

ALTERNATIVE DISPUTE RESOLUTION (ADR) IN TANZANIA

Law and Practice

J. Clement Mashamba



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Preface

Two main reasons encouraged me to write this book. The first reason is the dearth of literature on Alternative Dispute Resolution (ADR) in Tanzania, despite the fact that ADR was formally incorporated in the country's civil procedure and practices since 1994 when Orders VIIIA, VIIIB and VIIC were introduced into the First Schedule to the Civil Procedure Code (1966). The second reason is the informality of ADR proceedings, where the usually cumbersome and highly technical rules of procedure applicable in conventional civil proceedings are not applied.

Given the above reasons, ADR is increasingly becoming an integral part of the civil proceedings and has thus been made a compulsory subject in legal studies in higher learning institutions in the country. This development makes it compelling to have a book on ADR in the context of the development in civil litigation as well as in higher learning institutions in Tanzania.

J. Clement Mashamba
Institute of Public Policy and Law
Dar es Salaam
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Abbreviations and Acronyms

AAA/ICDR	American Arbitration Association/International Centre for Dispute Resolution
ABA	American Bar Association
ABC	Attitude, Behaviour, Context
ACAS	Advisory, Conciliation and Arbitration Services
A.C.	Appeal Cases
Ag. J.	Acting Judge
A.I.R.	All India Reports
All E.R.	All England Reports
Aus.	Australia
BATNA	Best Alternative to a Negotiated Agreement
BIT	Bilateral Investment Treaty
Cap.	Chapter of Laws
C.A.T.	Court of Appeal of Tanzania
CC	Constitutional Court (of South Africa).
CCM	Chama cha Mapinduzi
C.J.	Chief Justice
CMA	Commission for Mediation and Arbitration
Co.	Company
CPC	Civil Procedure Code
CRS	Community Relations Services
c/s	Contrary to Section
DC	District Commissioner

DCCR	Danish Centre for Conflict Resolution
D.C.I.	Director of Criminal Investigation
D.P.P	Director of Public Prosecutions
d/o	Daughter of
DW	Defence Witness
E.A.	East Africa Law Reports
E.A.C.A.	Eastern Africa Court of Appeal Reports
ECHR	European Court of Human Rights
Ed.	Editor (eds. – editors)
et seq.	et sequentes (and the following)
G.N.	Government Notice
H.C.	High Court
H.C.D.	High Court Digest
H.L.	House of Lords
Hon.	Honourable
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICSID	International Centre for Settlement of Investment Disputes
Ind.	India
ILO	International Labour Organisation
IPPL	Institute of Public Policy and Law Co. Ltd.
J.	Judge
J.A.	Justice of Appeal
J.K.	Jaji Kiongozi (Principal Judge)
K.B.	King's Bench
L.J.	Lord Justice
LCIA	London Court of International Arbitration
LRC	Law Reports of the Commonwealth
LRCT	Law Reform Commission of Tanzania
LRT	Law Reports of Tanzania
Ltd.	Limited (normally, a company with limited liability)

M.R.	Master of the Rolls
MP	Member of Parliament
NAME	National Association of Mediation in Education (US)
N.B.	Nota Bene
NGO	Non-Governmental Organisation
No.	numero (number)
nola	National Organization for Legal Assistance
OAU	Organisation of African Union
OCD	(Police) Officer Commanding District
OHADA in Africa	Organisation for the Harmonization of Business Law
op. cit	opere citato (in the work mentioned)
p.	page (pp – pages)
para	Paragraph
PCE	Permanent Commission of Enquiry
PIL	Public Interest Litigation
PON	Project on Negotiation (at Harvard University, US)
Q.B.	Queen's Bench
R.	Rex, Regina or Republic
R.C.	Regional Commissioner
R.C.O.	Regional Crime Officer
R.E.	Revised Edition (of the Laws of Tanzania, 2002)
Rev.	Reverend
RM	Resident/Regional Magistrate
RPC	Regional Police Commander
RPO	Regional Prisons Officer
Rtd.	Retired
s.	Section
S.A.	South Africa
SADC	Southern African Development Cooperation
SALC	South African Law Commission.
SAP	Structural Adjustment Programme
S.C.C.	Supreme Court of Canada

