UGANDA LAW REFORM COMMISSION
- Modernising the Law -

THE REPUBLIC OF UGANDA

REVIEW OF THE ARBITRATION AND CONCILIATION ACT, CAP. 4

STUDY REPORT

JUNE 2021

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FOREWORD

The Government of Uganda through the Uganda Law Reform Commission with support of the Justice Law and Order Sector has completed a study of the Arbitration and Conciliation Act. The study was undertaken to review and examine the adequacy of the Arbitration and Conciliation Act to ensure effective, efficient arbitration and conciliation procedures and promote Uganda as a leading choice for international commercial arbitration.

Whereas the Arbitration and Conciliation Act applies to both domestic and international arbitration, the development of arbitration in Uganda has not extended to the field of international arbitration. Although it is common for international companies in Uganda to resort to arbitration for their international contracts, the arbitral seats chosen have traditionally been outside Uganda. Similarly, it has been rare for foreign parties to choose Uganda as a neutral forum for arbitration. It is on this basis, that Uganda needs to ensure that the Arbitration and Conciliation Act, Cap. 4 is aligned to the international uniform standards stipulated in the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006.

According to the study findings, Uganda still faces a number of challenges in gaining momentum and recognition as an arbitration seat. In this report, the Commission has made some recommendations towards transforming Uganda into a major forum for domestic and international arbitration.

The Commission has made recommendations and to clarify certain aspects of the law. For example, a comprehensive definition and form of an arbitration agreement has been provided, as well as immunity of arbitrators and the power of an

arbitration tribunal to grant and enforce interim and preliminary measures.

We are hopeful that the recommendations proposed will inform and change the practice of arbitration and conciliation to enhance Uganda's standing as an arbitration seat in Africa and the world at large.

Dr. Pamela Tibihikirra-Kalyegira
Chairperson, Uganda Law Reform Commission

EXECUTIVE SUMMARY

The Arbitration and Conciliation Act, Cap. 4 makes provision for domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and the law relating to conciliation of disputes. The Act is based on the UNCITRAL Model Law on International Commercial Arbitration of 1985 (hereinafter referred to as “the Model Law”) which provides a model for countries with the desire to have uniformity in the law of arbitral and the specific needs of international commercial arbitration practice. Recognising the need to conform to current practices in international trade and modern means of contracting, the Model Law was amended in 2006 to provide for a new definition of a form an arbitration agreement and interim measures in arbitration.

The review was intended to align the Act with international best practices, address challenges and gaps in the law and ensure that the Act is brought in tandem with international arbitration practices.

During the review, the Commission undertook comprehensive consultations with key stakeholders with a view of ensuring that the recommendations are all inclusive. A task force of key stakeholders was constituted to guide the Commission in appreciating and assessing issues affecting arbitration in Uganda and internationally.

Further consultations in the form of key informant interviews and a validation workshop were conducted with stakeholders in the districts of Kampala and Mukono to gather views and build consensus on the proposals. A comparative study of

arbitration practices in other jurisdictions was conducted to borrow best and next practices.

The Key findings and recommendations of the review are as follows:

(1) Nature and form of an arbitration agreement

The nature and form of an arbitration agreement was found to be inadequate, particularly concerning oral and electronic agreements.

The study recommend the nature and form of an arbitration agreement which addresses the evolving practice in international trade and technological development. It follows Option I of the Model Law as amended in 2006 and the New York Convention in requiring the written form of an arbitration agreement but recognises a record of the 'contents' of the agreement in any form as equivalent to traditional 'writing'. The agreement to arbitrate may be entered into in any form including orally and electronically as long as the content of the agreement is recorded and can be retrieved for future reference.

The proposed form also covers the situation of exchange of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another.

(2) Interim and preliminary measures

The requirement to seek interim and preliminary measures from court before or during arbitration was revealed as a cause of undue delay of arbitration proceedings. It is recommended that the law be amended to grant an arbitration tribunal powers

to grant interim and preliminary measures. This will reduce the delays and promote expeditious disposal of arbitration hearings.

(3) Immunity of arbitrators

Failure to provide for immunity of arbitrators was found to be inhibiting the powers of an arbitrator due to fear of liability for decisions made out of improper interpretation of the law. A comparative analysis of other jurisdictions like the United Kingdom, United States of America and Singapore confirmed increased acceptance of the principle of immunity of an arbitrator to ensure efficient and effective administration of justice. The study has recommended that arbitrators should be immune from liability for acts done in good faith during arbitration proceedings.

(4) Management of CADER

Advocates, the Judiciary and arbitration practitioners were found to be discontented with the way the Center for Arbitration and Dispute Resolution (CADER) is managed and operated which has, in their view, largely rendered it ineffective. Study findings indicate that CADER is faced with a number of administrative and financial challenges which hinder the effective delivery of its statutory duties. Some of the challenges cited included lack of adequate funding to run the centre and an unpopulated institutional structure with only three staff members of which the Executive Director is a part-time staff; unclear tenure of office of the Executive Director; and lack of transparency in the appointment of arbitrators.

The study recommends that the tenure of office of the Executive Director is streamlined, the administrative structure populated and funds availed for the smooth running of the Centre.

(5) Level of awareness of arbitration and conciliation.

There is limited knowledge about arbitration among advocates and members of the general public in Uganda. It was established that the public prefer litigation to arbitration in Uganda this may be attributed to limited knowledge about arbitration and the fact that the public has more confidence in Courts of law than in arbitrators. Majority of advocates in Uganda have little knowledge of the conduct of arbitration as a dispute resolution mechanism.

Arbitration is not taught in law schools in Uganda. Arbitration practitioners have to take personal initiative by enrolling at an arbitration institute to learn more about arbitration.

Conciliation was found to be an uncommon practice in Uganda. Many of the respondents reported that they had not been involved in conciliation proceedings. What is common is mediation, which is a preliminary requirement by the Commercial division of the High Court before full litigation.

The study recommends the introduction of arbitration as a course module at law schools in Uganda and public sensitisation on arbitration as a mode of dispute resolution.

Vision

"Laws that facilitate transformation and development of Uganda"

Mission Statement

"To reform and update the laws in line with the social, cultural and economic needs and values of the people of Uganda."

Core values of the Commission

Professionalism
Accountability
Integrity
Result oriented

Slogan

"Law reform for transformation and sustainable development"

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List of Acronyms

ACA	Arbitration and Conciliation Act
CADER	Centre for Arbitration and Dispute Resolution
ICC	International Chamber of Commerce
JLOS	Justice Law and Order Sector
KIAC	Kigali International Arbitration Centre
LCIA	London Court for International Arbitration
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER ONE

INTRODUCTION AND BACKGROUND

Introduction

The Uganda Law Reform Commission (Commission) with support of the Justice Law and Order Sector (JLOS) undertook a study to review and reform the Arbitration and Conciliation Act, Cap. 4. The review was intended to establish the gaps, if any, in the law, address challenges faced in implementation of the Act, update the law and make proposals for amendment of the Act.

Background

In Uganda, the first enactment of the law governing arbitration was the Arbitration Act, Cap. 55[1] which was enacted on the 31st December 1930 arising from Ordinance No. 29 of 1930 and No. 7 of 1931. The Act only provided for arbitration. This Act was repealed and replaced in 2000 with the Arbitration and Conciliation Act, Cap. 4 to provide for both arbitration and conciliation.

The Arbitration and Conciliation Act, Cap. 4 (hereinafter referred to as "the Act") was enacted by the Parliament of Uganda on 19th May, 2000 and commenced on the same date. The Act provides for domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, defines the law relating to conciliation of disputes and makes other provisions relating to arbitration and conciliation matters. In 2008, the Act was amended by the Arbitration and Conciliation (Amendment) Act No. 3 of 2008 to specifically provide for

1 Laws of Uganda 1964, Volume II

funding of the Centre for Arbitration and Dispute Resolution (CADER) by Government.

The Act is largely based on the 1985 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules of 1976. In 2006, the Model Law was amended to address evolving practices in international arbitration with regard to the form of arbitration agreements and interim measures.

In general terms, arbitration is a consensual process in which a binding decision is taken by a privately appointed decision maker in accordance with neutral procedures that give each party the opportunity for a fair hearing and to present its case to the arbitrator(s).[2] Black's Law Dictionary defines arbitration as the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called "arbitrators," or "referees."[3] As a dispute resolution mechanism, arbitration has long gained prominence among governments and multinational organisations, for instance most contracts now contain clauses that mandate parties to explore arbitration options in the event of disagreement.[4]

Arbitration primarily takes the form of agreement in which the parties opt to refer a dispute for arbitration. This may be in the form of a clause in a contract or under a specific agreement for arbitration. Due to the consensual nature of arbitration, the agreement to arbitrate is central to the conduct of arbitration.

2 Steven P. Finizio and Duncan Speller, A practical guide to International Commercial Arbitration: Assessment, Planning and Strategy, Reprint Sweet &T Maxwell 2010.

3 Black's Law Dictionary 10th Edn, Thomas Reuters, 2014.

4 Wuraola O. Durosaro, The Role of Arbitration in International Commercial Disputes, March 2014 Volume 1, Issue 3, International Journal of Humanities Social Sciences and Education (IJHSSE), PP 1-8 <www.arcjournals.org> accessed on 3 February 2017.

The arbitration agreement may provide the nature of disputes to be arbitrated upon, the appointment of arbitrators, powers of arbitrators, arbitration seat, law applicable and rules to apply.[5]

Arbitration is divided into two forms: institutional or *ad hoc* arbitration. Institutional arbitration refers to arbitration that is administered by an established institution that has its own set of rules, a framework for arbitration, its own form of administration to assist the process and parties agree to be bound by those rules.

Ad hoc arbitration refers to a form of arbitration where parties choose to administer their own arbitration and determine their own procedure.[6] Parties can opt to adopt a set of any institutional rules of their preference.

Arbitration has gained popularity over time amongst the business community due to its advantages over litigation. One of the most outstanding benefits of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national Courts, thus boosting the parties' confidence of realising justice in the best way achievable.[7]

The finality and the relative ease of enforcement of arbitral awards throughout the world has been identified as one of the primary advantages of arbitration. This is manifested in the increase of countries signing up as member states to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') 1985. Countries around the world have thus embarked on promoting domestic

5 The Arbitration and Conciliation Act, Cap.4, s 3.

6 Hogan Lovells, Introduction to International Arbitration; Trainee Pack, 2007 https://www.hoganlovells.com/en/knowledge accessed 3 February 2017.

7 Hogan Lovells 'Introduction to International Arbitration; Trainee Pack, 2007< https://www.hoganlovells.com/en/knowledge> accessed 3 February 2017.

and international arbitration as the best dispute settlement approach in commercial disputes.

Arbitration offers flexibility to the parties. Parties are free to choose among other things: the language of the proceedings; the venue of the hearing; the applicable procedural law; the composition of the arbitral tribunal; and procedure of appointment of the arbitral tribunal. Each party is given an opportunity to participate in the selection of the tribunal and each member of the tribunal is required to be independent and impartial.[8]

Enforcement of foreign arbitral awards in multiple jurisdictions is an advantage in international arbitration that gives parties a neutral forum for the determination of their dispute, rather than on the home ground of one party or the other.

The growth of arbitration can be attributed to the expansion in international trade and commerce and the advantages it presents as a means of resolving commercial disputes between parties.

Arbitration has been criticized as being expensive. The parties are solely burdened with the cost of paying arbitrators. It is also argued that the administrative costs of an institutional arbitration are substantially higher than the equivalent of court costs.[9]

Arbitration proceedings have been criticised for being lengthy. Whereas it is expected to be a fast means of resolving disputes, it sometimes takes longer than litigation depending on the nature of the dispute.[10] For example, the parties sometimes take long to agree on the choice of arbitrators and may have to wait a long time for their chosen arbitrators to become available.

8 ibid.
9 ibid.
10 Hogan Lovells, Introduction for International Arbitration ; Trainee Pack, 2007 https://www.hoganlovells.com/en/knowledge accessed 3 February 2017.

Although the Act provides for a period of two months within which arbitrators are expected to make an arbitral award after entering the reference, this period has been abused from time to time.

The Arbitration and Conciliation Act also provides for conciliation as an alternative form of dispute resolution. Black's Law Dictionary defines conciliation as a settlement of a dispute in an agreed manner.[11] Conciliation is a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved. It is a relatively unstructured method of dispute resolution in which a third party facilitates communication between parties in an attempt to help them settle their differences. The decisions are usually not binding on the parties.[12]

The advantage of the conciliation process is that it lowers tensions between parties, improves communications, interpretes issues, explores potential solutions and assists parties in finding a mutually acceptable outcome.

The outcome of conciliation proceedings is however not binding. The conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award. Conciliation does not guarantee that there will be a final and binding decision.

The use of arbitration and conciliation as mechanisms of commercial dispute resolution is on the increase both domestically and internationally. This has necessitated the review of different applicable laws and rules to ensure that the processes are well facilitated to meet parties' expectations. For

11 Black's Law Dictionary, `10th Edn, Thomson Reuters, 2014.

12 Lloyd Duhaime, Duhaime's Law Dictionary, Lloyd Duhaime Victoria, Canada 2000 <http://www.duhaime.org/LegalDictionary/C/Conciliation.aspx > accessed 28 February, 2017.

example, the 1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration on which the provisions of the Arbitration and Conciliation Act (Cap. 4) are premised was amended in 2006. Rules therein have been developed to address emerging practices in arbitration and conciliation.

As Uganda strives to achieve middle income status, Government has committed itself under Vision 2040 to review and put in place laws and regulations that favour business development, establish measures to ease doing business, harmonise laws to guarantee competitiveness and encourage increased investments and ensure that businesses observe internationally acceptable standards in production and business process.[13] The review of the Act is in line with this commitment by ensuring that the legal framework of arbitration and conciliation, as forms of dispute resolution, is updated to support the commercial sector.

It is important to review the laws of Uganda in order to adopt globally accepted standards for domestic and international commercial arbitration. It is against this background that the Commission undertook this study with a view of updating national laws governing arbitration and conciliation.

1.2 Statement of the problem

The Act is inadequate in addressing the arbitration matters that facilitate faster and effective arbitration proceedings. The Act does not address, among other things, issues relating to interim measures in arbitration proceedings, the broader definition of an arbitration agreement and immunity of arbitrators. The failure of the law to address these issues has made arbitration unattractive and cumbersome to parties.

