge has no control of the numbers of cases that are allocated to him and as such this affects how quickly the matters are disposed.

The other strand which makes arbitration competitive and advantageous is that the parties in exercising their rights and autonomy to choose an arbitrator would usually have professional and ethical credentials of an arbitrator they seek to engage. The said credentials reduce the potential of an arbitrator being biased towards or against one party. This process of choosing an arbitrator who is ethically acceptable to the parties gives confidence to the whole process. The screening by the parties of an arbitrator diminishes the chances of having a biased professional, enhances the quality of an award and also eliminates the chance of challenging an award.

Despite the above position obtaining in arbitration proceedings, parties in litigation have no say to which judge the matters goes. The allocation of a matter to any judge mostly without vetting whether the judge is potentially biased is what characterises litigation. An appearance of bias by a judge, who was just given to the parties, obviously without the parties input, was manifest in a matter before the High Court which prompted the Supreme Court to unsympathetically declare that:

We wish to state that a judge plays the role of an unbiased adjudicator who listens to both parties present their case before him. Even in an *ex parte* application like in this case, the role of the judge does not extend to him or her producing evidence from the bench. It is not the role of the judge or court to begin to look for evidence and rely on it. In the present case, it is not clear where the learned trial judge obtained the tender document from because the application was made *ex parte*. Proceeding in the manner in which the learned trial judge did breed suspicion on how the judge found the document that he relied on. It also breeds suspicion that the learned trial judge is biased or may have had an interest in the matter. We therefore agree with the

submission by the appellant that the judge erred by taking into account evidence which he found from an unknown source and relied on it.¹²⁴

The above observation by the Supreme Court makes it clear that since the judges are not examined and subsequently chosen by the parties, the incidences of bias are more common than in arbitration. This is so because the parties in arbitration would put the arbitrator under the professional and ethical examination.

The principle of neutrality is yet another advantage of arbitration. The principles of neutrality and equality also become prominent when parties to arbitration are from different jurisdictions. The parties have the choice to, 'appoint an arbitrator from another country... and in so doing the parties may be more confident that there will be equality of treatment.'¹²⁵ The choice of having to appoint an arbitrator who is not nationally connected with any party to arbitration gives both parties an equal footing of neutrality. This eliminates the dangers of an arbitrator siding with a party with whom he shares the same origin.

Choosing of judges to handle the matter does not happen in the national courts. It is not permissible to have a judge from another territory to preside over a case in another jurisdiction. The parties in litigation are subjected to the judges of the national courts without any consideration with the nationality of the parties in relation to the judge. This leaves a party who does not share the same nationality with the judge feeling a sense of possibility that the court would act in favour of its nationals. This sense of impartiality by the national courts against the foreigners becomes acute when a foreign national is the losing party.

Another trait which makes the arbitration process a considerable option is that of privacy and confidentiality. Mostly, this feature is more important where the dispute involves trade secret. The law with regard to confidentiality, 'provides that an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.'¹²⁶

¹²⁴ C K Scientific Group Zambia Limited v. Zambia Wildlife Authority SCZ Judgment No. 5 of 2011.

¹²⁵ DJ Sutton, J Gill and M Gearing Russell on Arbitration 23ed (2009) 12

¹²⁶ S. 27(1) of Arbitration Act No. 19 of 2000.

The principle of confidentiality is anchored on the proposition of exclusion. Non parties to the arbitration are excluded from attending the proceedings and even accessing documents in the arbitration. The exclusion of non parties to participate in arbitration was appropriately expressed when the court observed that:

The concept of private arbitration derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration and that neither the tribunal nor any of the parties can insist that the dispute shall be heard or determined concurrently with or even in consonance with another dispute, however convenient that course may be to the parties seeking it and however closely associated with each other the disputes in question may be.¹²⁷

The above observation makes it very clear that no matter how closely connected the matters may be, they cannot be heard together with another dispute. This is so because if the hearing was to be made concurrently or in consonance with another matter, the rules of confidentiality would be breached. This happens since one party in a different matter would be exposed to the information in another matter. The disclosure of information to a non-party is the mischief the rule of confidentiality would want to remedy.

This principle of confidentiality in arbitration is intended to hedge against the publicity of the dispute. The publicity could have a very damaging impact on the reputation of the parties engaged in the dispute. The damage to the parties flowing from publicity is that there would be a barrage of similar suits anchored on the one which has been decided. Further, the damage extends to the creation of perception by other business and potential partners of considering the party involved as being litigious. This would result in avoiding the said party.