S.C.R.	Supreme Court Reports (Canada and India)
Shs.	Shillings (TShs. – Tanzanian Shillings)
SMZ	Serikali ya Mapinduzi Zanzibar
s/o	Son of
Supp.	Supplementary (Law Reports, etc)
TIA	Tanzania Institute of Arbitrators
TCCR	Tibetan Centre for Conflict Resolution
TCCIA	Tanzania Chamber of Commerce, Industries and Agriculture
T.L.R.	Tanzania Law Reports
TLS	Tanganyika Law Society
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNODC	United Nations Office on Drugs and Crime
URT	United Republic of Tanzania
U.S.	United States of America (also USA)
v.	versus (against)
ZEC	Zanzibar Electoral Commission
Z.L.R.	Zanzibar Law Reports

Part I

The Genesis of Alternative Dispute Resolution (ADR)

Chapter One

The Concept of Dispute and Conflict Management

1.0 INTRODUCTION

Any meaningful study of dispute resolution must necessarily entail an understanding of what disputes or conflicts are. In this study we prefix an analysis of conflicts and the need to manage them. This is done here because conflicts are endemic to, and form an integral part of, human life; thus, society should always look at ways to manage or contain them. From time immemorial, societies around the world have grappled with conflicts or disputes and have come up with different approaches to managing them. From such endeavours normative laws evolved.

1.1 UNDERSTANDING DISPUTES AND CONFLICTS

As long as human beings have conscience and intellect to think about the future, definitely there will be conflicts. Conflicts are made by human beings and methods to solve them must be created through human intelligence. It is wise to solve the conflict through dialogue, not through weapons. – H.H. the Dalai Lama, Dharamsala 29.11.2001¹

1.1.1 Introduction

There are numerous definitions of, and approaches to understanding and addressing, conflicts or disputes worldwide. An interesting definition of conflicts or disputes is one offered by the Danish Centre for Conflict Resolution, which simply states that: ‘Conflicts are disagreements that lead to tensions within and between people.’² Inspired by Buddhist philosophy, the Dalai Lama elaborates that:

... from the perspective of dharma, we say that the root causes of conflict are hatred and attachment, and a strong separation of “we” and “others”. Building this strong notion of “self” and “others” is based on ignorance, or not knowing reality. All these problems are caused by

1 Quoted in Hammerich, E., *Meeting Conflicts Mindfully*. Tibetan Centre for Conflict Resolution (TCCR) and Danish Centre for Conflict Resolution (DCCR).

2 Ibid, p. 5.

*ignorance of the concrete grasping of the self, which is diametrically opposed to the comprehension of selflessness. This is a very profound discussion of the Buddhist philosophy.*³

1.1.2 The Dimension and Nature of Conflict

Viewed in the above sense, conflict results from a 'relationship between two or more parties (individuals or groups) who have, or think they have, incompatible goals.'⁴ According to Fisher et al, conflicts are 'a fact of life, inevitable and often creative. Conflicts happen when people pursue goals which clash. Disagreements and conflicts are usually resolved without violence, and often lead to an improved situation for most or all of those involved.'⁵ In human relations, imbalances may give rise to conflicts. These imbalances may be reflected in unequal social status, unequal wealth and access to resources, and unequal power, which lead to 'problems such discrimination, unemployment, poverty, oppression, crime.'⁶

Conflict is a necessary part of society, which affects life and our relationships with each other. The challenge facing human society is not to eliminate them but to seek effective ways to positively address them. The management of conflicts can be done both positively and negatively. Negative conflict management can be done through avoidance or use or threat to use force. Conflicts can be managed through negotiation, joint problem-solving and consensus-building.⁷ Positive conflict management helps to build and sustain constructive relationships with others.

1.1.3 Functions of Conflict

If not positively managed, conflicts may degenerate into devastating human calamities such as violations of human rights. To the contrary, if positively managed conflicts may help to build and sustain relationships, may foster communication and create coalitions in society. It may also strengthen institutions, foster ideas and enhance

³ Ibid, p. 6.

⁴ Fisher, S. et al, *Working with Conflict: Skills and Strategies for Action*. New York: Zed Books/Responding to Conflict, 2000, p. 4. See also Mitchell, C., *The Structure of International Conflict*. London: Macmillan, 1981. Chapter 1.

⁵ Fisher, et al. Ibid.

⁶ Ibid. P. 4.