13 Uganda Vision 2040, April 2013 Page 113.

The institutional mechanism for supporting arbitration in Uganda is ineffective and dysfunctional because of understaffing and underfunding. This has affected the manner in which institutional arbitration is conducted in the country thus undermining the confidence of the public in arbitration and conciliation processes. This situation is exacerbated by the lack of awareness about arbitration as a dispute resolution mechanism among members of the public.

It is pertinent therefore that the law on arbitration and conciliation addresses the challenges and the gaps identified to ensure that the legislation is up-to-date and comprehensive enough to handle both domestic and international disputes where arbitration and conciliation is an option for commercial dispute resolution.

1.3 Justification of the study

The Arbitration and Conciliation Act, Cap. 4 largely adopted the provisions of the 1985 UNCITRAL Model Law and rules there under. However, the UNCITRAL Model Law was amended in 2006 to provide a new definition of an arbitral agreement and provide for interim measures in arbitration proceedings. The Act does not address these new developments. The failure to adopt these developments under the Act renders Uganda non-compliant with international standards. As such, Uganda is less competitive and unattractive as an arbitral seat for international arbitration. There is need to align the Act with international arbitration standards as reflected in the international legal framework. This will make Uganda more competitive and attractive for international investment and business.

The National Development Plan II of Uganda[14] provides a road map for priorities. Under the Justice, Law and Order sector, the Government has committed itself to improve legal, policy and regulatory framework. This is to be achieved through introducing measures to ensure effective enforcement of laws.[15] Among the priorities highlighted are: access to justice, enhanced law and order services, promotion of rights to ensure accountability, inclusive growth, competitiveness and fighting corruption in order to strengthen Uganda's competitiveness for wealth creation and inclusive growth. Review of the Arbitration and Conciliation Act is timely to support the prioritised areas.

There is need to review the institutional mechanisms governing arbitration and conciliation to address the identified gaps and challenges. These include enhancement of the operation of CADER, limited knowledge of arbitration and conciliation proceedings, confidence and participation of the public in arbitration, inadequate rules, inadequate funding and lack of a specific tenure of office for the Executive Director of CADER

1.4 Objectives of the study

The main objective of the study was to review and examine the adequacy of the Arbitration and Conciliation Act with a view of making proposals for reform.

The study was guided by the following specific objectives:

(i) to identify the gaps in the legal framework relevant to arbitration and conciliation;

(ii) to identify regional and international best and next practices in arbitration and conciliation for incorporation in the Act; and

(iii) to make proposals for reform of the Act.

14 Uganda Government, Second Development Plan 2015/16 – 2019/20, Kampala, 7 June 2015.

15 ibid page 226.

1.5 Scope of the study

The study entailed a review of the Arbitration and Conciliation Act, Cap. 4, the UNICTRAL Model Law on International Commercial Arbitration as amended in 2006 and literature on international commercial arbitration. Special attention was given to the scope of arbitration, conduct of arbitration proceeding, enforcement of arbitral awards and emerging issues.

The study benchmarked from Rwanda as one of the preferred arbitral seats in Africa to learn best and next practices. In addition, comparative desk studies were done on jurisdictions where arbitration practice is more developed such as Singapore, Mauritius, United Kingdom and India.

1.6 Methodology

The study was largely qualitative. This method was chosen to generate and establish a detailed description and analysis of arbitration and conciliation as a form of alternative dispute resolution mechanism and to enable a deeper understanding of the issues affecting arbitration and conciliation to identify areas for reform.

The following techniques were used for data and information collection during the study:

1.6.1 Literature review

This entailed review of literature on arbitration and conciliation, including laws of other jurisdictions, model laws, reports, textbooks, journals, presentations, policy documents, individual researchers, position papers, minutes of meetings, workshop documents and other relevant laws of Uganda.

1.6.2 Key Informant Interviews

Key informant interviews were conducted with purposively selected people involved in implementation of the law on arbitration including arbitrators advocates and conciliators. This was intended to explore and gain deeper understanding of issues relating to the practice of arbitration and conciliation and the challenges faced in implementation of the law.

1.6.3 Technical Working Group

The Commission constituted a technical working group to provide technical expertise throughout the review process. The technical working group was constituted of representatives from the following institutions.

1. Centre for Arbitration & Dispute Resolution (CADER);
2. Judiciary;
3. Law Firms: Sebalu & Lule Advocates, Katende, Ssempebwa & Co. Advocates
4. Uganda Law Society;
5. Academia: Uganda Christian University;
6. Uganda Revenue Authority;
7. Justice Law and Order Sector; and
8. Ministry of Justice and Constitutional Affairs.

1.6.4 Consultation

Consultative meetings were held in Kampala and Mukono districts with selected persons. Kampala and Mukono were chosen as centres of business transactions. The consultative meetings were held with judicial officers, government officers, advocates, arbitrators and conciliators, academia and representatives of the business community. This was done

through key informant interviews, focus group discussions and technical working group meetings.

A bench marking exercise was conducted at the Kigali International Arbitration Centre in Rwanda. **Annex 1** presents the bench marking report

CHAPTER TWO

REVIEW OF THE LEGAL FRAMEWORK ON ARBITRATION AND CONCILIATION.

This chapter presents a review of the national, regional and international legal framework relating to arbitration and conciliation. The review considered thematic areas ranging from: nature and form of arbitration proceedings, arbitration agreement, matters subject to arbitration, questions of interim and preliminary measures in arbitration proceedings, appointment and immunity of arbitrators, enforcement of arbitration awards, court intervention and institutional framework.

2.1 International legal framework on arbitration

2.1.1 The UNCITRAL Model Law on International Commercial Arbitration, 1985

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the United Nations General Assembly. On 21st June 1985 UNCITRAL adopted the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Model Law).[16] The Model Law was developed to address considerable disparities in national laws on arbitration. The need for improvement and harmonization was based on findings that national laws were often inappropriate for international cases.[17]

The Model law plays an important role in improving the legal framework for international trade by preparing legal texts for

16 The United Nations General Assembly, in its resolution 40/72 of 11th December 1985 recommended that all States give due consideration to the Model Law on International Commercial Arbitration so as to achieve uniformity in the arbitration practice.

17 Ibid.

use by States in modernizing the law on international trade.[18] The Model Law was revised by the UNCITRAL on 7th July 2006 to provide a framework for the form of an arbitration agreement and grant of interim measures. The General Assembly has recommended that all State Parties give due consideration to the revised Model Law when they enact or revise their laws.[19]

Uganda domesticated the Model Law in 2000 by enacting the Arbitration and Conciliation Act. Considering that the model law was revised in 2006, this study sought to update the Arbitration and Conciliation Act.

2.1.2 UNCITRAL Arbitration Rules as revised in 2013

UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings. These rules are often used in ad hoc arbitrations as well as institutional arbitrations. The Rules provide for arbitral processes, model arbitration clause, appointment of arbitrators and the conduct of arbitral proceedings, the form, effect and interpretation of arbitral award.[20] The Arbitration and Conciliation Act requires CADER to make appropriate rules for the conduct of arbitration or conciliation proceedings and administrative procedures. this study sought to examine whether Uganda has put in place arbitration and conciliation rules that are in conformity with the UNCITRAL Arbitration Rules.

18 A Guide to UNCITRAL, Basic facts about the United Nations Commission on International Trade Law, English, Publishing and Library Section, United Nations Office at Vienna, January 2013 < www.uncitral.org > accessed 17 October 2018.

19 Explanatory notes by the UNCITRAL Secretariat, on the 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Yearbook, vol. XVI – 1985, United Nations publication, Sales No. E.87.V.4.

20 s II, III,IV of UNICTRAL Arbitration Rules <www.uncitral.org/uncitral/en/uncitraltexts/arbitration/2010arbitrationrules.html > accessed 17 October, 2018.

2.1.3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention") seeks to provide common legislative standards for recognition and enforcement of foreign arbitral awards.[21] The Convention is intended to ensure that foreign arbitral awards are not discriminated against and it obliges State Parties to ensure such awards are recognized and enforced in their jurisdictions in the same way as domestic awards.

Uganda assented to the New York Convention in 1992 to recognise awards made in territories of other contracting States[22] and hence is obliged to comply with its provisions. The study sought to establish the extent to which Uganda has complied with the Convention in recognizing and enforcing foreign arbitral awards.

2.1.3 Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), Regulations and Rules

The ICSID Convention came into force on October 14th 1966. It was formulated by the World Bank to provide facilities for arbitration and conciliation of investment disputes between Contracting States and nationals of other Contracting States. The Convention establishes the International Centre for Settlement of Investment Disputes (ICSID). The provisions of

21 New York Convention 1958, Article 1.

22 Acceded on 12th February 1992, Declaration: The Republic of Uganda will only apply the Convention to recognition and enforcement of awards made in the territory of another Contracting State <www.newyorkconvention.org/countries> accessed 17 October 2018.

the ICSID Convention are complemented by Regulations and Rules adopted by the Administrative Council of the Centre.[23] The ICSID Convention entered into force for Uganda on October 14th, 1966 and the law was domesticated in the Arbitration and Conciliation Act.[24]

Article 69 of the ICSID Convention obliges a Contracting State to take legislative or other measures as may be necessary to give effect to the Convention in its territory. Uganda has fulfilled the obligation through the enactment of Part IV on enforcement of ICSID Convention awards.[25] The study sought to examine the legislative or other measures that Uganda has taken to give effect to the Convention.

2.2 Regional legal framework on arbitration

2.2.1 The Common Market for Eastern and Southern Africa Court of Justice Arbitration Rules (2003)

At regional level, the Common Market for Eastern and Southern Africa (COMESA) Court[26] and East African Court of Justice[27] are established as arbitration institutions where parties to arbitration may refer disputes.

These institutions have put in place rules that guide them in undertaking arbitration proceedings. The EAC Court of Justice Arbitration Rules, 2004 guide the conduct of arbitration in the East African Court of Justice (EACJ). The Common Market for Eastern and Southern Africa Arbitration Rules (2003) were put in place to guide the COMESA Court in conducting arbitration

23 Article 6 (1) (a) – (c) of the Convention.
24 Arbitration and Conciliation Act, Part IV.
25 s 45-47 of the ACA.
26 EAC Treaty, Article 28.
27 EAC Treaty, Article 23.

proceedings. The study sought to explore the possibility of adopting these rules as best practices to enhance the conduct of arbitration.

2.3 Domestic legal framework on arbitration

2.3.1 Arbitration and Conciliation Act, Cap. 4

Arbitration is conducted in accordance with the Arbitration and Conciliation Act. The Act was enacted in 2000 to amend the law[28] relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards among other thing.

The Act provides for forms of arbitration agreements, instances in which the court may interfere in arbitration processes, composition and powers of arbitration tribunals, termination of arbitration proceedings, instances when arbitration awards can be set aside and the recognition and enforcement of awards.

The provisions on arbitration apply to both domestic and international arbitration. The Act establishes the Centre for Arbitration and Dispute Resolution (CADER) as an administrative structure for arbitration matters.[29]

The Arbitration and Conciliation Act is modelled along the UNCITRAL Model law of 1985. It is important to note that the Model Law was revised in 2006. The revision introduced aspects in arbitration proceedings that need to adopted and incorporated in the Arbitration and Conciliation Act of Uganda.

28 Laws of Uganda 1964, Arbitration Act, Cap. 55.
29 ACA, s 67 and 68.

2.3.2 Civil Procedure Act, Cap. 71 and Civil Procedure Rules Statutory Instrument No. 71-1

The Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed under the Rules made under the Act.[30] The Civil procedure Rules provide for procedures to be followed by parties to a suit who are interested in having a matter resolved by arbitration. They seek to establish the efficacy and relevancy of court guided arbitration in the modern principles guiding arbitration.

2.4 International legal framework on conciliation

2.4.1 The United Nations Charter

Article 33 of the United Nations Charter[31] does not so neatly separate diplomatic and legal procedures and simply stipulates that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Thus, in international law there is a fundamental principle of peaceful settlement of disputes.

2.4.2 UNCITRAL Model Law on International Commercial Conciliation

A Model Law was developed in the context of recognition of the increasing use of conciliation as a method for settling commercial

30 Cap. 71, s 60.
31 Signed on 26 June 1945, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.

disputes. UNCITRAL has a model law on conciliation[32] which is designed to assist States in reforming and modernising their laws on mediation procedure.[33] It provides uniform rules in respect of the mediation process and aims at encouraging the use of mediation and ensuring greater predictability and certainty in its use. The Model Law was initially adopted in 2002. It was known as the "Model Law on International Commercial Conciliation", and it covered the conciliation procedure. However the Model Law was amended in 2018 to include a new section on international settlement agreements and their enforcement.

To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of mediation, including appointment of conciliators. It provides an exhaustive list of grounds that a party can invoke in a procedure covered by the Model Law. While the Model Law is restricted to international and commercial cases, the State in enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones.[34]

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32 The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute.

33 The Model Law has been renamed "Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation". In its previously adopted texts and relevant documents, UNCITRAL used the term "conciliation" with the understanding that the terms "conciliation" and "mediation" were interchangeable. In amending the Model Law, UNCITRAL decided to use the term "mediation" instead in an effort to adapt to the actual and practical use of the term and with the expectation that this change will facilitate the promotion and heighten the visibility of the Model Law. This change in terminology does not have any substantive or conceptual implications.

34 Article 1 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).

2.4.3 UNCITRAL Conciliation Rules

The UNCITRAL Conciliation Rules[35] were prepared to offer parties an internationally harmonised set of rules suited for international commercial disputes. It provides a comprehensive set of procedural rules upon which parties may agree for the conduct of conciliation proceedings arising out of their commercial relationship. The Rules cover all aspects of the conciliation process, providing a model conciliation clause defining when conciliation is deemed to have commenced and terminated and addressing procedural aspects relating to the appointment and role of conciliators and the general conduct of proceedings. The Rules also address issues such as confidentiality, admissibility of evidence in other proceedings and limits to the right of parties to undertake judicial or arbitral proceedings whilst the conciliation is in progress.

2.4.4 International Centre for Settlement of Investment Disputes Convention

Uganda is a member state and signatory to the International Centre for Settlement of Investment Disputes (ICSID). The ICSID does not conduct arbitration or conciliation proceedings itself, but offers institutional and procedural support to conciliation commissions, tribunals, and other committees which conduct such matters. Article 33 of the ICSID Convention provides that conciliations will be conducted in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation, except as the parties otherwise

35 Adopted by UNCITRAL on 23 July 1980.

agree.[36] All ICSID contracting member states, whether or not they are parties to a given dispute, are required by the ICSID Convention to recognise and enforce ICSID arbitral awards.[37]

2.5 Regional legal framework

Parties in Africa involved in commercial arbitration have several options at their disposal depending on the region of the continent. However, these regional institutions are fairly new and have some organisational and legitimacy concerns.