The fact of confidentiality does not characterise litigation. In fact, litigation is normally conducted in open court with the press having access. It is a requirement of law to conduct litigation in open court. This was clearly expressed by the Supreme Court in the following terms:

¹²⁷ The Eastern Saga (1984) 2 Lloyds Report 373 at 379.

You cannot try contentious matters, such as declaration and damages, pleaded in a statement of claim, in chambers.... Rules of procedure state that a contentious matter, pleaded in a statement of claim and supported by viva voce evidence, such as this, is an open court matter. And it should have been dealt with as such.¹²⁸

The above principle makes it patently clear that the holding of the matter in open court is a norm rather than an exception. The rule of confidentiality generally does not apply. Parties and issues once in court become available for public consumption. This extends to having the matters publicised to the detriment of the parties who would have wished that the matter be private.

While under our national courts, a dissatisfied party has a right to appeal to a higher court, this is not so with arbitration. The arbitral award is final¹²⁹ and cannot be subjected to an appeal on the merit. This is a very cardinal part of arbitration. This feature of an award being final renders the determination of disputes between parties. It affords the successful party to enjoy the fruit of his judgment. The finality affords expeditious and efficient implementation of the arbitral decision. The handing down of an award presents an opportunity to the parties to re-order their ventures without being in a speculative mode of not knowing when the matter would effectively end.

The process of litigation on the other hand runs the full course of appeal process both on the merit of the matter and otherwise. The party's decision to appeal is more of a right. The process of appeal takes time. Because of the time it takes, parties are left in a speculative mode as to their respective positions in relation to the matter. This makes it difficult for the affected parties to order their activities.

Once an award has been handed down, the subsequent step is the execution of an award through the process of enforcement. The enforcement of an arbitral award is more effective

¹²⁸ Aristogerasmos Vangelatos and Vasiliko Vangelatos v. Metro Investment Limited, King Quality Meat Products Limited, Demetre Vangelatos and Maria Likiardo Poilou (Covert Baron) SCZ Ruling No 21 of 2013.

¹²⁹ See Note 81. It must be differentiated that an application to set aside an award is not an appeal and as such an award cannot be attached for misapprehension of the law by an arbitrator.

than that of a court judgment. An award can be enforced in many jurisdictions outside the territory it was rendered. Thus, ‘an award also differs from the judgment of a court, since the international treaties that govern the enforcement of an arbitral award (such as the New York Convention)¹³⁰ have much greater acceptance internationally than the treaties for the reciprocal enforcement of judgments.’¹³¹ The difficulties which accompany the foreign judgement, which is not so the case with an award is found in the judgment of Hamaundu J where he recounts to the effect, ‘that a judgment creditor wishing to enforce a foreign common law will have to commence an action founded on that judgment as a cause of action.’¹³²

An award by virtue of the international treaties which uphold it is insulated from the drawbacks which the court judgment suffers. An award will be enforced without the hustles of having to commence another action.

From the attributes discussed above, it becomes patently clear that arbitration has reminded the avenue of dispute settlement. It caters not only the resolutions of the matters before the arbitral tribunal but also provides parties with a bright outlook in terms of their relations beyond the dispute. Though other advantages such as low cost have been associated with arbitration, the same remain extremely qualified whether the argument is still sustainable. Despite this small blot on this dispute resolution mechanism, its relevance has become too entrenched to think of abandoning it but avenues remain to make it better.

4.3 Going into the future background: The whittling away of arbitration.

There is no doubt that arbitration has achieved a great deal of approval by the end users from of 1933 when the first Act was promulgated. The monumental achievements of the arbitral process were mostly attained after the enactment of the current Arbitration Act. However,

¹³⁰ By virtue of Section 33 of the Arbitration Act No 19 of 2000, the third schedule of the Act applies to Zambia. The third schedule is the New York Convention. Therefore the New York Convention has not only been ratified by Zambia but has also been extended by the statute.

¹³¹ A Redfern, M Hunter, N Blackaby and C Partasides *Law and Practice of International Commercial Arbitration* 4ed (2004) 27.