⁷ Centre for Conflict Resolution, *The Human Rights and Conflict Management Training Programme: Induction Workshop*. Cape Town, Centre for Conflict Resolution, 2000, pp. 9–10.

rule of law and observations of human rights in society emerging from well managed conflict.⁸

Coser (1956)⁹ lists the following positive functions of conflict:

- (i) Conflicts help to establish our identity and independence;
- (ii) Intensity of conflicts demonstrate the closeness and importance of relationships;
- (iii) Conflicts can build new relationships;
- (iv) Conflicts can create coalitions;
- (v) Conflicts serve as a safety-valve mechanism, which helps to sustain relationships;
- (vi) Conflicts help parties to assess each other's power and can work to redistribute power in a system conflict.
- (vii) Conflicts establish and maintain group identities;
- (viii) Conflicts enhance group cohesion through issue and belief clarification; and
- (ix) Conflicts create or modify rules, norms, laws and institutions.

In fact, conflicts or disputes are with us willy nilly. In this context, conflicts or disputes function to make people aware of problems, promote necessary change, improve solutions to addressing them, raise morale, foster personal development, increase self-awareness, and enhance psychological maturity.¹⁰ Fisher et al offer a very interesting assumption about conflicts and disputes. They point out that,

*Without [conflicts], you might imagine, individuals would be stunted for lack of stimulation, groups and organisations would stagnate and die, and societies would collapse under their own weight, unable to adapt to changing circumstances and altering power relations. It is commonly said, for example, that the Roman Empire collapsed because it was not able to adapt and change.*¹¹

8 Ibid, p. 11.

9 Coser, L., *The Function of Social Conflict*. Free Press, New York, 1956.

10 Fisher, et al. P. 4. See also Tjosvold, D., *The Conflict-Positive Organisation: Stimulate Diversity and Create Unity*. Addison Wesley, 1992.

11 Fisher, et al. Ibid.

1.1.4 Causes of Disputes and Conflicts

(a) Theories of Causes of Conflicts or Disputes

Fisher et al offer a list of six major theories on the causes of conflicts¹², each of which points to different methods and goals. The six theories are summarized below.

(i) Community Relations Theory

This theory presupposes that conflict is caused by ongoing polarization, mistrust and hostility between different groups within a community. According to Fisher et al, the goals of this theory are: first, 'to improve communication and understanding between conflicting groups'; and, second, 'to promote greater tolerance and acceptance of diversity in the community.'¹³

(ii) Principled Negotiation Theory

This theory presumes that 'conflict is caused by incompatible positions and a "zero-sum" view of conflict being adopted by the conflicting parties.'¹⁴ This theory has the following goals: first, 'to assist conflicting parties to separate personalities from problems and issues, and to be able to negotiate on the basis of their interests rather than fixed positions'; and, second, 'to facilitate agreements that offer mutual gain for both/all parties.'¹⁵

(iii) Human Needs Theory

This theory presupposes that 'deep-rooted conflict is caused by unmet or frustrated basic human needs – physical, psychological and social. Security, identity, recognition, participation and autonomy are often cited.'¹⁶ The goals of this theory are: first, 'to assist conflicting parties to identify and share their unmet needs, and generate options for meeting those needs'; and, second, to assist the parties to reach agreements that meet the basic human needs for all the sides.¹⁷

12 This list of theories of causes is adapted from Working with Conflict course notes on "Conflict Theories" by Hugo van der Merwe, Johannesburg, South Africa, 1997, and from a paper by Ross, M., "Creating the Conditions for Peacemaking: Theories of Practice in Ethnic Conflict Resolution." *Ethnic and Racial Studies*, 2000.

13 Fisher, et al. Op. Cit, p. 8.

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

(iv) Identity Theory

The identity theory assumes that 'conflict is caused by feelings of threatened identity, often rooted in unresolved past loss and suffering'.¹⁸ Its goals are: first, to identify threats and fears embedded in the conflicting parties through facilitated workshops and dialogue. This helps each party to feel and build empathy and reconciliation between themselves. Second, to jointly reach agreements 'that recognize the core identity needs of all parties'.¹⁹

(v) Intercultural Miscommunication Theory

This theory presupposes that conflict 'is caused by incompatibilities between different cultural communication styles'.²⁰ This theory aims at: first, increasing the conflicting parties' knowledge of each other; second, to weaken negative stereotypes the parties have of each other; and, third, to ultimately enhance effective intercultural communication.²¹

(vi) Conflict Transformation Theory

This theory assumes that conflict is caused by real problems of inequality and injustice expressed by competing social, cultural and economic frameworks. The goals of this theory are: first, to change structures and frameworks that cause inequality and injustice, including economic redistribution; second, to improve longer-term relationships and attitudes among the conflicting parties; and, third, to develop processes and systems that promote empowerment, justice, peace, forgiveness, reconciliation, and recognition.²²