2.5.1 East African Court of Justice

The East African Court of Justice (the Court) is established under Article 9 of the Treaty for the Establishment of the East African Community.[38] The East African Community is a regional intergovernmental organisation established with the aim of promoting the East African economic, social, cultural and political integration. The Partner States have signed up to several trade and customs unions to enhance regional cooperation under the treaty.

The Court has jurisdiction over the interpretation and application of the treaty. It also has arbitral jurisdiction on matters arising from an arbitration clause contained in a contract or agreement

36 The original Conciliation Rules were adopted on September 25, 1967 and were effective as of January 1, 1968. The Conciliation Rules have subsequently been amended three times. The first amendment was approved and took immediate effect on September 26, 1984: ICSID Rules (1984). The second amendment was approved on September 29, 2002 and was effective on January 1, 2003: ICSID Rules (2003). The current Conciliation Rules were approved by written vote of the Administrative Council in 2006 and were effective from April 10, 2006: (ICSID Rules (2006).

37 International Centre for Settlement of Investment Disputes (2006). ICSID Convention, Regulations and Rules (PDF) (Report). World Bank Group. p. 128. Archived from the original (PDF) on 4 September 2012. Retrieved 8th May 2019.

38 Established in November 2001, the court operates on an *ad hoc* basis.

which confers such jurisdiction to which the Community or any of its institutions is a party; arising from a dispute between the Partner States regarding this Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court. This court has the potential of becoming a power house in the region in resolving cross border commercial disputes. It has promulgated its own set of arbitration rules and procedures which vary from other international and regional rules and standards.[39]

2.5.2 Organization for the Harmonization of Business Law in Africa

Organization for the Harmonization of Business Law in Africa ("OHADA"), is a supranational organisation established by a treaty.[40] It is comprised of sixteen sub-Saharan African member states[41] and its major purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonisation of business law among its member states. Once a Uniform Act comes into force by the Council of Ministers, it overrides all incompatible national law in the member states. The OHADA Uniform Act on Arbitration[42] authorises the practice of alternative dispute resolution, lays out the rules of procedure, provides for an enforcement mechanism in member states and creates a key alternative dispute resolution regional center; the Common Court for Justice and Arbitration ("CCJA"). The Uniform Act unifies and supersedes the national laws on

39 East African Court of Justice, Arbitration Rules of the East African Court of Justice, Arusha, Tanzania, (2004) <http://www.eacj.org/docs/EACJ_Arbitration_Rules.pdf> accessed 3 February 2017

40 Signed on October 17, 1993.

41 Benin, Burkina Faso, Cameroon, Central Africa, Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guniea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad, and Togo.

42 Established in 1999.

arbitration of member states.[43] The CCJA has the potential and ability to hear a variety of issues including commercial disputes.[44]

2.5.3 Asian-African Legal Consultative Organization

The Asian-African Legal Consultative Organisation ("AALCO") is an international organisation.[45] It was established to help the member states on concerns pertaining to international law. In 1978 AALCO proposed the establishment of regional centers for International Commercial Arbitration.[46] All centers use the UNCITRAL arbitration rules and aim to provide arbitration facilities of a widely acceptable international standard. The regional centers are parties of the New York Convention and as such its provisional awards may be enforced against a disputing party in other signatory State. For example focusing exclusively on the Lagos Regional Centre in Lagos, Nigeria, the center promotes and administers international commercial arbitration. It offers advice and assistance in relation to arbitration, provides other options for settlement of disputes such as negotiation, mediation, and conciliation. The center deals with disputes of an international character; however the parties in the suit may be individuals, corporate bodies or governments.[47] Uganda is a member state of AALCO having joined in 1979 and in 1993 the annual session was held in Kampala.

43 OHADA treaty, Article 10.
44 OHADA treaty, Article 21.
45 Members from 47 States in Africa and Asia.
46 Currently there are four Regional Centers: The Regional Centre for Arbitration, Kuala Lumpur, the Cairo Regional Centre for International Commercial Arbitration, the Lagos Regional Centre for International Commercial Arbitration, and the Tehran Regional Arbitration Centre.
47 T. Sutherland and G. Sezneck, Alternative Dispute Resolution Services in West Africa: A Guide for Investors, A guide sponsored by the Commercial Law Development Program US Department of Commerce, (2003).

2.5.4 Africa Alternative Dispute Resolution

Africa Alternative Dispute Resolution (Africa ADR, is a non-profit, dispute resolution administering authority started in 2009[48]. Africa ADR is intended to be the arbitral link between those who invest in Africa and those who trade in Africa; between the business communities of Africa and abroad; and between the international community. It will foster the culture of alternative dispute resolution in Africa and will oil the wheels of international trade and commerce.[49] Uganda can benefit from the cost effective, credible and efficient resolution of cross-border commercial disputes in Africa. It is envisaged that Africa ADR will provide comprehensive and complete administrative services in the resolution of regional and international disputes by way of arbitration, mediation or conciliation throughout Africa at approved venues.[50] They have established a set of different rules and regulations for conciliation and arbitration, to ensure that all commercial disputes are effectively administered using the most appropriate dispute resolution method. Similar to the International Chambers of Commerce (ICC), a secretariat has been established to deal with the procedural aspects of a party's arbitration or conciliation.[51] Africa ADR offers a modern, faster, cost effective and less abrasive way of resolving commercial disputes across borders.

48 Initially managed by a multi-national steering committee under the leadership of the Arbitration Foundation of Southern Africa <www.africaadr.com> accessed 8 May 2019.

49 ADR in Africa; F. Peter Phillips Esq on http://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/#more-1075 accessed on 8th May 2019.

50 They have established venues at Port Louis, Mauritius; Maputo, Mozambique; and in 3 locations in South Africa at Pretoria, Johannesburg, and Cape Town.

51 Ernest E. Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) No.16 Africa Security Brief, African Centre for Strategic Studies, < https://africacenter.org/wp-content/uploads/2016/06/ASB16EN-Alternative-Dispute-Resolution-in-Africa-Preventing-Conflict-and-Enhancing-Stability.pdf > accessed on 23 September 2020.

In addition to the organisations and various treaties listed above, there are several other notable treaties and organisations dealing commercially in Africa. These include the West African Economic and Monetary Union, Economic and Monetary Community of Central Africa, African Monetary Union and the Southern African Development Community.

2.5.5 Domestic legal framework on conciliation

Uganda has enacted a number of legislations, providing for a number of aspects on conciliation.

2.5.6 Arbitration and Conciliation Act, Cap. 4

Conciliation is another form of alternative dispute resolution provided for under the Act. The Act was enacted to define the law relating to conciliation of disputes and the procedures there under.[52] The appointment of conciliators, their roles, termination of conciliation proceedings and procedures to be followed in conciliation processes is provided for within the Act.

A conciliator assists the parties to a dispute to find a solution, but has no power to enforce it. The Act emphasises confidentiality of the proceedings. The parties to the dispute arrive at their solution independently and impartially as stipulated by section 53 of the Act. The Act provides the basis for which the conciliator plays his role under section 53 (2). It states that:

"The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties."

52 ACA, Part V.

The Act also establishes the Centre for Arbitration and Dispute Resolution (CADER) as an administrative structure for conciliation matters.[53]

There are other laws that provide for conciliation as a mode of dispute resolution. These emphasise the appointment of a conciliator to settle disputes and some of these laws include:

2.5.7 Equal Opportunities Act, No. 2 of 2007

Section 14 (3) provides that the Equal Opportunities Commission may rectify, settle or remedy any act, omission, circumstance, practice, tradition, culture, usage or custom that is found to constitute discrimination, marginalisation or which otherwise undermines equal opportunities through mediation, conciliation, negotiation, settlement or other dispute resolution mechanism.[54]

53 s 67 and 68.
54 No. 2 of 2007.

CHAPTER THREE

FINDINGS AND RECOMMENDATIONS

This chapter presents the findings and recommendations of the review.

3.0 Gaps in the legal framework relevant to arbitration and conciliation

The review sought to identify the gaps in the Arbitration and Conciliation Act. The review considered thematic areas ranging from nature of arbitration, form and nature of arbitration agreement, domestic and international arbitration matters, interim and preliminary measures, immunity of arbitrators from suit, arbitrability, extension of time for making an award, arbitration rules and other emerging issues.

3.1 Nature of arbitration

This study sought to establish the nature of arbitration in Uganda, the justification for its use and the implications arising from the preferred nature of arbitration.

Arbitration is considered an alternative to the adversarial system of court litigation on account of being a convenient, progressive and cost efficient method of resolving disputes.

The inaugural task force constituted by the Commission to steer this study, observed that in Uganda, arbitration has not taken firm root, notwithstanding the fact that an enabling law has been in place for a long time.[55] Some respondents

55 Inaugural Taskforce meeting held on (Kampala,18th March 2018).

interviewed revealed that arbitration is practiced on an *ad hoc* basis, although it was not possible to establish the number of arbitrators involved in *ad hoc* arbitration, their qualifications and the number of cases they have handled over a given period as there was no documented evidence. In other jurisdictions, *ad hoc* arbitration is recognised. In Rwanda for instance, the Kigali International Arbitration Centre provides administrative and technical assistance to parties of *ad hoc* arbitration upon request.[56]

Findings further indicate that in Uganda, the recognised center that administers arbitration is Centre of Arbitration and Dispute Resolution (CADER). However, there are other bodies that administer arbitration amongst their members for example, Uganda Institution of Professional Engineers and Kampala City Traders Association (KACITA). Other bodies like Uganda Law Society together with Uganda Bankers' Association are in advanced stages of establishing an arbitration institution. These institutions provide specialised arbitration and determine their own rules and timelines for the conduct of arbitration.

At the international level, different institutions of arbitration have been established all over the world such as: the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), Kigali International Arbitration Centre (KIAC).

Arbitration proceedings may be conducted either *ad hoc* or under institutional procedures and rules. Institutional arbitration is one in which arbitration is conducted by a specialised institution with its own set rules and forms of administration[57]. While *ad hoc*

56 Bench marking exercise undertaken in Kigali, Rwanda, June 2017.
57 Nigel Blackaby et al., Redfern and Hunter on International Arbitration (6th ed.2015) 6.07

arbitration is where parties choose to administer arbitration and determine their own procedure.[58]

When parties choose to proceed with *ad hoc* arbitration, the parties agree to their own rules and procedures to be followed in resolving the dispute. Whereas *ad hoc* arbitration gives parties greater control over the arbitration process, flexibility to decide on the procedure and may be cheaper,[59] it has been criticised as uncertain due to lack of standardised rules, lack of oversight and is characterised by delays and litigation arising from procedural defects which is characteristic of institution arbitration.

In light of the above, most parties in arbitration prefer to use institutional arbitration. According to a study conducted by PricewaterhouseCoopers (PWC) and Queen Mary University of London ("QMUL"), 86 percent of arbitral awards given during the preceeding ten years were given in arbitrations administered by arbitral institutions and not *ad hoc* arbitrations.[60] Similarly, the Indian Law Commission recommended the popularisation of institutional arbitration and noted that it provides distinct advantages, which are unavailable to parties opting for *ad hoc* arbitration.[61]

A comparative study with other jurisdictions revealed that arbitration institutions are preferred for conduct for arbitral proceedings. Some of these institutions which are recognised and used internationally include: the International Chamber

58 Ulrich Schroeter, *Ad Hoc* or Institutional Arbitration- A clear cut distinction? A closer look at borderline cases. (2017) 10(2) Contemporary Asia Arbitration Journal 141.

59 Indian Council of Arbitration, Working Paper on Institutional Arbitration Reforms in India. April 2017 <http://www.icaindia.co.in/HLC-Working-Paper-on-Institutional-Arbitration-Reforms.pdf> accessed 24 September 2018.

60 International Arbitration; Corporate attitudes and practices (2008) Queen Mary University of London and PricewaterhouseCoopers <http://www.arbitration.qmul.ac.uk/docs/123294.pdf. > accessed 19 October 2018.

61 Report No. 246 On Amendments To The Arbitration And Conciliation Act, Law Commission Report No. 246 (2016) 10.

of Commerce (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC), Kigali International Arbitration Centre (KIAC) and the Nairobi Centre for International Arbitration.

Promoting the use of institutional arbitration is vital to the development of arbitration as a preferred form of arbitration and would make Uganda an attractive destination for arbitration. The Commission acknowledges the benefits of institutional arbitration *vis a vis ad hoc* arbitration, therefore, there is need to strengthen the framework for institutional arbitration.

Recommendation

Arbitration should be strengthened by putting in place a framework that facilitates both institutional and *ad hoc* arbitration.

3.1 Defining domestic and International arbitration

Arbitration may be characterised as domestic or international. The study sought to draw a distinction between domestic and international arbitration so as to provide clarity and certainty in the law. The study revealed that the concept of domestic and international arbitration varies from country to country. Some countries treat a dispute subject to arbitration between two local parties as domestic and apply domestic law. While other countries treat a dispute as international if there is an international element in the dispute.[62]

Findings indicate that some countries do not draw a clear distinction between domestic and international arbitration. For

62 Meeting with Ssebalu and Lule Advocates (Kampala, 5 June 2017).

example, Common Law does not distinguish between domestic and international arbitration.[63]

International arbitration remains a preferred dispute resolution mechanism in cross-border transactions. It gives parties autonomy and flexibility in resolving their disagreements and provides a neutral forum, away from local courts. Arbitral awards are also easier to enforce across jurisdictions than court judgments. To benefit from the many advantages arbitration has to offer, companies should be mindful that arbitration clauses must reflect local requirements, which can vary significantly.[64]

The implications of an unclear distinction is that if a dispute is considered domestic under local law, the parties' chosen law might be unenforceable, requiring the parties to litigate in local courts under local laws. Such a scenario may disadvantage the parent company, as the local counterparty is likely more familiar with local courts and procedures. It also creates uncertainty as to whether the choice of a foreign seat by two local companies can be defended, if challenged. This uncertainty can expose a foreign parent company to litigating the dispute in local courts. This will not satisfy the party especially if they feel the rules of procedure are not modern enough or lack flexibility.

Furthermore, it is argued, local affiliates may find that business considerations or the bargaining power in negotiations between local affiliates and their counterparties limit their options regarding the governing law and seat of arbitration.[65] In those circumstances, foreign companies ought to give

63 Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development (Cambridge University Press 2001) 158.