¹³² Attorney General v. Dr Fredrick Titus Chiluba, Xavier F. Chungu, Attan Shansonga, Stella Mumba Chibanda, Aaron Chungu, Faustin Mwenya Kabwe, Irene Kabwe and Francis Kaundu (2010) ZR 287 Vol. 1.

despite the accolades attributed to arbitration as a process, weaknesses which reduce the effectiveness of the process still exist. These weaknesses which beset the effectiveness of arbitration in Zambia do not emanate from outside the Arbitration Act. They instead reside within the provisions of the Act itself. The weaknesses can safely be described as the self undermining provisions of the Act which whittle away the advantages of arbitration. These provisions which are self undermining to the process of arbitration are perceived as being harmful to the reputation of the arbitral process. The concern for these drawbacks to the achievement of the arbitration process has been put as follows:

Recent commentaries have lamented that arbitration is losing its reputation as the quick and informal alternative to court proceedings. Although initially conceived as an attractive means of dispute resolution because of its flexibility and potential to save time and costs for all parties concerned, preconceived notions of what constitutes a fair dispute resolution process may have inevitably resulted in protracted and lengthy proceedings. Where urgent and interim relief was required, there were also limitations on the arbitral process which meant that court proceedings remained more effective and desirable.¹³³

The lamentations from the above quotation significantly show that arbitration has lost its campus from what it was intended to be. In addition, the process does not any more sit well with the expectations of the user in that courts have become more attractive than the process which was intended to be an alternative to litigation.

In discussing the whittling away of arbitration process, it's important from the onset to emphasise that we will discuss the intrinsic problems within the Arbitration Act and other interpretation difficulties placed by the courts. In doing so, the starting point would be the consideration of an arbitration agreement which is the trigger to the whole arbitral process. The interpretation of an arbitration agreement has been a subject of equal tension between the courts and arbitral tribunals. The arbitration agreement determines, among others, the jurisdiction of the arbitrators.

¹³³ CL Sun S. C. and T Weiyi 'Making Arbitration Effective: Expedited Procedures, Emergency Arbitrators and Interim Relief' (2013) 6 Contemp. Asia Arb. J. 349 .

The authority to determine the jurisdiction of the arbitral tribunal resides with the tribunal itself under the principle of competence- competence.¹³⁴ However the court has wrestled the said authority away from the arbitral tribunal.¹³⁵ This definitely does not enhance the spirit of arbitration as it contradicts the principle of party autonomy and blatantly disregards the clear provision of the Act. By the courts assuming the role of determining whether the arbitral tribunal would have the jurisdiction over the matter totally paralyses the entire swift and quick disposal of matters as envisaged under the arbitral process. This is so because the matters would have to join the court system laden with a heavy backlog just to determine the question of jurisdiction. With the said backlog, the matter will remain unresolved for a long time and by the time it is determined, the aggrieved party would have suffered immense economic ruin.

Further, on the point of the arbitration agreement, the Act stipulates a particular form which an arbitration agreement must take. The requirement of form is that the arbitration agreement must be in writing.¹³⁶ This provision of the Act prejudices the whole process of arbitration particularly when the tribunal will have to look to as to who are the parties to the arbitration contract. The parties to the written agreement will remain the legible parties to arbitrate under the said arbitral agreement. This possesses difficulties in having the interrelated matter arising from the same contract from being arbitrated. Thus, a third party who is affected by a contract between two parties cannot be invited into the arbitration a proceeding because he is not a party to the written agreement to arbitrate. This difficulty is acutely experienced mainly due to the demands of the Act that the arbitration agreement should take a particular form and not to look whether there was tacit agreement or not.

The difficulties brought about by the requirement of writing form extends to the fact that even when there are two contracts which are so intertwined, there cannot even be consolidation of the said matters and thereby leading to having two parallel arbitration proceedings. With the two tribunals having to hear two intertwined matters, the danger of

¹³⁴ See note 16.

¹³⁵ See Note 17 where the court determined the effectiveness of the arbitration Agreement.

¹³⁶ See note 4 which has dealt with the form of the arbitration agreement.

coming up with conflicting decision is real. The coming up of conflicting decisions on the same matter would bring the administration of justice into disrepute.¹³⁷

Additionally, the consequence of the form requirement of an arbitration agreement, where you want to involve a party who is relevant to the matter but not a party to the arbitration agreement, led the Supreme Court to opine that, ‘the fact that the 1st respondent is not party to the arbitration agreement and therefore not bound by its terms or the outcome also make the arbitration inoperative in this matter.’¹³⁸ The effect is that despite there being a valid arbitration agreement the fact that the matter needs the involvement of a party who is not party to the arbitration agreement nullifies the otherwise valid agreement. This means litigation is always the option whenever there is a relevant party who needs to be involved in the process but is not a party to the arbitration agreement.