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

22 Ibid, pp. 8–9.

(b) Analytical Causes of Conflicts or Disputes

In order for one to come out with strategic methods for resolving disputes, a better understanding of the causes or sources of conflict is paramount. Moore (1996)²³ identifies five sources of conflict as follows:

(i) Data or Information Conflict

This involves lack of information and misinformation, as well as differing views on what data are relevant, the interpretation of that data and how one performs the assessment. As the Centre for Conflict Resolution opines, dealing with this type of conflict 'may entail the help of human rights actors, since they would be in a position to provide the information necessary for conflict resolution practitioners to efficiently carry out their functions.'²⁴

(ii) Relationship Conflict

This type of conflict results from strong emotions, stereotypes, miscommunication and repetitive negative behaviour. It is this type of conflict 'which often provides fuel for disputes and can promote destructive conflict even when the conditions to resolve the other sources of conflict can be met.'²⁵

(iii) Value Conflict

This arises over ideological differences or differing standards of evaluation of ideas or behaviour. The actual or perceived differences in values do not necessarily lead to conflict. It is only when values are imposed on groups or groups are prevented from upholding their value systems that conflict arises.

(iv) Structural Conflict

This is caused 'by unequal or unfair distributions of power and resources. Time constraints, destructive patterns of interaction and geographical or environmental factors contribute to structural conflict.'²⁶

23 Moore, C.W., *The Mediation Process: Practical Strategies for Resolving Conflict*. 2nd edn. San Francisco: California: Jossey-Bass, 1996.

24 Centre for Conflict Resolution. Op. Cit, p. 12.

25 Ibid.

26 Ibid.

(v) Interest Conflict

This involves actual or perceived competition over interests, such as resources, the way a dispute is to be resolved, or perceptions of trust and fairness.²⁷

From this kind of analysis of causes of conflicts or disputes, the Centre for Conflict Resolution observes that: 'An analysis of the different types of conflict the parties are dealing with helps the intervenor to determine strategies for effective handling of the disputes.'²⁸

1.1.5 Conflict Analysis

In order to be able to manage conflicts or resolve disputes, a better understanding of the dynamics, relationships and issues involved in a conflict situation is very important as it helps conflict managers to plan and carry out better actions and strategies.²⁹ Fisher et al argue that this understanding can be gained in two ways: first, by carrying out a detailed analysis of the conflict or dispute from a variety of perspectives; and, second, by exploring the specific issues and problems that relate to the conflict or dispute.³⁰ According to them, conflict analysis is 'a practical process of examining and understanding the reality of the conflict from a variety of perspectives. This understanding then forms the basis on which strategies can be developed and actions planned.'³¹

In practical terms, conflict analysis can be done with the help of a number of simple, practical and adaptable tools and techniques, such as the Circle of Conflict, which is 'a useful analytical tool for examining disputes and uncovering the root cause of conflict behaviour.'³² The Centre for Conflict Resolution observes, in this context, that,

*By examining a conflict and evaluating it according to the five categories – relationship, data, interest, structure, and value – we can begin to determine what causes the dispute, identify what sector is primary, and assess whether the cause is a genuine incompatibility of interests or perceptual problems of involved parties. These insights can assist us in designing a resolution strategy that will have a higher probability of success than an approach which is exclusively trial-and-error.'*³³

27 Ibid.

28 Ibid.

29 Fisher, et al. Op. Cit, p. 17.

30 Ibid.

31 Ibid.

32 Centre for Conflict Resolution.Op. cit, p. 13.

33 Ibid.

The Circle of Conflict is well illustrated by the Figure 1.