64 Meeting with the Judges of the Commercial Court (Kampala, 12 July 2017).

65 Claudia Salomon and Irina Sivachenko, When International Arbitration Becomes Domestic<https://www.lw.com/thoughtLeadership/When-International-Arbitration-Becomes-Domestic> accessed 25 September 2019.

careful consideration to the dispute resolution procedures to understand their rights and remedies under the local law.[66]

The study revealed that whereas the Arbitration and Conciliation Act applies to both domestic and international commercial arbitration, it does not define the terms domestic or international commercial arbitration. Section 2(1) (b) of the Act defines "arbitration" as any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement. The study noted that the failure by the Act to define domestic and international commercial arbitration creates uncertainty and lack of clarity.

Some scholars have argued that the distinction between national and international arbitration 'is vastly overstated' as their connections are often quite obvious.[67] As Albert van den Berg explained; "in fact, when reference is made to international (commercial) arbitration, it is in the sense of an arbitration 'internationalised' within the limits of an applicable national arbitration law, that this term is commonly used."[68]

The study established that some jurisdictions have defined domestic and international arbitration in their legislation. For example, the Kenya Arbitration Act contains explicit definitions of both domestic and international arbitration.[69] According to the Act, arbitration is domestic if the arbitration agreement provides expressly or by implication for arbitration in Kenya and

66 Claudia Salomon and Irina Sivachenko, When International Arbitration Becomes Domestic <https://www.lw.com/thoughtLeadership/When-International-Arbitration-Becomes-Domestic> accessed 25 September 2019.

67 Yves Dezalay and Byrant .G Garth, Dealing in Virtue; International Commercial Arbitration and the Construction of a Transnational Legal Order (0002- edition University of Chicago Press, 1996) pp.120 – 6.

68 Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development (Cambridge University Press 2001) 158.

69 Section 3(2)(3) of the Kenya Arbitration Act No.4 of 1995 Revised Edition 2019.

at the time when proceedings are commenced or arbitration is entered into if:

(a) the parties are nationals of Kenya or are habitually resident in Kenya;

(b) in the case of a body corporate, that body is incorporated in or its central management and control is exercised in Kenya; or

(c) the place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is Kenya.

Arbitration is international if;

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;

(b) one of the following places is situated outside the state in which the parties have their places of business—

    (i) the place of arbitration if determined [in], or pursuant to, the arbitration agreement; or

    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.

Section 3 (4) of the 1995 Kenyan Act further provides that, for the purpose of subsection (3):

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; and

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

Similarly, the Arbitration and Conciliation Act of India[70] defines international commercial arbitration as arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is:

(a) an individual who is a national of, or habitually resident in, any country other than India; or
(b) a body corporate which is incorporated in any country other than India; or
(c) an association or a body of individuals whose central management and control is exercised in any country other than India; or
(d) the Government of a foreign country.

In Algeria, Article 458bis[71] defines international arbitration as 'arbitration which deals with disputes relating to international commercial interests and in which, at least one of the parties is domiciled abroad.

The Tunisia Arbitration Code.
[72] describes an international arbitration to mean where:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
(b) one of the following places is located outside the State in which the parties have their places of business;
    (i) the place of arbitration as determined in the arbitration agreement or pursuant to the methods provided therein for determining it; and
    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the

70 Arbitration and Conciliation Act No. 26 of 1996 (India).
71 The 1993 Arbitration Law (Algeria).
72 Arbitration Code 1993 (Tunisia).

subject matter of the dispute is most closely connected;

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; and

(d) in a broader sense, an arbitration is international if it implicates international commercial interests.

2 The place of business shall be construed according to the following:

(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference shall be made to his habitual residence.

The UNCITRAL Model Law under Article 1(3) provides that an arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:
   (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
   (b) if a party does not have a place of business, reference is to be made to his habitual residence.

The International Chamber of Commerce uses the nature of the dispute as the criterion for deciding whether or not arbitration is international under its Rules. The function of the International Court of Arbitration of the International Chamber of Commerce is to provide, under its Rules, for the settlement by arbitration of business disputes of an international character. However, it may accept business disputes which are not of an international nature if the International Chamber of Commerce Court has jurisdiction by reason of an arbitration agreement.[73]

The above discussion clearly shows a trend towards merging the party oriented and the subject matter approach in drawing a distinction between domestic and international arbitration. Specially defining this distinction in legislation offers parties to arbitration certainty, clarity and predictability. The distinction drawn by the Model Law is most recommended because it is comprehensive.

Recommendation

The law should distinguish between domestic and international arbitration through specific definitions.

3.2 Nature and form of arbitration agreements

An arbitration agreement is "an agreement by the parties to submit to arbitration all or certain disputes which have arisen

73 Rules of Arbitration of the ICC, Article 1(1). The International Court of the ICC does not settle disputes. It ensures the application of the ICC Rules. see also ICC Rules, Article 1(2) and the Statutes of the ICC Court, Article 1(1).

or which may arise between them in respect of a defined legal relationship, whether contractual or not."[74] An arbitration agreement may be in form of an arbitration clause in a contract or in form of a separate agreement and must be in writing.[75] An arbitration agreement is in form of writing if it is contained in a document signed by the parties or an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement.[76]

Currently, the Act provides that an arbitration agreement shall be in a written form. This does not cater for oral agreement between the parties, which also amounts to an arbitration agreement. According to some study respondents, reducing arbitration agreements into writing is most preferred because it offers evidential basis that parties have agreed to have their matters arbitrated.[77] Parties who enter into oral agreements may have no reference to an arbitration agreement and the terms agreed upon may be ambiguous. A study conducted by UNCITRAL revealed that in a number of situations, the drafting of a written document was impossible or impractical.[78] In such cases, where the willingness of the parties to arbitrate was not in question, the validity of the arbitration agreement should be recognised.[79] This was intended to address the evolving practice in international trade and technological developments,[80] which allows for the making of oral agreements. Under the UNCITRAL Model Law, the agreement to arbitrate may be oral, written or

74 ACA, s (2) (e).
75 ACA, s 3 (1) & (2).
76 ACA, s 3 (3).
77 Respondents in a focus group discussion of arbitrators and arbitration advocates held at CADER on 26 March 2018
78 Explanatory notes by the UNCITRAL Secretariat, on the 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Yearbook, vol. XVI – 1985, United Nations publication, Sales No. E.87.V.4.
79 ibid.
80 Explanatory notes by the UNCITRAL Secretariat, on the 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Yearbook, vol. XVI – 1985, United Nations publication, Sales No. E.87.V.4.

electronic. This development in the law is significant because there is no requirement for parties to exchange signatures or messages in order to enter into an arbitration agreement.

The UNCITRAL Model Law adopts two approaches on the form of an arbitration agreement.[81] The first approach follows the detailed structure of the original 1985 text which confirms the validity and effect of a commitment by the parties to submit to arbitration an existing dispute ("compromise") or a future dispute ("clause compromisoire"). It also follows the New York Convention in requiring the written form of the arbitration agreement but recognises a record of the "contents" of the agreement in any form as equivalent to traditional[82] "writing. As such, if the parties have agreed to arbitrate, but have entered into the arbitration agreement in a manner that does not meet the form requirement (that it must be in writing), any party may have grounds to object to the jurisdiction of the arbitral tribunal.

The second approach defines the arbitration agreement in a manner that omits any form requirement.[83] No preference was expressed by UNCITRAL in favour of either option, both of which are offered for enacting States to consider, depending on their particular needs, and by reference to the legal context in which the Model Law is enacted, including the general contract law of the enacting State. Both options are intended to preserve the enforceability of arbitration agreements under the New York Convention.

There are other circumstances where a contract may refer parties to arbitration. Such a situation may arise in an exchange

81 UNICTRAL Model Law, Chapter II.
82 New York Convention, Article II.
83 Option 2 of Article 7 of the Model Law reads as follows:

"'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not."

of statements of claim and defence in which the existence of an arbitration agreement is alleged by one party and not denied by another. The other situation is where the reference in a contract or any document (for example, general conditions) contains an arbitration clause constituting an arbitration agreement in writing provided that the reference is such as to make that clause part of the contract.[84] The Model Law thus clarifies that applicable contract law remains available to determine the level of consent necessary for a party to become bound by an arbitration agreement allegedly made 'by reference'.[85]

Most jurisdictions have adopted Option I because it is inclusive of the nature and form of an arbitration agreement. This is the case in Kenya, South Africa[86] and Rwanda. In Kenya, section 4 of the Arbitration Act[87] provides as follows:

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

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84 The United Nations Convention on the use of Electronic Communications in International Contracts, 2007, Article 4(b) electronic communication means any communication that the parties make by means of data message.

85 Option 1 of Article 7 of the Model Law reads as follows:

"(1)'Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

86 The International Arbitration Act, No. 15 of 2017.

87 The Laws of Kenya, Arbitration Act, Cap. 49 Revised Edition 2012.

(3) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

The Law on Arbitration and Conciliation in commercial matters of Rwanda similarly provides for the form of an arbitration agreement. Importantly, key terminologies such as electronic communication and data messages are defined for clarity. Electronic communication is defined to mean any communication that the parties make by means of data messages. While data message is defined as any information written, sent, received or stored by electronic, magnetic, optical and other means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telefax.

Uganda could benefit from adopting Option I as is because it is inclusive of the definition and form of an arbitration agreement. In addition, Option I addresses evolving practices in international trade and technological developments to enhance arbitration as a commercially significant method of alternative dispute resolution.

Recommendation

The form of an arbitration agreement, as stipulated under UNCITRAL Model Law Option 1 Article 7, should be adopted by Uganda.

3.3 Interim and preliminary measures

From the study findings, an arbitral tribunal does not have powers to grant interim and preliminary measures. This causes unnecessary delays in the arbitral proceedings since parties have to seek relief from the courts of law, which have case backlog. This further defeats the very purpose of arbitration as a faster method of resolving disputes.

According to an advocate familiar with the arbitration law and practice in Uganda, "the involvement of court for interim measures during arbitration proceedings causes unnecessary delays. Courts also have an elaborate process for granting such interim measures."[88]

A member of the Technical Working Group observed that "most people prefer to go to court since court orders are easily enforceable compared to orders of an arbitration tribunal. This however was not the case since the Arbitration and Conciliation Act does not provide a specific mechanism for ensuring such interim measures."[89]

On the other hand, a meeting with judicial officers revealed that there is minimal or no arbitration in the court. However, the court can only intervene in terms of recognition of, or setting aside of arbitral awards or interim orders.[90]

88 Meeting with the technical working group, advocate from Ssebalu and Lule Co. Advocates (Kampala, 15 March 2018).
89 Meeting with the technical working group (15 March 2018). in the Uganda Law Reform Commission.
90 Meeting with the Judges of the Commercial Court (12 July 2017).

Granting interim measures is one of the limited areas which allow for court's intervention in arbitration matters.[91] A party to arbitration is allowed to apply to court before or during arbitral proceedings for an interim measure of protection, and the court may grant that measure as provided for under section 6 of the Arbitration and Conciliation Act. Even so, in the case of *Sekaziga & Anor v Church Commissioners Holding Company Ltd*[92] Judge Christopher Madrama held that an arbitral tribunal in any case has powers to grant interim relief under the provisions of section 6 (2) of the Arbitration and Conciliation Act or the general provisions of sections 17 of the Arbitration and Conciliation Act.

In 2006, the UNCITRAL Model Law adopted a new chapter IV on interim measures and preliminary orders (attached to this Study Report as **Annex 2**). The chapter replaces Article 17 of the original 1985 version of the Model Law. The extensive revision of article 17 on interim measures was considered necessary in light of the fact that such measures are increasingly relied upon in the practice of international commercial arbitration. The revision also includes an enforcement regime for such measures in recognition of the fact that the effectiveness of arbitration frequently depends upon the possibility of enforcing interim measures.[93]

In any review of the Act, it is advisable to consider whether to enact all or part of the provisions of the Model Law relating to interim measures by an arbitration tribunal.

91 ACA,s 6.
92 Miscellaneous Cause No. 15 of 2013 UGCOMMC 135 (31 July 2013).
93 Explanatory notes by the UNCITRAL Secretariat, on the 1985 Model Law on International Commercial Arbitration as amended in 2006, UNCITRAL Yearbook, vol. XVI – 1985, United Nations publication, Sales No. E.87.V.4.

In light of the decision of Madrama, in *Sekaziga & Anor v Church Commissioners Holding Company* Ltd,[94] the amended UNCITRAL Model Law and stakeholder concerns during the study, there is need to give powers to an arbitral tribunal to grant preliminary and interim measures.

Recommendation

The Arbitration and Conciliation Act should be amended the Act to provide for the power of an arbitration tribunal to grant and enforce preliminary and interim measures.

3.4 Immunity of arbitrators from suit.

Arbitrators should have a sense of accountability. Arbitrators should be careful when executing their duties and should take insurance cover against liability.[95]

A judicial officer argued that "the same immunity given to judicial officers should be given to arbitrators since they are all dispensing justice."[96]

The study findings also revealed that the immunity that should be granted to arbitrators should be qualified and not absolute and one of the considerations that should be given is that acts should be done in good faith.[97]

An arbitrator who is not immune from actions or omissions can be exposed to open ended liability from the parties. Considerable harm can be done to the finality of the arbitral process which might make it difficult to find arbitrators willing to serve at all.

94 Supra at Note 92.
95 Meeting with an arbitration practitioner at K Solutions and Partners (Kigali, 30 June 2017).
96 Meeting with the judicial officers at the commercial court (Kampala, 12 July 2017).
97 Meeting with the judicial officers at the commercial court (Kampala 12 July 2017).

Therefore, insurance would become essential in this case and the cost might well prove prohibitive.

Immunity from a suit is clearly a prerogative reserved to the State. In affording arbitrators with immunity, the State will weigh the wrong such immunity can cause against the benefits distilled from the public policy reasons to find that the concession is worthwhile.[98] Arbitrators are individuals whom the legal system permits to perform a function that is in principle reserved for the State.

Previously, an arbitrator held a professional insurance policy so as to protect himself or herself from risk for actions done during arbitration proceedings. This has however changed to one who enjoys immunity. For the unsuccessful litigant however, it can be argued that they are now faced with an arbitrator armed with a charter for incompetents, who lacks elementary skill, increases costs and delay, and can now carry on in that regard without fear of litigation. Thus instead of providing a positive motivation to those considering arbitration, it can be argued that the extension of immunity may in fact amount to a turn off.[99]

In the leading case of *Sutcliffe v Thakra*,[100] Lord Salmon stated, "it is well settled that judges, barristers, solicitors, enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This presumption should be equally applied to arbitrators on the grounds of public policy."[101]

98 The Principle of Arbitrator Immunity <https://www.lawteacher.net/free-law-essays/commercial-law/the-principle-of-arbitrator-immunity-commercial-law-essay.php; >accessed on 3 March 2017.