The above circumstance is dissatisfying particularly that an oral contract in our jurisdiction is enforceable. This was stated by the Supreme Court where it was well thought that, ‘where a party demonstrates part performance in reliance on the oral agreement consistent with the contract alleged, the court will enforce the contract.’¹³⁹ It therefore effectively means that by the statute insisting that the arbitration agreement should take a particular form while on the other hand the courts are ready to enforce an oral agreement; it becomes clear that we are moving in the future backward. This position is abhorrent to the full realisation of arbitration as a dispute resolution mechanism. The rendering of the arbitration agreement as inoperative would have easily been avoided if there has not been intransigent insistency by the Act on the requirement that an arbitration agreement need to take a particular form which is a writing form.

When the form of arbitration agreement as currently demanded by the has been met and it is not subject to any challenge and a dispute has arisen, the next step by the parties would be the appointment of the arbitrator in accordance with what the arbitration agreement provides.

¹³⁷ In the case of *BP Zambia PLC v. Interland and Motors Limited* (2001) Z.R. 37 the Supreme Court in discussing the effect of having conflicting decisions observed that, ‘The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermined each other from two or more different judges over the same subject matter.’

¹³⁸ *Odys Oil Company Limited v. The Attorney General and Constantino James Papoutsis* (2012) ZR 164 Vol. 1.

¹³⁹ *Jonas Amon Banda v. Dickson Machiya Tembo* (2008) ZR 204 Vol. 1 (SC).

However, where the parties do not agree as to the mode of appointment or indeed where the parties don't agree on the arbitrator or in the circumstances where one party is just unwilling to effect the appointment of an arbitrator the next option available is to seek the intervention of the court to appoint an arbitrator.¹⁴⁰ The call on the court to appoint an arbitrator almost destroys all that the arbitration process stands for. By invoking the courts which are public in nature, it means that the dispute and its document would be accessible to the public which include the media. By exposing the dispute to the public, through an application for an appointment of an arbitrator, it breaches the rule of confidentiality. The breach of confidentiality is more pronounced in that there are no court rules to ring fence the matters which are coming to court for the Sole purpose of the appointment of an arbitrator. Thus, the publicity of the matter exposes the parties to the reputation risks which otherwise would have been avoided if the matter would have remained within their privacy.

Apart from non existence of the court rules to protect the privacy of arbitration, there are also no special rules before the court which give an expedited hearing and handling of arbitration applications. Consequently the matter joins the queue of other matters in an already clogged court system. The joining into the queue of the court systems dims the argument that arbitration is quicker when compared with litigation. This delay caused by the clogged court has been said to have the following result; "parties are unable to get on with their commercial lives when their rights and obligations are uncertain pending the outcome of any dispute resolution process"¹⁴¹. This is so because while the application before court is pending the parties cannot make progress with the arbitral process. The situation is compounded if the matter goes on appeal to the Supreme Court. The situation is even made worse if the court appointed arbitrator is not available to take up the appointment and consequently parties will require going back to court.

Further, when the matter has been taken to court, it is subjected to the same rigidity which is associated with the matter before courts. This has the result of the parties losing the flexibility which usually characterises the arbitral proceedings. When the matters go to court, it polarises the parties and removes the atmosphere of corporation between them. This has the effect of destroying the party's good will in the matter. This damage is particularly

¹⁴⁰ See Note 34.

¹⁴¹ Op cit (no.132) 351

detrimental to parties who would want to continue having a business relationship beyond the dispute.

Additionally, the whittling away of arbitration process also finds its expression at the time after an award has been rendered. The only way to seek the enforcement of an award is by going to court. The drawbacks which attend the use of court such as those during the appointment of arbitrators are also present during enforcement.¹⁴²

More so, during an application for setting aside an award, by virtue of making the application to set aside, the whole process of execution becomes stayed pending the determination of the said application. This is despite the application to set aside being frivolous and vexatious. The automatic granting of the stay defeats any laid principle that a stay should be granted on the understanding that the same has prospect of success. The granting of a stay has the effect of numbing the edge which arbitration has over the other process of dispute resolution.