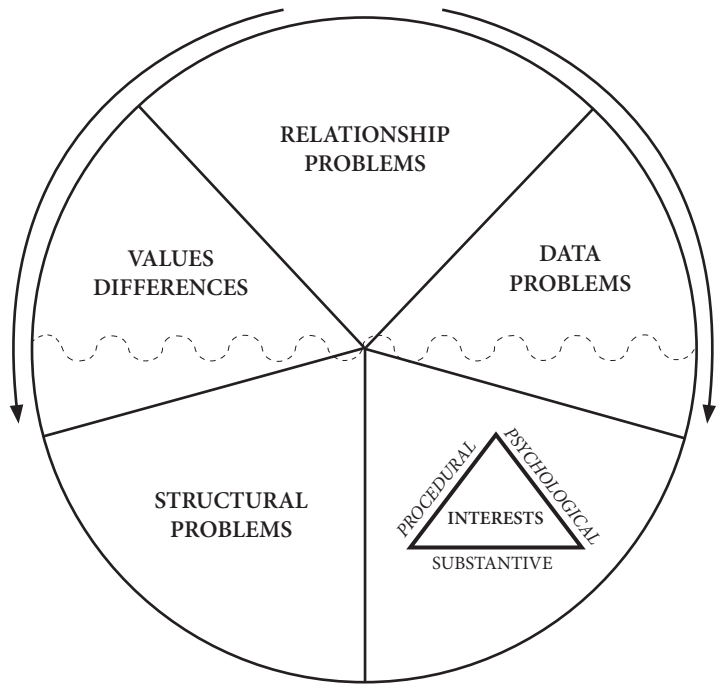


Figure 1: Circle of Conflict (Copyright © 1997 CDR Associates, Boulder, Co.)

There are five reasons why there is a need to analyse conflicts or disputes. These are: first, to understand the background and history of the situation as well as current events. Second, to identify all the relevant groups involved, not just the main or obvious ones. Third, to understand the perspectives of all these groups and to know more about how they relate to each other. Fourth, to identify factors and trends which underpin conflicts and, fifth, to learn from failures as well as successes.³⁴

1.1.6 Tools for Conflict Analysis

There are several tools that have been developed to assist in analyzing conflict. Some of the core tools are discussed below.

(a) Stages of Conflict

Analyzing the stages through which a conflict or dispute passes helps to understand the dynamics and events that form the material part of the conflict or dispute. This is so principally because conflicts change over

34 Fisher, et al. Op. cit, p. 17.

time, passing through different stages of activity, intensity and, in some cases, violence.³⁵ Normally, there five different stages used to analyze the metamorphosis through which a conflict passes as discussed below.

(i) Pre-Conflict

This is a period characterized by an incompatibility of goals between two or more parties, which may lead to open conflict. At this stage, the conflict 'is hidden from general view, although one or more of the parties is likely to be aware of the potential for confrontation. There may be tension in relationships between the parties and/or a desire to avoid contact with each other at this stage.'³⁶

(ii) Confrontation

This is a stage where the conflict has become more visible; and if one of the conflicting parties feel there is a problem, 'its supporters may begin to engage in demonstrations or other confrontational behaviour.'³⁷ It is at this stage of a conflict where there occurs occasional fighting or other low levels of violence committed by either side of the conflicting parties. The conflicting parties may also start to mobilize resources and garnering support from allies 'with the expectation of increasing confrontation and violence.'³⁸ One of the main symptoms of a conflict visible at this stage is strained relationship between the conflicting parties, which result in polarization between the supporters of each side.

(iii) Crisis

In many ways, this is a crest of the conflict or dispute. It is at this stage where tension and/or violence is most intense. In a large-scale conflict, this period may be marked by break out of war, 'when people on all sides are being killed. Normal communication between the sides has probably ceased. Public statements tend to be in the form of accusations made against the other side(s).'³⁹

35 Ibid, p. 19.

36 Ibid.

37 Ibid.

38 Ibid.

39 Ibid.

(iv) Outcome

In most conflict situations, a conflict leads to an outcome, which may be in the form of a defeat or success or a cease-fire (if it is a war). An outcome, at this stage, may be expressed in the surrender or giving in to the demands of the other party by one of the parties; or the parties may agree to negotiate with or without a mediator. As Fisher et al point out: ‘at this stage the levels of tension, confrontation and violence decrease somewhat with the possibility of a settlement.’⁴⁰

(v) Post-Conflict

In the end, a conflict situation may be resolved in a way that leads to the ending of any violent confrontation, to a decrease in tension and to more normal relationships between the conflicting parties. Nonetheless, if the issues and problems arising from the conflicting parties’ incompatible goals ‘have not been adequately addressed, this stage could eventually lead back into another pre-conflict situation.’⁴¹