99 Jenny Brown, Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion? (2009) Volume 2009/ Issue 1 Journal of Dispute Resolution, Article 10 Page 227.

100 [1974] A.C. 727 et seq.

101 ibid.

Several institutions administering arbitration have provided for the immunity of arbitrators and themselves in a number of institutional rules and national legislations. According to Finizio and Speller,[102] some arbitration rules expressly specify that arbitrators are immune from liability, although many rules are silent and national laws vary. Article 34 of the International Chamber of Commerce (ICC) Rules stipulates that:

> "Neither the arbitrators, nor the Court and its members, nor the ICC and its employees, or the ICC National Committee shall be liable for any act or omission in connection with arbitration."

Article 31 of the London Court of International Arbitration (LCIA) Rules bears a similar provision for the exclusion of liability of arbitrators. Further Article 16 of the UNCITRAL Arbitration Rules, 2010 contains an express provision that;

> "Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

This is a new provision which was not present in the previous version of the UNCITRAL Rules.

In the United Kingdom, section 29 (1) of the Arbitration Act 1996 provides that:

> "An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions

102 Steven Finizio and Duncan Speller, A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy, Thomson Reuters, 2010.

> as arbitrator unless the act or omission is shown to have been in bad faith".

The Arbitration and Conciliation Act is silent on the immunity of an arbitrator or the institution. The lack of immunity would cause fear of liability for decisions that could have been made out of improper interpretation of the law. Jurisdictions such as the UK, USA, and Singapore all have laws supporting an arbitrator's immunity for efficient and speedy administration of justice which is needed on the ground of public policy.[103] The respondents agreed that arbitrators in Uganda and arbitration in general would benefit from the inclusion in the Act, a provision to guarantee the immunity of an arbitrator or arbitral institutions from suits.

Recommendation

The Act should provide for immunity of arbitrators or arbitral institutions from suits for matters done in good faith.

3.5 Procedure for stay of legal proceedings

Findings indicate that sometimes parties with disputes will involve the court even when there is an arbitration clause providing for the matter to be settled through arbitration. One party may be interested in arbitration and the other may want the courts to resolve the matter.[104]

It was observed during the study that some matters in the commercial court are to be resolved through alternative dispute

103 Rules supporting immunity of arbitrators include International Chamber of Commerce (ICC) Rules, International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules, WIPO Arbitration Rules and London Court of arbitration Rules.

104 Meeting with Centre of Arbitration and Dispute Resolution (Kampala, 26 March 2018).

resolution such as arbitration. These are matters that have an arbitration clause or a separate agreement to arbitrate. The judicial officers before whom such a matter is referred it to the Centre of Arbitration and Dispute Resolution. When a stay of legal proceedings is granted, the suit that has been filed lapses.[105]

The study established that the procedure that the courts follow when referring a matter to arbitration is a court order. The party interested in arbitration will usually initiate the proceedings.[106]

The role of court in arbitration matters is limited and determined by specific statutory provisions. Section 9 of the Act provides that except as provided, no court shall intervene in matters governed by the Arbitration and Conciliation Act. A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement is obliged to refer the matter back to arbitration unless he or she finds that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not any dispute between the parties with regard to the matters agreed to be referred to arbitration.[107]

The Court of Appeal in the case of *NSSF v Alcon International Ltd*[108], quoting David St. John Sutton[109] stated that “an arbitral clause in a contract has an enduring and special effect. Even if parties decide to adopt a different dispute resolution mechanism for a particular dispute that arises under a contract, the arbitration continues in force and is not thereby totally repudiated unless

105 Meeting with the judicial officers at the Commercial Court (Kampala, 12 July 2017).
106 Meeting with the technical working group (Kampala, 15 March 2018).
107 Arbitration and Conciliation Act, s 5.
108 Court of Appeal, No. 2 of 2008.
109 David St John Sutton, Judith Gill and Matthew Gearing, Rusell on Arbitration,22ndedn, Sweet & Maxwell 2015 para 2 -119, page 80.

there is a solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause."

Similar views were held in *British American Tobacco v Lira Tobacco Stores*[110] and *Yan Jian Uganda Co Ltd v Siwa Builders and Engineers.*[111] In both decisions, the High Court held that where the contract provides for arbitration, the court shall refer the parties for arbitration and the suit lapses.

Section 5 (1) of the Act requires the court to refer the dispute back to arbitration. In *Daniel Delestre and others v Hits Telecom (U) Ltd,*[112] Judge Christopher Madrama held that where the court orders the dispute embodied in the proceedings before court to be referred for arbitration, the pending suit lapses.

In *Sanlam General Insurance (U) Ltd v Victoria Motors Ltd & Anor*[113] Court held that, where the parties need intervention of court, specific rules of procedure have been provided under section 71 of the Act and the first schedule thereto, prescribing the procedure for moving the court in any manner enabled by the Arbitration and Conciliation Act.

The study revealed that the courts are uncertain on the procedure to be used to refer the matter to arbitration. This is because the Arbitration Rules in the First Schedule to the Act do not offer much guidance on how to proceed. This is further exacerbated by the vice of parties who intentionally want to delay proceedings without the intention of instituting arbitral proceedings. The law should expressly provide for the procedure under section 5 of Act for the court to refer such matter to arbitration.

110 HCMA No. 924 of 2013.
111 HCMA No. 1147 of 2014.
112 Misc. Application No. 310 of 2013.
113 Misc. Application No. 41 Of 2016.

Recommendation

The procedure for court referral of a matter to arbitration should be provided for under the Arbitration Rules.

3.6 Arbitrability

The study findings revealed that the law is silent on the scope of arbitral matters. An arbitration advocate observed that “tax and employment matters are excluded from arbitration in Uganda because there are special tribunals established by statute to hear and determine tax and employment matters.[114]

Practitioners in the area of arbitration were of the view that matters that are non-arbitrable should be defined through mandatory rules. Arbitrability is one of the grounds to refuse both recognition of arbitration agreements and or the recognition and enforcement of arbitral awards.[115]

Arbitrability refers to whether or not arbitrators have the authority to rule on a dispute.[116] The issue of arbitrability can arise at three stages in an arbitration:

(a) on an application to stay the arbitration, when the opposing party claims that the tribunal lacks the authority to determine a dispute because it is not arbitrable;

(b) in the course of the arbitration proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction; and

(c) on an application to challenge the award or to oppose its enforcement.[117]

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114 This was the same view expressed in Rwanda during the bench marking exercise carried out in June 2017. For employment matters, the rationale was that these are public policy issues that cannot be addressed in private.

115 Meeting with the technical working group (Kampala, 15 March 2018). (ULRC)

116 Baker McKenzie, Who decides arbitrability? <http://www.lexology.com/library/detail> accessed on 3 Febuary 2017.

117 David St John Sutton, Judith Gill and Matthew Gearing, Rusell on Arbitration,22ndedn, Sweet & Maxwell 2015 page 13.

According to Sutton Gill, an obvious area where disputes are not arbitrable is crime. Only judges and magistrates can punish criminals and there will be few occasions where an arbitration tribunal must consider whether a crime has been committed.[118]

In *Booz Allen & Hamilton Inc. v SBI Home Finance Ltd. & Others,*[119] the supreme court carved out six categories of cases which are incapable of being decided by arbitration even though parties agreed for their settlement by arbitration namely:

(a) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;
(b) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;
(c) guardianship matters;
(d) insolvency and winding up matters;
(e) testamentary matters (grant of probate, letters of administration and succession certificate); and
(f) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

The Supreme Court of India in *Shri Vimal Kishor Shah v Jayesh Dinesh Shah & Ors*[120] has also added one more category to the list namely, cases arising out of trust deed and the Trust Act.

Non-arbitrability of a dispute, however, is not only a ground for refusing to recognise or enforce an arbitral award, but also a ground for refusing to recognise and give effect to an arbitration agreement under Article II of the New York Convention.[121] Article II of the Convention states that:

118 ibid.
119 (2011) 5 SCC 532.
120 SCCA of India No.8164 of 2016.
121 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

> 'Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. [...]

The Convention does not define the concept of arbitrability. Therefore, it is up to individual states to determine whether there are any matters they consider non-arbitrable and consequently reserve for the exclusive jurisdiction of their state courts. The scope of the notion of arbitrability may vary considerably between jurisdictions.[122]

The Arbitration and Conciliation Act, Cap. 4 does not expressly provide for whether or not any matters are non-arbitrable. Although, Section 34 (2) (b) of the Act provides that a court may set aside an arbitral award if the court finds that:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or
(ii) the award is in conflict with public policy of Uganda"

This provision is similar to Article V (2) of the New York Convention, which provides that:

> Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> The subject matter is not capable of settlement by arbitration under the law of that country' [123].

122 Hollander Pascal, Report on the Concept of 'Arbitrability' under the New York Convention, May 2017 Vol. 11 No.1 Journal of Dispute resolution International.
123 Article V (2) of the Convention on the recognition and enforcement of Foreign Arbitral Awards. United Nations, 1958.

Some jurisdictions have provisions in the national arbitration law that set general standards to determine which subject matters are arbitrable. The question whether such general standard is met in a given case is left to the assessment of the courts. In Common Law jurisdictions such as Australia, England and Pakistan, however, arbitration laws do not put forward a direct general standard of arbitrability. In these jurisdictions, the standards for arbitrability appear to be established by courts through precedent. English courts have construed arbitrability broadly.[124]

Many jurisdictions have defined specific subject matter, which are reserved for state courts. Generally the two approaches applied are:

(a) general exclusions; most jurisdictions put forward a general standard of arbitrability. Such a general standard also imposes a general limitation. For example, many jurisdictions exclude 'subject matter on which parties cannot reach a settlement agreement.'[125]

(b) subject matter of which parties 'cannot dispose'. As a result of such exclusions, criminal matters are for example not arbitrable in any of the reported countries.[126]

According to study by the International Bar Association (IBA) subcommittee on recognition and enforcement of foreign arbitral awards, a number of categories were reported to be non-arbitrable or subject to certain limitations.[127] These include:

(i) administrative law issues;[128]

124 Pascal Hollander, Arbitrability under the New York Convention-General Report, IBA subcommittee on recognition and enforcement of arbitral awards, September 2016 page 13.

125 1993 Tunisian Code, Article 7.

126 The Code of Civil Procedure of Cameroon, Article 577 and 756.

127 Pascal Hollander, Arbitrability under the New York Convention-General Report, IBA subcommittee on recognition and enforcement of arbitral awards, September 2016 page 12.

128 In Austria, Colombia, Finland, Egypt, Mexico and Paraguay.

(ii) anti - trust matters;[129]
(iii) bankruptcy and insolvency matters;[130]
(iv) carriage of goods by sea and transportation;
(v) civil status and legal capacity;
(vi) commercial agency agreements;
(vii) disputes with consumers;
(viii) intra-company and share holder disputes;
(ix) employment and labour law;[131]
(x) environmental damage disputes;
(xi) family law and status of persons;[132]
(xii) financial market regulations;[133]
(xiii) real estates or property issues and residential leases;[134]
(xiv) insurance;[135]
(xv) intellectual property rights;
(xvi) privatisation disputes
(xvii) taxation;[136] and
(xviii) public procurement disputes

Consequently, it is up to Uganda to determine domains considered non-arbitrable and therefore a reserve for the exclusive jurisdiction of the national courts. This will provide certainty and avoid ambush at the time of enforcement of an arbitral award.

Recommendations

(i) The Act should specify matters that are non-arbitrable.

129 Austria, Belgium, Colombia, France, Italy , Japan.
130 England, Austria, England, France, Italy.
131 Austria, Belgium, England, Egypt, France, Germany.
132 England, Finland, France.
133 Italy and Japan.
134 Egypt, Serbia, Russia, Ukraine.
135 Australia and Belgium.
136 France.

(ii) Non arbitrability or void arbitration agreements should be provided for as a ground upon which court can retain jurisdiction.

3.7 Setting aside arbitral awards

The study established that there is uncertainty about the role of court in respect of an application for setting aside an arbitral award. The Act provides the court with grounds for setting aside which are different from the grounds provided for under the Civil Procedure Rules.[137]

That the time frame for setting aside an arbitral award in the Act and the Rules within the Act are in contradiction. The Act provides for thirty days while the Rules stipulate 90 days. The rules are also not clear as to when the ninety days begin to run.[138]

The study also established that the courts should be allowed to vary an award in case there is a problem otherwise there will only be declarations without any remedy.[139]

The contradiction on the time frame and the grounds for setting aside of an arbitral award causes a miscarriage of justice for a party seeking to set aside an award. This complicates and lengthens the time for the arbitration process.

The role of court in arbitration matters is limited and determined by specific statutory provisions.[140] Recourse to the court against an arbitral award may be made only by an application for setting

137 See ACA s 34(2)(3) and Order XLV11 Rule 15 of the Civil Procedure Rules SI 71-1.
138 Arbitration and Conciliation Act, Cap, 4, s 34(3) and Rule 7(1) of the Arbitration Rules.
139 Meeting with the judicial officers of the Commercial court(Kampala, 12 July 2017).
140 Arbitration and Conciliation Act, 2000 s 9.

aside the award under sections 34 (2) and (3) of the Arbitration and Conciliation Act which provides that:

> "An arbitral award may be set aside by the court only if—
>
> (a) the party making the application furnishes proof that—
>
> (i) a party to the arbitration agreement was under some incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;
>
> (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident

partiality or corruption by one or more of the arbitrators; or

(vii) the arbitral award is not in accordance with the Act;

(b) the court finds that—

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or

(ii) the award is in conflict with the public policy of Uganda.

Court has an important role to play in the recognition and enforcement of an arbitral award. Where the time for making an application for setting aside has lapsed or an application has been made and rejected, the award is enforced as if it were a decree of the court.[141]

Under the Arbitration Rules within the Act,[142] an aggrieved party can apply to court to set aside an arbitral award as follows:

> *"(1) Any party who objects to an award filed or registered in the court may, within ninety days after notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested.*
>
> *(2) The parties on whom the objections are served may, within fourteen days after the date of service of the objections, lodge cross objections which shall be served on the original objector.*

141 Arbitration and Conciliation Act, 2000, s 35 and 36.

142 ACA, First Schedule of the Act.

The rules in this regard contradict the timeframe of thirty days within which an aggrieved party can apply to set aside an arbitral award under section 34 of the Arbitration and Conciliation Act. There is need to reconcile the timeframe provided under section 34 and rule 7 of the Act.