¹⁴² The drawback includes delay, removal of confidentiality and indeed lack of flexibilities.

Section Five

5.0 CONCLUSION, PROPOSED REFORMS AND RECOMMENDATIONS.

5.1 Conclusion.

The arbitration process in Zambia has grown from being a “branch of court litigation” under the 1933 Act to a more resolute and stand alone process as provided under the subsisting Act. The process of arbitration is triggered by the consent of parties to arbitrate. Thus, the arbitration clause by its nature is the underpinning factor to the jurisdiction and the actual process of arbitration. The far reaching consequences of the arbitration clauses serves to put on alert to have it expertly and compressively structured so as to meet the aspiration of the parties.

However, and sadly, the approach the court has assumed in looking at the arbitration clause is to bring it under strict interpretation. This usually ignores the fact that parties’ preferred forum of their dispute resolution is not the tradition litigation process. The courts seem to be too ready to overturn the parties’ preferred choice.

Within the autonomy of the parties to consent to arbitrate, it brings into play the concept of access to justice. Thus, access to justice is an idea which fits well in arbitration. The idea is ingrained in the philosophy of arbitration in that parties participate in the choice of arbitrators. They also partake in the formulation of the rules which guides the conduct of arbitral proceedings. The choice of arbitration by the parties ensures that their disputes are taken away from the clogged court system to a forum where the dispute can be resolved without delay. Before the arbitral forum, parties are given equal treatment. To secure a fair hearing, the consequence to the infringement of the said right is the setting aside of an award. It also puts an arbitrator in bad light. Thus, the emphasis that an arbitrator needs to be impartial and independent gives a non theoretical guarantee to the parties to the quality of justice they receive before the private forums.

In ensuring that the access to justice is realised as consented to by the parties, an arbitrator would be appointed to steer the process. The parties would file with the arbitrator the pleadings which would define the issues to be determined. The filing would be regulated by the schedule which the parties would have agreed at the instance of the arbitrator. Mostly,

once the arbitration has commenced, issues of confidentiality which are incidental to arbitration are emphasised both to the parties and the arbitrator.

After the hearing of the parties, an award would be rendered. The award as to the merit of the dispute is final and only subject to the procedural issues of setting it aside and more so of resisting its enforcement. It therefore follows that in the context of an award being final as on the merit, it brings into operation the rendering of issues in the award as *res judicata*.

Despite all the edge which arbitration has in comparison to other modes such as litigation, the process has been hindered by the un progressive provisions of the Act. This has been compounded by practices and interpretations which the courts have adopted in matters relating to arbitration. This has substituted from the inroads which arbitration has made in the dispute settlement system. The laws, practices and interpretive positions need to be revisited and reformed if the process is to continue being robust.

5.2 Proposed reforms and recommendations.

The arbitration process in Zambia, just like other sectors, is guided by the law. Therefore, the arbitral process is not a still point but keep on evolving and as such the law requires that it make a rejoinder to the challenge so as to prevail over them. That is, if the law is still to remain relevant, it has to meet the expectation of the end users of the process whose needs, notably, are mostly in the state of flux.

The starting point in evaluating the process of arbitration is the arbitration agreement. As the law stands, the arbitration agreement requires complying with a particular form. The form requirement is the agreement must be in writing. The form requires revalidation and consequently abandonment.¹⁴³ Thus, the requirement of an arbitration agreement should only bear the significance that there is an agreement by the parties without the need of it being in writing. This has the advantage of bringing all the parties involved in the transaction in one set of the arbitral proceedings and consequently having a binding award on all the parties even those who participated in the negotiation. Accordingly, the lack of form will look at

¹⁴³ See Article 7 of Model Law 2006 where the requirement for a form has been opted out.

who has an input into the matter and thereby overcome the opting out by a party on a pretext of not having signed the agreement.

The other significant issue which is usually borne out of the arbitration agreement is the appointment of an arbitrator. Where parties are unable to overcome the issues of appointment of arbitrator they look to the national courts. The national courts are usually congested and the importance of confidentiality is violated.