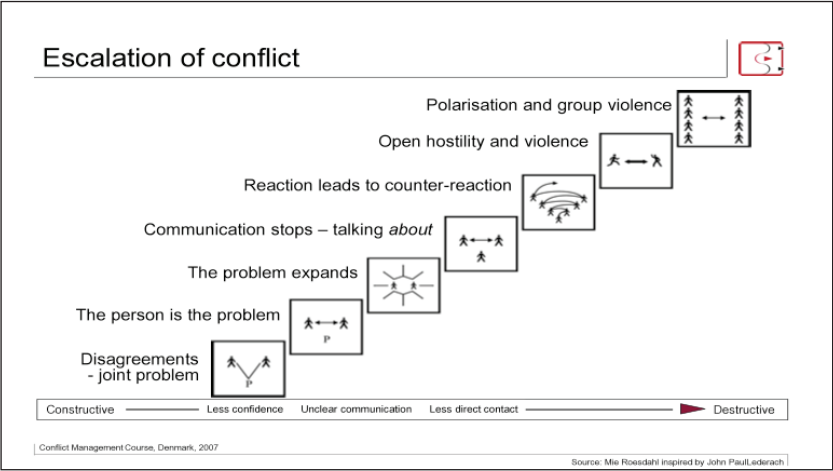


Figure 2: Escalation of Conflict

(b) Timelines

Fisher et al observe that timeline is ‘a very simple tool. It is a graphic that shows events plotted against time. It lists dates (years, months or days, depending on the scale) and depicts events in chronological

40 Ibid.

41 Ibid.

order.’⁴² This tool is principally used to show the history of a conflict. Through the timeline tool conflicting parties ‘may note or emphasise different events, describe them differently, and attach contrasting emotions to them.’⁴³

The aim of using timelines ‘is not to try to arrive at a “correct” or “objective” history but to understand the perceptions of the people involved. For this reason, the different events described by opposing groups are an important element in understanding the conflict.’⁴⁴ The tool also is ‘a way for people to learn about each other’s history and perceptions of the situation.’⁴⁵ Through discussing their different perceptions of the conflict, conflicting parties ‘develop a richer understanding of their shared situation.’⁴⁶

(c) Conflict Mapping

Mapping is a tool or technique used in conflict analysis to represent a conflict graphically. In this regard, the technique places the conflicting parties in relation to both the problem and to each other. Fisher et al opine that: ‘When people with different viewpoints map their situation together, they learn about each other’s experiences and perceptions.’⁴⁷ This technique helps to show the relationships between the conflicting parties.

Conflict mapping aims at achieving a number of goals, including assisting in understanding the conflict situation better. It also helps to see more clearly the relationships between the parties, clarifying where the power lies. It further helps to check the balance of one’s own activity or contacts; and to see where allies or potential allies are. It, moreover, assists in identifying openings for intervention or action and to evaluate what has been done already.

Given its strategic importance, the conflict mapping tool should be applied as early as possible in the conflict or dispute resolution process. This should be applied along other analytical tools. It could be applied thereafter in the conflict or dispute resolution process to

42 Ibid, p. 20.

43 Ibid, p. 21.

44 Ibid.

45 Ibid.

46 Ibid.

47 Ibid, p. 22.

help identify possible entry points for action or to help the process of strategy-building.⁴⁸

(d) The ABC (Attitude, Behaviour, Context) Triangle

Conflicts have three interdependent major components: the context or situation, the behaviour of those involved and their attitudes. Popularly abbreviated as the ABC tool, these three factors influence each other. According to Fisher et al, the ABC Triangle is an analytical tool of factors related the attitude, behaviour and context for each of the major conflicting parties.⁴⁹ The tool aims at analyzing how these factors influence each other and relate them to the needs and fears of the conflicting parties. This helps to identify a starting point for devising intervention in the conflict situation. Viewed in this sense,

... a context that ignores the demands of one group is likely to lead to an attitude of frustration, which in turn may result in protests. This behaviour might then lead to a context of further denial of rights, contributing to greater frustration, perhaps even anger, which could erupt into violence. Work that is done to change the context (by making sure that demands are acknowledged), to reduce the level of frustration (by helping people to focus on the long-term nature of their struggle) or to provide outlets for behaviours that are not violent will all contribute to reducing the levels of tension.⁵⁰

This tool should be applied at the early stage in the process of resolving a dispute or conflict in order to gain a greater insight into what motivates the conflicting parties; and later into the process in order to identify what factors might be addressed by an intervention to be devised. Fisher et al⁵¹ draw four essential stages for applying the ABC Triangle tool in conflict management or dispute resolution:

- (i) Draw up a separate ABC Triangle for each of the major parties in the conflict situation.
- (ii) On each triangle, list issues related to attitude, behaviour and context from the viewpoint of that party. (If the parties are participating in this analysis, then they can each make a triangle from their own perspective.)

48 Ibid, p. 23.

49 Ibid, p. 25.

50 Ibid.

51 Ibid, p. 27.

- (iii) Indicate for each party what you think are their most important needs and/or fears in the middle of their own triangle. This will be YOUR perception.
- (iv) Compare the triangles, noting similarities and differences between the perceptions of the parties.