On the other hand, Order XLVI rule 15 of the Civil Procedure Rules provides different grounds for setting aside an arbitral award by court. These include:

(a) corruption or misconduct of an arbitrator or umpire;
(b) fraudulent concealment of either party or the wilful misleading or deceiving the umpire or arbitrator; and
(c) the award having been made after the issue of an order of court superseding the arbitration or after the expiration of the period allowed by the court or being otherwise invalid.[143]

The different sets of grounds for setting aside an arbitral award in the Act and the Civil Procedure Rules are a potential source of conflict. Consequently, there is need for harmonization of the grounds under the Arbitration and Conciliation Act and the Civil Procedure Rules.

A review of some court decisions indicates that courts have done more than set aside or uphold an arbitral award. In some cases, courts have varied or re-evaluated the arbitral award and sometimes partially set it aside.

In the case of *Simbamanyo Estates Ltd v Seyani Brothers Co. (U) Ltd*,[144] the High Court held that applications for setting aside awards are regulated by section 34 of the Arbitration and Conciliation Act and the law is settled. When court is called upon to decide objections raised by a party against an arbitral award,

143 These are the grounds which were in the repealed arbitration Act of 1964.
144 HCMA No. 555 of 2002.

the jurisdiction of the court is limited as expressly indicated in the Act. It was further held that the court has no jurisdiction to sit in appeal and examine the award on its merits. This decision was upheld in the case of *Katamba Philip and 3 Ors v Magala Ronald.*[145]

In the case of *Kampala Capital City Authority v Omega Construction Limited*[146] The principles of setting aside an arbitral award as set out in the Arbitration and Conciliation Act were explained.[147] The court relied on the case of *Mbale Resort Hotel v Babcon Uganda Ltd*[148] and held that, "the court can intervene and set aside the award if it is shown to be bad on the face of it or there has been something radically wrong or vicious in the proceedings amounting to violation of natural justice". The court set aside part of the award in respect to the cost claims and maintained the rest of the award as made and delivered by the arbitrator in as far as it was not affected by the order of the court.

Courts are mindful of the fact that they cannot delve into analysing evidence like would be in the case of a second appeal because it is not court's duty to re-evaluate the evidence presented before the arbitral tribunal and make decisions thereon. The powers of the court should be harmonised and clearly spelled out.

Recommendations

(i) The Act should clearly spell out the powers of court in setting aside of an arbitral award.

145 High Court Arbitration cause No. 003 of 2007.
146 High Court Miscellaneous Cause No. 14 of 2017.
147 Section 34.
148 HCMA No 265 of 2010.

(ii) The grounds for setting aside an arbitral award under section 34 of Act and Order 47 rule 15 of the Civil Procedure Rules should be harmonised.

3.8 Extension of time for making an award

The study established that the timeframe within which an arbitrator may make an award is sufficient since there is a provision to extend the time where the two months are insufficient.[149]

During a taskforce meeting, it was observed that most arbitrators deliver their awards on time and at times when they are not able to, notice is given to the parties.[150]

Some respondents were of the view that arbitrators sometimes abuse this provision when they unjustly extend time without just reasons. To curb this, it was agreed that the law should state the reasons as to why an award may be delayed.[151]

Section 31 (1) of the Arbitration and Conciliation Act provides that:

"The arbitrators shall make their award in writing within two months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award."

Arbitration which is intended to be an expeditious process enjoins the arbitrator to conclude the proceedings with all possible

149 Section 31(1) of the Arbitration and Conciliation Act. Cap.4 .
150 Meeting of taskforce members working on the project at ULRC (Kampala, 15 March 2018).
151 Meeting of taskforce members working on the project at ULRC (Kampala 15 March 2018).

dispatch. If the court appoints an arbitrator, the court can fix the time within which proceedings have to be completed. If the arbitrator has been appointed or is to be appointed outside the court, the parties may set the time for completion of arbitration proceedings in the agreement itself[152] or subsequently by a separate agreement. In the absence of such a consensual prescription of period, statutory provision contained in the law would come into play.[153] Section 31(1) of the Act sufficiently addresses the issue of extension of time.

Recommendation

Maintain the time frame for making an award and provide for giving of reasons in case of delay in delivery of an award.

3.9 Inconsistencies between the Act and the Rules

The study revealed that practitioners were dissatisfied with the depth of the Rules. An academic criticised and pointed out that the Rules are too brief and insufficient to provide the required guidance for both arbitrators and parties to arbitration.[154]

According the same members of the Judiciary[155] and advocates interviewed, the Arbitration Rules under the Arbitration and Conciliation Act are too shallow and do not give much guidance. The Rules only contain a few rules some of which contradict the Act.

152 Arbitration Act 1996, s 50 (UK).

153 M.A. Sujan, 'Law relating to Arbitration and Conciliation' 2 edn, Universal Law Publishing Company Pvt. Ltd
2001 page 368.

154 Meeting with the Dean, Faculty of Law, Uganda Christian University (Kampala, 6 June 2017).

155 Consultative meeting with the judges at the Commercial Division of the High Court (Kampala 12 July 2017).

Whereas the Arbitration Rules are contained in the First Schedule to the Act, it has been noted that some aspects of the rules contradict the provisions of the Principal Act. For example, rule 7 (1) provides that a party who objects to an award may lodge his or her objection within 90 days while section 34 (3) provides that an application for setting aside the arbitral award may not be made after one month has elapsed.

This contradiction was observed by Egonda-Ntende, J. in *Kilembe Mines Ltd v B.M. Steel Ltd*.[156] When he noted that the rules and the principal legislation are at variance over the same subject.

The same position was restated in the case of *Lottery Ltd v. Attorney General*,[157] where the learned judge ruled that there was indeed a contradiction between the two provisions as follows:

> "The main Act is clear and unambiguous. At the end of the proceedings, an award is given by the arbitrator. If a party is unhappy with the outcome, it shall file an application to set aside the award within 30 days on the grounds set out in the Act (section 34 ACA). The Rules provide for 90 days and both counsel for the applicant and respondent acknowledged that this is indeed in conflict with the 30 days provided for by the Act. It has therefore led to this confusion and in the absence of any ambiguity in the Act; the Act prevails over the Rules."

According to the Justice Mulyagonja Kakooza, in *Katamba Philip & 3 Ors v Magala Ronald,*[158] "no procedure for setting aside was laid down in the Arbitration and Conciliation Act (which was repealed).[159] Rule 7, which provided the procedure for challenging

156 HCMA 002 0f 2005.
157 HCMC 627 of 2008.
158 Arb. Cause No 03 Of 2007.
159 Laws of Uganda, 1964 Edition, Chapter 55.

awards, was reproduced in the Arbitration and Conciliation Act."[160] This did not address the inconsistence of the mechanism for challenging an arbitral award. The Act still contains contradicting timeframes for challenging the arbitral award.

Other contradicting provisions include; Rule 8 which provides for objections to awards and has no bearing on the Arbitration and Conciliation Act because the Act does not provide for applications for setting aside under section 34.

Rule 11, on the other hand, contradicts the provisions of section 36 of the Arbitration and Conciliation Act which provides that subject to an application for setting aside an award under section 34, or in the event of such application having been refused, an arbitral award shall be enforced in the same manner as if it were a decree of the court.

The Rules should be amended to enable the enactment of more comprehensive rules that address the gaps in the law.

Recommendations

- **(i) There is need to reconcile section 34 (3) of the Act with Rule 7 (1) of the Arbitration Rules.**
- **(ii) Rules 8 and rule 11 of the Arbitration Rules should be repealed because they are redundant.**
- **(iii) The Arbitration Rules should be reviewed and reformed to comprehensively cover procedural matters.**

3.9.1 Definition of Public Policy

During the study, one of the issues considered was the concept of public policy as one of the grounds upon which an arbitral

160 High Court Arbitration cause No. 003 of 2007.

ward may be side aside. The study revealed that generally the concept of public policy is determined on a case by case basis.[161] The study established that the Act is silent on the definition of public policy. Section 34 (2) provides that;

> *"An arbitral award may be set aside by the court only if—*
>
> *the award is in conflict with the public policy of Uganda."*

Public policy has been defined as the principles and standards regarded by the legislature or courts as being of fundamental concern to the State and the whole of society.[162] During consultations, a section of respondents were of the view that the failure to define public policy creates uncertainty and there is need to define the concept in the law.

However, the majority of the persons consulted argued that the term public policy should not be defined by law but rather left for determination by courts on a case by case basis. This was mainly attributed to the fact that what constitutes public policy connotes to public good or public interest that is subject to change. The technical working group agreed that the courts should determine what amounts to public policy.

Recommendation

The term public policy should be determined by court on a case by case basis.

161 Meeting with the taskforce members (Kampala 15 March 2018).
162 Black's Law Dictionary, 10th edn, Thomson Reuters , 2014.

3.9.2 Other issues considered

During the study, some issues emerged that merited consideration, these include: structure, role and management of CADER, regulation of arbitration fees and challenges hindering effective arbitration.

3.9.3 The structure and role of CADER

Section 67 (1) of the Act establishes the Centre for Arbitration and Dispute Resolution (CADER). The Centre is a body corporate with perpetual succession and a common seal. It is responsible for functions relating to arbitration and conciliation proceedings under the Arbitration and Conciliation Act.[163]

Study findings indicated that although the Act provides for the establishment of CADER, in practice no formal structures have been put in place.[164] CADER is run a by skeletal staff of three members: the Executive Director, an accountant and a receptionist/clerk. This has affected the proper functioning of the Centre in discharging its mandate under the Act. The status quo at the centre is mainly attributed to little or no funding of CADER by government.[165]

In 2008, an amendment to the Act[166] was made to enable CADER draw funds from the consolidated fund, however the Centre is still financially constrained.

In the matter of *Pile Corporation Limited v Twed Property Development Limited* [167] filed at CADER, BNB advocates raised

163 ACA, s 68.
164 Consultative meeting with Justice Law and Order Sector (Kampala, 9 April 2018).
165 Meeting with the judicial officers of the commercial court (Kampala,12 July 2017).
166 Arbitration and Conciliation (Amendment) Act, 2008.
167 CAD/ABR/NO.004 of 2018.

a complaint to the Minister of Justice and Constitutional against CADER on the grounds that:

(a) the Executive Director (ED) who is also a practicing advocate is susceptible to various conflicts of interests;

(b) CADER is thinly staffed which gives the Executive Director a lot of powers with no substantive checks and balances;

(c) the ED routinely awards costs yet there is no legal basis for such power; that the ED is usurping the powers of arbitral tribunals to award costs;

(d) parties to arbitration proceedings who have disagreed with the appointment of an arbitrator do not have access to the list of accredited arbitrators;

(e) charges by compulsorily appointed arbitrators are shrouded in secrecy and absolutely lacking in transparency; and

(f) in a number of matters, arbitrators make astronomical awards that have very little factual or legal basis.

A bench marking study carried out in Rwanda revealed that the Kigali International Arbitration Centre (KIAC) is established as an autonomous institution with financial independence. This has made KIAC an attractive forum for dispute resolution in Rwanda.

This study also revealed that due to the perceived inefficiency of CADER, the Uganda Law Society (ULS) and Uganda Bankers' Association (UBA) have established the International Centre of Arbitration and Mediation in Kampala.[168] During the study, some respondents called for the establishment of another institution that is independent and well facilitated to discharge the functions of arbitration. Other respondents were of the view

168 The International Centre for Arbitration & Mediation in Kampala commences operations<http://ugandabankers.org/the-international-centre-for-arbitration-mediation-in-kampala-commences-operations/ > accessed on 4 January 2020.

that the creation of another institution would be a duplication of the mandate and functions of CADER. It was observed that it is better to facilitate CADER to carry out its functions.

A review of practices in other jurisdictions revealed that arbitration is not a monopoly of a single institution. Several independent and effective institutions can be established to administer arbitration. For example, Kenya has two arbitration centres: Dispute resolution Centre Nairobi and Nairobi International Arbitration Centre. Similarly, Libya has two arbitration institutes: Libyan Centre for Mediation and Arbitration and the Libyan International Arbitration Commercial Centre, while South Africa and Nigeria have six each. Therefore, the establishment of multiple arbitration centres depend on the felt need in any given country.

Clearly, the financial independence and autonomy of an arbitral institution are key to its effectiveness in dispute resolution. On one hand, financial independence allows arbitral institutions to expeditious handle disputes. On the other hand, autonomy enables the institution to operate without external inference. In order for CADER to effectively discharge its functions, it is necessary that it be established as a strong and robust structure that is autonomous and financially independent. This will make arbitration one of the preferred modes of dispute resolution and therefore attract big investment. A robust dispute resolution mechanism has the potential of attracting foreign investors into the country.

Recommendations

(i) **The law should provide a framework that enables the registration and supervision of arbitration institutions.**

(ii) **The Government should commit to fully funding CADER and put in place proper structures for its operation.**

3.9.4 Tenure of the Executive Director of CADER

The study established that there is a gap within the governing council of the centre since the term of the old members had expired and new members had not been appointed. This affects the structure and operations of the Executive Director and the Secretariat, which was meant to address some of the gaps in the administration of the centre.[169]

Section 70 of the Arbitration and Conciliation Act establishes the office of an Executive Director of CADER. Section 69 (4) of the Act provides for the tenure of office of the governing council of CADER who shall hold office for a term of three years and shall be eligible for reappointment. This provision excludes the office of the Executive Director of CADER or a time limit for the Executive Director. The Act is also silent on the mode of appointment of the Executive Director of CADER.

In jurisdictions such as Rwanda, a Board of Directors appoints the Secretary General who is the equivalent of the Executive Director. The Board of Directors for KIAC is composed of seven members appointed by the Private Sector Federation from professional associations and international members with knowledge and practice in international arbitration. An international advisory board comprised of renowned international arbitrators advises the Board of Directors. This is a best practice that can be adopted by Uganda.

169 Meeting with Technical Advisor, Justice, Law and Order Secretariat (Kampala, 9 April 2018).

Recommendation

The Act should provide for the tenure of office of the Executive Director of CADER and mode of appointment.

3.9.5 Appointment of arbitrators and qualifications

Findings indicate that a person should undergo some training to qualify to be an arbitrator. The fact that one is a former judicial officer should alone be sufficient.[170]

It was discovered that arbitrators are appointed for the parties and the list of arbitrators and their brief profile is not gazetted or published.[171]

This practice of not publishing the list of arbitrators deprives parties of the autonomy to choose an arbitrator(s).