In responding to the above challenged the law should designate an institution¹⁴⁴ i.e. the Permanent Court of Arbitration as an institution which should appoint the arbitrator and the said decision should be final. The advantage with this approach is that the institution is specialised in arbitration and the range of expertise is wide. It also gives an international outlook to the arbitration regime in the country and makes the country to be a favourable seat of arbitration. This procedure can equally be utilized when there is need to replace an arbitrator who is unable to proceed for whatever reason.

In arbitration, like in any other matter before court, circumstances may arise before the appointment of an arbitrator which may necessitate the securing of an interim order of injunction and or preservation order. The only recourse for interim relief in our current law is to go to court. Mostly, the interim measure would require to be made ex – parte and only one party would attend on the arbitration and only serve the opposite side with an order. The approach of an arbitrator in an ex- parte application has received approval and criticisms in equal measures. Those against the idea have stated that:

An ex parte order would fall out of the proper remit of freedom of contract, as the issuing of such an order by the arbitral tribunal may be taken to contradict the underlying principles of international arbitration; notably, the principles of: trust, of consensus, and of equal and fair treatment for both parties.¹⁴⁵

Analogues to the 2006 amendments to the Model Law, those in favour have reasoned that, ‘... the 2006 amendment of the Model Law provides the arbitral tribunal a power to grant ex

¹⁴⁴ See Section 12 (3) (a) (ii) of the Mauritius Arbitration Act of 2008.

¹⁴⁵ J Lee ‘Court-Subsidiarity and Interim Measures in Commercial Arbitration: A Comparative Study of UK, Singapore and Taiwan’ (2013) 6 *Contemp. Asia Arb. J.* 230.

parte interim measures. The theoretical basis for this lies in the fact that the parties agree to arbitrate and arbitrators have the power to grant ex parte interim measures.’¹⁴⁶

To go around the above contesting issues, would be to introduce a provision for the appointment of an emergence arbitrator. To operationalise the thought of an emergency arbitration, the Chief Justice should be mandated to designate three judges who would individually perform the functions of an emergency arbitrator. The designation of these judges on a rotational basis would be aimed at avoiding the arbitral issues from entering the main stream litigation. The said judges would handle all the application purely under the principles which guide arbitration which include rules of confidentiality and also being resolved with quick dispatch. Such order obtained should be equivalent to the court order but subject to review by the tribunal.

Though arbitration is designed to be a quick method of resolving disputes, delays have been witnessed. Our Act, as it stands, does not prescribe the period within which arbitral proceedings should be concluded. This does not induce a sense of time and as such the law should prescribe time within which the proceedings should be concluded. The Act should clearly provide that when the delay is caused by the parties, it should be presumed that parties consent to an impaired award. If only one party is causing the delay, this should be reflected in terms of costs. The Act should also limit the number of extensions for parties to comply with the procedural orders which are given. The limiting of times will expedite the process. If the tribunal exceed time of extension, it should follow that they would have exceeded their jurisdiction.

When the delays would have been caused by the arbitrator, it should be desirable to, ‘... consider it necessary to decrease on arbitrator’s fees because of extensive delays for which the arbitral tribunal is at least partly responsible.’¹⁴⁷ Beyond this, the arbitrator should be subject of disciplinary measures by permitting the parties to report to the professional institution. The arbitrators should not hide under the confidentiality rules to avoid exposure of their conduct. Thus, rules should be developed to which disciplinary hearing should be conducted against the erring arbitrator.

¹⁴⁶ Ibid 231.

¹⁴⁷ S Wilske ‘Legal Challenges to delayed Arbitral Awards’ (2013) 6 Contemp. Asia Arb. J. 162.

The rules of arbitration which entitles a party who has made an application to set aside an arbitral award to translate into procuring a stay of execution for losing party should be revisited. More so, such application should be made before the judges who, the Chief Justice would have been designated to handle the arbitration matters. Thus, a stay of execution should not automatically be granted by virtue of an application to set aside an award. The application for stay of execution should be put under the stress of scrutiny by the judge handling the matter. The exercise of discretion by the sitting judge would be informed by the sense that the successful party should also be secured while the losing party pursues other remedies available to him.

Finally, the sense of arbitral values keep in changing and this happens even at an international level. New concepts out of the difficulties encountered in the practice of arbitration emerge. Further the legal failure to counter these challenges experienced inspires the need to reform. To this end, reforms are never a one off situation; it's a continuous process which improves the quality of relevance the law can play for its end users.

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