In using the ABC Triangle 'it is important to be sure about whose perception the analysis is based upon. You could do the analysis entirely on your own perception of the realities in the conflict if you are closely involved in it. Otherwise, it will be important to put yourself in the shoes of each of the main parties and look at the issues in the conflict as they see it in terms of "context", "behaviour" and "attitude".'⁵²

(e) The Onion (or the Doughnut)

The onion tool is a way of analyzing what different parties to a conflict are saying. This is reflected in positions the parties take; the interests they pursue; and needs they want to be satisfied in a conflict situation. In this analysis, positions are contained in an outer layer of the onion – that is, the position is shown publicly for all to see; the interests are put in the middle layer and needs form a core of the onion. According to Fisher et al, the Onion Analytical Tool aims at moving beyond the public position of each party and understanding each party's interests and needs. It also aims at finding the common ground between groups that can become the basis for further discussions.⁵³

The Onion technique can be used at various stages of conflict management or dispute resolution: as part of an analysis to understanding the dynamics of a conflict situation; in preparation for facilitating dialogue between groups in a conflict or dispute; and as part of a mediation or negotiation process.⁵⁴

(f) The Conflict Tree

This tool has been borrowed from the "Problem Tree" used in development and community work. Preferably used within groups, the Conflict Tree is a graphic tool using the image of a tree to sort key conflict issues. Fisher et al point out that:

52 Ibid.

53 Ibid.

54 Ibid.

*The Conflict Tree offers a method for a team, organization, group or community to identify the issues that each of them sees as important and then sort these into three categories: (1) core problem(s), (2) causes and (3) effects.*⁵⁵

The Conflict Tree tool aims at stimulating discussion about causes and effects in a conflict as well as helps a group to agree on the core problem. It also assists a group or team to make decisions about priorities for addressing conflicts and to relate causes and effects to each other and to the focus of the organisation. This tool is usually used when a group is having difficulty in agreeing about the core problem in their conflict situation and when a team needs to decide about which conflict issues they should try to address.⁵⁶

(g) Force-field Analysis

This is tool for analyzing both positive and negative forces in a conflict. It is normally used to identify forces influencing a conflict. It 'offers a way of identifying these positive and negative forces and trying to assess their strengths and weaknesses.'⁵⁷ It can also help the dispute settlement actor to 'see more clearly what is maintaining the status quo.'⁵⁸ It strives to identify forces which either support or hinder a plan of action or a desired change; to assess the strengths of these forces and our own abilities to influence them; and to determine ways of increasing positive forces or decreasing negative forces. It can be used when planning an action or strategy, 'to clarify the forces that might support or hinder what you intend to do.'⁵⁹ It can also be used 'while implementing a strategy of change to assess the strengths of other forces and your ability to influence them.'⁶⁰

(h) Pillars

This is also a graphic illustration tool of conflict, which illustrates the elements or forces that impinge on an unstable situation. It aims at: understanding how the structures are sustained; identifying factors that are maintain an unstable situation; and considers ways to weaken or remove these negative factors, 'or perhaps to change them to more positive forces.'⁶¹

55 Ibid, p. 29.

56 Ibid.

57 Ibid, p. 30.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid, p. 31.

(i) The Pyramid

This tool is used to analyze conflicts with more than one level. Using this tool, the dispute settlement manager identifies the key parties or actors at each level and relates them to the present situation, with a view to locating 'critical resource people who are strategically placed and embedded in networks that connect them vertically within the setting and horizontally in the conflict.'⁶² As Fisher et al contend,

*These are people who have the ability to work with counterparts across the lines of division, therefore they can be key allies for working within the various levels as well as working simultaneously at all levels.*⁶³