The functions of CADER include: qualifying and accrediting arbitrators, conciliators and experts[172] and to establish appropriate qualifications for institutions, bodies and persons eligible for appointment.[173] The Arbitration and Conciliation Act is silent on the nature of qualifications although CADER has some qualifications for arbitrators.

170 Meeting with Dean, Faculty of Law , Uganda Christian University (Kampala, 6 June 2017).
171 Meeting with a judicial officer at the commercial court (Kampala,12 July 2017).
172 ACA, s 68 (e) o.
173 ACA, s 68 (g).

Recommendation

CADER should regularly publish a list of qualified arbitrators.

3.9.6 Regulation of arbitrators' fees

During the study, it was discovered that there is no established fee structure for arbitrators which has led to arbitrary fees being charged. In one case, it was revealed that an arbitrator was sued over exorbitant arbitration fees.[174] The matter was reported then withdrawn and resolved out of court. Further, the fees are paid to the arbitrators and not the Centre of Alternative Dispute Resolution.

The Arbitration and Conciliation Act mandates CADER to establish and administer a schedule of fees for arbitrators.[175] An amendment to the Arbitration and Conciliation Act in 2008 provided that, the Minister shall, by statutory instrument, prescribe the fees to be charged by the Centre.[176]

In order to address some of these challenges, the standard fees structure should be provided. The arbitrators' fees should be paid to CADER then CADER pays the arbitrators for work done in order to harmonise the mode of payment of arbitrators.

The KIAC Arbitration Rules of Rwanda provide for arbitration costs under Annex 1 which include case filing fees (non-refundable –US $ 250). This filing fee is applicable to all cases administered by the Centre; to each claim and counterclaim. The costs also include administrative expenses that are dependent on the monetary value of the claim or counterclaim. Arbitrators' fees are computed in thresholds of below and above

174 A consultative meeting at the Commercial Division of the High Court (Kampala, 12 July 2017).
175 ACA, s 68 (j).
176 Arbitration and Conciliation (Amendment) Act No. 3 of 2008 s 70M (2).

three million dollars. This provides certainty as to the cost of an arbitral process.

Recommendation

CADER should establish and publish a schedule of fees for arbitrators as mandated under the Act.

3.9.7 Challenges hindering effective arbitration in Uganda

(a) Lack of sensitisation and awareness about arbitration

Majority of the respondents during the study cited the lack of awareness about arbitration as the main reason why people prefer court litigation to arbitration. Litigants prefer court to arbitration because they believe that court decisions are more reasoned and stronger which is not always the case. Some arbitral awards are equally good or even better than some court judgments.[177]

(b) Political instability

Political turmoil was cited was one of the factors that impact the development of arbitration in any country. Investors favour a good and safe political environment that guarantees a high likelihood of completing a case before civil unrest takes place.

(c) Corruption

Perceived or actual corruption among arbitrators is one of the factors hindering the development of arbitration in Uganda. Arbitration thrives on confidence and trust that the prospective parties have in an arbitral tribunal to deliver a just and fair

177 Meeting with Judges of the Commercial Division of the High Court(Kampala, 12 July 2017).

arbitral award, based on proper evaluation of the evidence presented by both parties. Corruption greatly compromises the ability of the arbitral tribunal in this regard yet the parties have no right of appeal. One of the reasons why KIAC has been able to attract international disputes is because Rwanda has gained a reputation as a no corruption zone with zero tolerance for corruption.

Recommendations

(i) **Sensitise the public about arbitration as an alternative dispute resolution mechanism.**

(ii) **Arbitration disputes should be heard daily and adjournments granted with sufficient cause such as death and sickness.**

(iii) **Parties who fail to submit their submissions to the arbitral tribunal should be penalized.**

CHAPTER FOUR

CONCLUSION

With increased globalisation, arbitration has become the preferred mechanism for settling international disputes. The Arbitration and Conciliation Act provides for both domestic and international arbitration. The bulk of the arbitration matters in Uganda are domestic, which implies a limited confidence in Uganda's arbitration mechanisms by international parties. The Arbitration and Conciliation Act of Uganda largely domesticates the UNCITRAL Model Law on International Commercial Arbitration of 1985. The amendment of the UNCITRAL Model Law in 2006 raised new areas of arbitration which sought to improve the practice of arbitration while embracing modern technological developments.

The Arbitration and Conciliation Act has been reviewed to adopt these changes arising out of the amendment to the UNCITRAL Model Law in 2006. Other areas for reform that affect the ideal functioning of arbitration have arisen in case law. These issues have been explored and recommendations for reform have been made.

Besides the legislative gaps, the institutional challenges of CADER stand out as a hurdle for the effective practice and development of arbitration in Uganda. The Centre, which was established as an independent and neutral organisation, is hamstrung with financial challenges. Due to financial constraints, the Centre has had to operate on a skeletal staff, with a part time Executive Director and a non- functional governing council. An established and well organised arbitral institution can do much to ensure the smooth progress of an international arbitration

even if the parties themselves or their legal advisers have little or no practical experience in the field.

The study established a knowledge gap on arbitration among Ugandans generally. This is not surprising considering that arbitration is not taught as a course module at schools in Uganda. This lack of knowledge fetters party autonomy due to ignorance of the processes. There is need for training and sensitisation of the public on arbitration as an alternative means of dispute resolution.

Finally, a robust judicial mechanism is paramount for the growth of arbitration in Uganda. This is because courts play a crucial role in upholding the finality of arbitral awards by recognizing and enforcing them.

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Annex 1

Benchmarking Report

REVIEW OF THE ARBITRATION AND CONCILIATION ACT, 2000

JULY, 2017

1 Introduction

The Uganda Law Reform Commission (the Commission) is established by Article 248(1) of the Constitution of the Republic of Uganda and the Uganda Law Reform Commission Act, Cap.25. It is responsible for making recommendations for the systematic improvement, development, modernisation and reform of laws to ensure the removal of bottlenecks and delays in the administration of justice, thus leading to improved efficiency in the justice system within the priorities of the Justice, Law and Order Sector.

The Uganda Law Reform Commission with support from the JLOS undertook a study to review the Arbitration and Conciliation Act, Cap. 4 to ensure efficient, effective arbitration and conciliation procedures and promote Uganda as a leading choice for international commercial arbitration. In this regard, a comparative benchmarking tour to Rwanda was conceived by the Commission and undertaken by a team. The officers were: Annet Koote, a Principal Legal Officer and Arwako Patricia, a Legal Officer. The benchmarking exercise was a platform for sharing experiences and practices to get first hand practical appreciation of arbitration and conciliation and an opportunity to borrow best practices from Rwanda.

The team appreciated the Rwanda experience from a practical point of view and was able to identify what has worked and learn lessons in arbitration and conciliation practice.

Objective of the bench marking exercise

The overall objective of the benchmarking was to learn best and next practices of arbitration from Rwanda to enrich the review of the Arbitration and Conciliation Act, 2000 of Uganda.

Specific objectives

The specific objectives were:

(a) to consult with experts and implementers of the arbitration legislation on the technical and practical aspects of arbitration;

(b) to engage with and understand the role of courts in arbitration;

(c) to understand more about the institutional arrangements and operations of the Kigali International Arbitration centre (KIAC);

(d) to gain exposure on the practical aspects of arbitration and how to address challenges that arise in undertaking arbitration and implementation of arbitration law; and

(e) to borrow ideas for improvement of the law of arbitration in Uganda.

This report provides information on the findings and best practices from Rwanda that Uganda needs to consider in reforming the Arbitration and Conciliation Act, 2000 and its effective implementation.

2 Areas of Consultation

Before embarking on the benchmarking exercise, the Commission had conducted a desk review of literature on arbitration and preliminary consultations with selected experts and practitioners of arbitration in Uganda to identify key issues for reform. Some of the issues identified necessitated a comparative analysis with the trends and practices in another jurisdiction in order to rationally conclude on some controversial and emerging issues. The team set out to seek clarity on these issues and learn from the Kigali International Arbitration Centre's (KIAC) experience.

3. Institutional briefs

3.1 Kigali International Arbitration Centre (KIAC)

The centre was established by an Act of Parliament 2008. The law was enacted with close reference to the UNICTRAL model law. In 2010, the centre was established as an independent body by an Act of Parliament in 2011 under the auspices of the Rwanda Private Sector Federation in partnership with the Government of Rwanda. KIAC is an independent and not a public institution run by the Government.

Mandate

KIAC's mandate is to provide institutional support to domestic and international commercial dispute resolution proceedings using arbitration, mediation and other alternative dispute resolution mechanisms.

Structure of KIAC

The Centre has a governance board comprised of seven members appointed by Private Sector Federation from professional associations and international members with knowledge and practice in arbitration. An independent international advisory board comprised of renowned international arbitrators advises the board. Currently, the Board is comprised of:

1. President of the Private Sector Federation who is the Chairperson;
2. a representative from the academia;
3. President of the Bar Association;
4. State Principal Attorney;

Three other international experts:

(i) President Mauritius Chamber of Commerce;
(ii) State Attorney from Nigeria;
(iii) Private lawyer from France based in London.

Secretariat

The KIAC secretariat is responsible for the day to day management of the Centre. It is led by a member of the Board of Directors and there is an Acting Secretary General currently who is appointed by the Board, Dr. Fidele Masengo. The secretariat boasts of six support staff members that include:

1. the Deputy General Secretary / Deputy Registrar
2. two lawyers
3. Case Manager
4. the Communication and Information expert
5. Project, Finance and Operations Manager.

The Secretariat is also assisted by interns from all over the world who occasionally come to learn from the centre[178]. They have helped to offer support to the centre.

Funding of the centre

Although the Centre was initially funded by the Government of Rwanda, donors and the business community, continue to finance the Centre. Apart from the initial funding, KIAC is not funded by the Government; therefore the Government does not have any influence in the management of KIAC. The Centre obtains its funding from donations, conference and filing fees. The Centre still struggles financially to meet its operational costs. Sometimes *ad hoc* funding is obtained from the Private

178 At the time we visited, there was an intern from one of the Universities in U.S.A

Sector Federation and the United States of America to facilitate training of arbitrators.

The Secretary General stated that funding from the Government would not compromise the independence of the centre because Government is not involved in the management and appointment of staff and arbitrators.

Qualification of arbitrators

During the initial stages, the Centre relied on *ad hoc* arbitrators and the quality of awards was inadequate. The Centre embarked on capacity building activities for arbitrators in order to build a pool of competent arbitrators. KIAC organised training with the Chartered Institute of Arbitrators in London to ensure that the arbitrators were accredited.

KIAC, under the arbitration committee, appoints both international and national arbitrators. There are specific qualifications for the arbitrators under the KIAC Arbitration rules[179].

Panel of domestic arbitrators

The panel of domestic arbitrators must have the following qualifications:

(a) educational degree(s) and/or professional license(s) appropriate to their field of expertise;
(b) at least five (5) years post qualification experience;
(c) have undertaken a recognized course of study in the law and practice of arbitration and/or have been at least qualified associate;
(d) membership of the Chartered Institute of Arbitrators or any comparable professional arbitration Institute;
(e) experience as an arbitrator in two or more cases; and

179 Annex 3 provides for the panel of international and national arbitrators

(f) aged between 30 and 70 years.

Panel of international arbitrators

The criteria for the panel of KIAC international arbitrators

The minimum standards include:

(a) educational degree(s) and/or professional license(s) appropriate to their field of expertise;
(b) at least ten (10) years post qualification experience or senior-level business or professional experience;
(c) fellow of Chartered Institute of Arbitrators or any comparable professional arbitration institute;
(d) experience as an arbitrator in five or more cases;
(e) membership in a professional association(s); and
(f) aged between 30-75 years.

A member of the panel is required to pay a membership fee of $200, which contribute part of the funds of the centre.

Admission

Admission to the KIAC panel of arbitrators is by invitation from the Chairman of the Board of Directors, as advised by the Secretary General.

The Board of Directors reserves the right, in its absolute discretion, to admit or to refuse the admission of any person to the panel. In exercising its discretion, the Board of Directors will have regard to the qualifications, experience of an applicant as well as the number of arbitrators currently on the panel from the country in which the applicant is resident.

Role of the Centre in the Arbitration Process

The Centre is responsible for the appointment of arbitrators. However, the Centre does not interfere in the award of the arbitrator. In order to maintain the quality of arbitral awards, KIAC reviews the award's decision with the Centre to correct any clerical, computational or typographical errors before the award is communicated to the parties. It was emphasized that KIAC does not change the decision in substance.

KIAC has been instrumental in training judges to appreciate and support arbitration.

Selection of arbitrators

The Secretary General of KIAC informed us about the elaborate procedure that is in place to guide the selection of arbitrators in any given case. Where the arbitration agreement provides for one arbitrator, priority is given to the parties to exercise their party autonomy, especially where there is a mechanism for appointment of an arbitrator in a clause to the agreement. Where the arbitration agreement is silent on the mode of selection of an arbitrator and the parties fail to agree, the rules of KIAC apply.

Under the KIAC rules, there is a criterion for selection of a panel of domestic and international arbitrators.[180] In the course of selecting an arbitrator, the following issues are taken into consideration:

1. the nationality of the parties;
2. language of the parties; and
3. the amount of money involved.

180 KIAC Arbitration Rules 2012, articles 1, 2 and 3.

The Secretary General suggests four names of arbitrators, which are forwarded to the parties to choose from in order of priority. Sometimes the parties have the same preference. However, where one of the parties has an objection to the list of arbitrators from KIAC, different arbitrators are proposed until the parties agree.

Where the arbitration agreement provides for three arbitrators, each of the parties selects one arbitrator then the Secretary General of KIAC selects the third arbitrator.

Arbitration Committee

There is an arbitration committee in place that is responsible for approving any proposed arbitrators by KIAC. The Committee is comprised of the Secretary General of KIAC, Rwanda Development Board, Private Sector Foundation, academia, Rwanda Bar Association, Principal State Attorney from Ministry of Justice, and three international arbitrators from Nigeria, France and Mauritius.

It was discovered that due to the systematic procedures in place for the appointment of arbitrators, no arbitrator has ever been challenged because the parties' views in the selection of arbitrators are respected. As a result, the arbitration tribunals have delivered sound arbitration awards and none had been set aside to date.

At the time of this study, KIAC had delivered 40 awards since its inception in 2010. Where the claim is small or the parties are unable to pay the arbitration fees, mediation or withdrawal of the matter has been recommended.

Recommendations

(a) There is need to review the delivery of commercial justice in Uganda for arbitration to be effective. Currently cases in the commercial court take two to three years to be completed. Therefore, where an award is contested in court, the party will have to wait for a long time for a court's decision which defeats the purpose of arbitration. Arbitration is intended to offer speedy resolution of commercial disputes.

(b) It is important for the courts to effectively support arbitration in order to build public confidence in arbitration as an alternative dispute mechanism. Consequently, there is need for a pro arbitration judiciary.

(c) Uganda should review her immigrant procedures so that all African countries can enter the country without any visa. This will make Uganda more accessible as an arbitration seat in Africa.

(d) Improve tourism to make Uganda an attractive arbitral seat for international arbitration and as arbitrators visit, they can explore and enjoy Uganda's tourist sites and attractions.

(e) CADER will require independent funding initiatives from the private sector, multi lateral agreement and self sustaining programmes to build the trust and confidence of the users and clients.

Institutional vs *Ad hoc* Arbitration

There are two types of arbitration practised in Rwanda namely: institutional arbitration and *ad hoc* arbitration. Institutional arbitration is one in which a specialised institution intervenes and takes on the role of administering the arbitration process while *ad hoc* arbitration is one which is not administered by an institution.

Institutional arbitration is cheaper than *ad hoc* arbitration in Rwanda because KIAC has a schedule of pre-determined rates for filing fees and arbitrators fees dependant on the value of the claim, ranging from $750 and $1000 respectively[181] This amounts to less than 4% of the value of the claim. On the other hand, in *ad hoc* arbitration, there are no specified rates and arbitrators have been known to charge up to 37% of the value of the claim. As such, advocates prefer *ad hoc* arbitration.

Several advantages are cited for institutional arbitration namely:

a) KIAC offers scrutiny of draft arbitral awards;
b) with established arbitration rules consistent with international best practice and standard costs for arbitration, the process is harmonised;
c) administrative and technical assistance is offered to parties;
d) the fees are clear, regulated and affordable;
e) speedy disposal of matters with clearly laid down time frames; and
f) minimal chances of corruption as a result of clearly laid out procedures.

Appeals

The Secretary General was not in favour of having an appeal against arbitral awards. In his view, this would defeat the essence of arbitration since such a process should be final and binding. He recommended that if there is a chance of an appeal, then there can only be one appeal to the high court level which should be final.

181 KIAC Rules Annex 1; Arbitration Costs. This is for claims not exceeding $50,000

Immunity of Arbitrators

The KICA rules[182] provides for the immunity of arbitrators. The Centre including its officers or arbitrators shall not be liable to any person for negligence, act or omission in connection with arbitration. However, parties and the arbitrators are required to treat all matters relating to the proceedings as confidential.

Interim Measures

The law provides that interim measures[183] may be granted by an arbitral tribunal for the following purposes:

(a) maintaining or restoring the status quo pending determination of the dispute;
(b) taking action to prevent or halt any action that is likely to cause any immediate or imminent loss of which may prejudice the arbitral process itself;
(c) providing means of preserving assets out of which a subsequent execution may be satisfied after the hearing; and
(d) preserving relevant and material evidence which may be useful in examining the case.

Arbitration is a complementary process as a judicial alternative. In commercial disputes, this would be the preferred and better way to resolve disputes since arbitrators are knowledgeable on the subject matter. Much as KIAC is an independent institution, it is recognized in Rwanda by law as it complements the work of the commercial court. In cases of claims that involve large sums of money, the parties prefer to go to KICA for arbitration because it is final and binding with no appeal. For claims involving small sums of money, the parties are encouraged to mediate.

182 Article 47
183 Section 5 article 19 of the law on arbitration and conciliation in commercial matters, No. 005/2008

Recommendations/best practices

1) There is need to sensitize the public on the arbitration process and its advantages so that the public can readily use arbitration as a preferred means of resolving disputes in commercial matters.
2) The arbitral process should embrace electronic filing of cases to reduce on the time of proceedings.
3) There is need to have good governance and legislation that will make African countries attractive arbitral seats to users all over the world instead of African countries referring matters to Europe and Asia.

3.2 Role of Court

In Rwanda, courts do not play a significant role in arbitration because it is outside of the court system. Once an arbitral award has been made, the court registers and facilitates its enforcement. The courts have not received any appeal against an award from the arbitral tribunals. However, parties can bring a case to the Commercial High court for setting aside an arbitral award. Furthermore, where there is an arbitration agreement, the court will refer the parties to arbitration unless the parties have agreed to litigate.

The judiciary is pro arbitration unlike other jurisdictions where arbitration is seen as a competitor in the judicial system. As such, it has been difficult to set aside arbitral wards. In cases where the parties have filed a case in court and it is established that there is a subsisting arbitration agreement, the parties are referred to arbitration by the court.

Arbitration has been promoted as a business tool and the Government has helped to build public trust in arbitration through the enactment of laws that promote arbitration, easy

access to visas for foreigners and promotion of tourism and services that will attract international arbitrators.

The courts also play a significant role in the arbitration process by endorsing and enforcement of the arbitration awards. The law provides for conditions that should be fulfilled before the arbitral award can be registered.[184] The grounds for refusing recognition or enforcement of the arbitral award at the request of the party against whom it is invoked are, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(a) a party to the arbitration agreement was under some incapacity; or
(b) the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
(c) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
(d) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains the decisions on matters submitted to arbitration may be recognized and enforced;
(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement

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of the parties or, failing such agreement, was not in accordance with the Law of the country where the arbitration took place; or

(f) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the Law of which, that award was made.

3.3 Institutional Vs *Ad hoc* Arbitration

Arbitration is good because it reduces case backlog. However, the reality is that people prefer the court system. There is need to change people's attitude towards arbitration. The commercial court proceedings are speedy in handling small claims and are faster than arbitral proceedings. Some cases are referred to mediation under the auspices of court; this has further reduced on the backlog.

Institutional arbitration has been promoted over *ad hoc* arbitration and is affordable. *Ad hoc* arbitration though is inadequate and KICA has provided supportive services in terms of conference facilities, secretarial services and training for non-legal arbitrators on the legal background.

For *ad hoc* arbitration, parties resort to court for interim measures while in institutional arbitration, the tribunal is empowered to grant interim orders. In terms of fees, the institutional fees are considered fair and affordable which is good for clients. Despite complaints from arbitrators (advocates) to have the fees increased, KICA has maintained the fees to promote arbitration and attract clients. In *ad hoc* arbitration, the fees are agreed upon by the parties and the arbitrator in most cases charge a high fee. The fees are determined by the value of the subject matter and the profile of the arbitrator, which varies significantly.

The Rwanda Bar Association applauds KICA for having comprehensive rules that are similar to other reputable arbitration institutions such as the London Centre for International Arbitration, Mauritius International Arbitration Centre and International Chamber of Commerce. KICA was also commended for its independence, which has made it attractive to foreign investors.

3.4 Arbitrability

Arbitration is largely limited to commercial cases. An attempt by the Rwanda Bar Association to have an arbitration clause in employment contracts has been met with resistance from the Ministry of Justice since these are matters of public policy. Proponents of this proposal considered arbitration a good model of resolving employment disputes due to its confidential nature. Arbitration is recommended for settlement of commercial disputes because it is a product of a contract.

Immunity

The President of the Bar Association was against granting immunity to arbitrators. He argues that arbitrators should take due diligence in the execution of their duty. He proposed though that the arbitrators can take insurance policies to cover their work. Arbitrators should have personal liability for their actions, which means that they should pay damages, be disqualified or prosecuted if they have breached the law.

Immunity

The immunity of arbitrators is subjective. Some practitioners opined that arbitrators should not be granted immunity. Arbitrators should be held liable for their actions since they are better paid than judges. Judges on the one hand have immunity

since they are lowly paid, permanent and have the government backing. Arbitrators on the other hand are highly paid and can afford to take out insurance in case of liability. Other advocates were of the view that arbitrators should execute their duties with due diligence. Immunity should only be granted to an arbitrator who has exercised his or her duties with reasonable care. The law should therefore not offer immunity to arbitrators who are incompetent, corrupt or have abused the powers given to them.

Recommendations/best practices

(a) All commercial matters should be arbitrable.
(b) In a case of setting aside an arbitration award, the law should provide for considerations.
(c) The reputation of the country should be marketed through good governance and effective laws to make it an attractive arbitration seat.
(d) Carry out advocacy and sensitization on the process of arbitration especially in the business sector so that the courts are not flooded with matters that would otherwise be subject to arbitration.
(e) Encourage advocates to involve an arbitration agreement when drafting commercial contracts of clients.

Conclusion

Arbitration is generally commended as a speedy and cost effective method of dispute resolution. However, our findings indicate that in jurisdictions where courts are effective, arbitration seems to lose its appeal because not only does it take long to resolve a dispute through arbitration, it is also expensive. It is cause for concern that KICA could lose its relevance because commercial courts in Rwanda are less costly and effective. The binding force of court decision is preferred to the

arbitration awards and therefore there is need to conduct more sensitization on the mechanism of arbitration.

In order to boost arbitration, the Government has embarked on a policy on alternative dispute mechanism including arbitration intended to encourage people to embrace arbitration as opposed to litigation.

Rwanda as a country, since the genocide, has embraced participatory justice where members of the community are involved in the administration of justice with a bias towards reconciliation and friendly resolution of disputes. The country has demystified the court system, which has reduced corruption and backlog in the courts.

Participants consulted during the bench marking exercise

No.	Name	Title	Institution
1.	Regis Rukundakuvuga F.	Justice of the High Court and Inspector General of Courts	The Judiciary
2.	Dr. Fidele Masengo	Executive Director and Acting Secretary General	Kigali International Arbitration Centre
3.	Emmanuel Kamere	President	Commercial High Court
4.	Victor Mugabe	Executive Director	Rwanda Bar Association
5.	Alain Songa Gashabizi	Acting Head , Law Reform and Research and Reform Analyst	Rwanda Law Reform Commission
6.	Emmanuel Butare	Partner	MRB Attorneys
7.	Julien Kavaruganda	Senior Partner / Advocate	K- Solutions & Partners

8.	Dr. Didas Kayihura	Advocate, author and lecturer	Fountain Advocates and University of Rwanda
9.	Annette Tamara Mbabazi	Communication & Marketing Specialist	Kigali International Arbitration Centre

Annex 2

Chapter IV A of the Model Law on Arbitration

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Annex 3

The Arbitration and Conciliation (Amendment) Bill, 2018

ARRANGEMENT OF CLAUSES

Clause

1. Replacement of Section 3 of the Principal Act.
2. Insertion of new sections 5A, 5B, 5C, 5D and 5E.
3. Amendment of section 5 of the principal Act.
4. Amendment of section 5 of the principal Act.
5. Amendment of section 34 of the Principal Act.
6. Insertion of a new Sections 70 (A) and 70 (B).
7. Amendment to the First schedule of the Principal Act.

A Bill for an Act

ENTITLED

THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2018

ARRANGEMENT OF CLAUSES

An Act to amend the Arbitration and Conciliation Act to provide for a new definition and form of an arbitration agreement, power of an arbitration tribunal to grant interim and preliminary measures, immunity of arbitrators from suit, tenure of the office of the executive director of CADER and; and to provide for related matters.

BE IT ENACTED by Parliament as follows:

1. Replacement of section 3 of the principal Act.

The principal Act is amended by substituting for section 3, the following –

3. Definition and Form of an arbitration agreement

"3(1) Arbitration agreement' is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.”

2. Insertion of new section 5A, 5B, 5C, 5D and 5E.

The principal Act is amended by inserting immediately after section 5 the following new section—

Section 5A. Interim measures

Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) maintain or restore the status quo pending determination of the dispute;
(b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
(c) provide a means of preserving assets out of which a subsequent award may be satisfied; or
(d) preserve evidence that may be relevant and material to the resolution of the dispute.

5B. Conditions for granting interim measures

(1) The party requesting an interim measure under section 5A (2)(a), (b) and(c) shall satisfy the arbitral tribunal that:

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section 5A (2)(d), the requirements in paragraphs (1)(a) and (b) of this section shall apply only to the extent the arbitral tribunal considers appropriate.

5C. Preliminary orders

Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under section 5A apply to any preliminary order, provided that the harm to be assessed under section 5A (1)(a), is the harm likely to result from the order being granted or not.

5D. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

5D. Provisions applicable to interim measures and preliminary orders

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

5E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the

order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

3. Insertion of a new section 17A

The principal Act is amended by inserting immediately after section 17, the following—

17A. Immunity of arbitrator

(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) Subsection (1) applies to an employee or agent of an arbitrator as it applies to the arbitrator himself.

(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning.

4. Amendment of section 5 of the principal Act.

The principal Act is amended by inserting a new subsection (3), after section 5(2) the following—

“Where an action referred to in Paragraph 1 of this section is accepted by court, the suit before court shall lapse.”

5. Amendment of section 34 of the Principal Act.

The principal Act is amended by inserting a new subsection (6) before section 34(5) the following—

"if court considers the application to be justified, it may, confirm, set aside or vary the award according to the evidence adduced".

6. Insertion of a new Sections 70 (A) and 70 (B)

The principal Act is amended by inserting new sections 70(3) after section 70 the following—

"70(A). Appointment, qualifications and tenure of office of the Executive Director.

1) The executive director of the centre shall be appointed by the Council.

2) A person to be appointed executive director of the centre shall be a lawyer with considerable practical, professional and administrative experience.

3) Subject to this Act, the executive director shall hold office on a full-time basis on such terms and conditions as shall be specified in the instrument of appointment.

4) The executive director may resign his or her office, by writing under his or her hand, addressed to the Council.

5) The Council may remove the executive director from office on the ground of inability to perform the functions of his or her office as a result of infirmity of body or mind or of any other cause or misbehaviour.

6) In the case of removal from office of the executive director under this section on the ground of inability to perform the functions of his or her office as a result of misbehaviour or of any other cause, the executive director shall, before removal,

be given an opportunity to be heard on the allegations made against him or her.

70(B). Functions of the Executive Director

1) The Executive Director shall be the executive and accounting officer of the Centre.

2) Subject to the general control of the Council, the executive director shall be responsible for—

(i) carrying out the policy decisions of the Council and for the day-to-day administration and management of the affairs of the Council and for the control of the other staff of the centre; and

(ii) recording and keeping the minutes of the Council at all its meetings.

7. Amendment to the First schedule of the Principal Act

The First Schedule to the principal Act is amended by repealing rule 11.

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