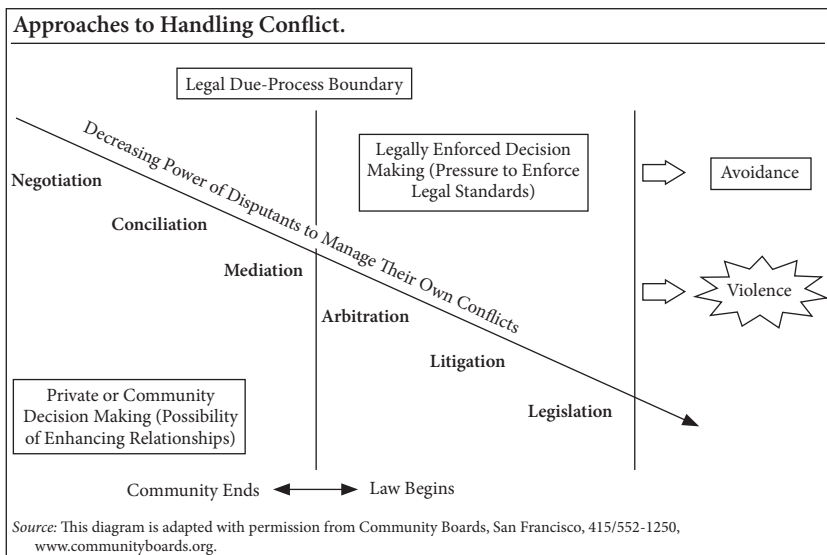


Figure 3: Approaches to Managing Conflicts or Disputes (Diagrammatic Summary)

This strategy aims at identifying key actors, including leaders, at each level and to decide what other actors should be included. It also aims at assessing what types of approaches or actions are appropriate for work at each level and how links should be built between levels and identify potential allies at each level. In this regard, it can be used when analyzing a situation that seems to include actors at various levels; when planning actions to address a multi-level conflict; and when deciding where to focus one's energy.⁶⁴

62 Ibid, p. 33.

63 Ibid.

64 Ibid.

Chapter Two

The Concept of Alternative Dispute Resolution (ADR)

2.0 INTRODUCTION

To date, “alternative dispute resolution” – or as also called in certain circles: “appropriate dispute resolution”⁶⁵ (ADR) – is increasingly becoming a common practice in many judicial processes around the world. This is because of its many benefits as compared to other judicial mechanisms of dispute resolution. Some of the benefits of ADR include its capability to reduce litigation costs as well as less time involved in the determination of disputes. In this Chapter we discuss the concept of ADR by looking at the origins and philosophy of ADR. The Chapter also traces the reform of the US justice system in favour of ADR in the 1970s and the spread of the concept and practice of ADR to other countries thereafter. Lastly, the Chapter looks at the benefits of ADR in general terms.

2.1 MEANING OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR simply refers to all modes of dispute settlement/resolution other than the traditional dispute settlement through courts of law. As Yona Shamir opines,

*It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies “mediation,” a process by which a third party aids the disputants to reach a mutually agreed solution.*⁶⁶

Developed in the West to resolve disputes or conflicts outside the formal litigation framework in courts, ADR comprises a variety of ‘mechanisms or techniques, which share the essential characteristics of being different from dispute mechanism of litigation in State

65 Shamir, Y., *Alternative Dispute Resolution Approaches and the Application*. Unesco, 2003, p. 2.

66 Ibid.

courts.^{67/68} Mainly, these mechanisms or forms are: negotiation, mediation, [re]conciliation, and arbitration. In most jurisdictions, like Tanzania, ADR has two modes: methods of resolving disputes outside of the judicial mechanisms; and informal methods attached to or pendant to official judicial mechanisms.⁶⁹

Of late, ADR is manifested in two categories: offline and online ADR. Whereas the former category is the most common in Tanzania, the latter has just started to take shape in the country, as elsewhere in the world, with the advent of e-commerce that is increasingly dominating the contemporary world stage. Offline ADR is traditionally conducted under paper-based environment; and online ADR uses the internet Internet as a medium of facilitating dispute resolution.⁷⁰

2.2 ORIGINS AND IDEOLOGY OF ADR

2.2.1 General Overview

As we have seen in Chapter One above, conflicts or disputes have been an integral part of human interaction from time immemorial; and, as such, societies around the world have learnt 'to manage them, to deal with them in a way that will prevent escalation and destruction, and come up with innovative and creative ideas to resolve them.'⁷¹ As such,

*Dealing with conflicts – “conflict management,” or “conflict resolution” as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.*⁷²

Scrutiny of many ancient or traditional societies around the world reveals that there exist accounts of various types of negotiations: for

67 Kimei, M.C., “Alternative Schemes for Resolving Banking and Financial Disputes.” *The Tanzania Lawyer*. Vol. 1 No. 2, 2012, pp. 46–71, p. 54. See also Street, L., “The Language of Alternative Dispute Resolution.” *Alternative Law Journal*, Vol. 66, 1992.

68 Kamau, W., “Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa.” *East African Journal of Peace and Human Rights*. Vol. 15 No. 2, 2009. pp. 336–360, pp. 336–7.

69 These methods of ADR in Tanzania are discussed in Chapters Eight and Nine of this work.

70 Mambi, A.J., *ICT Law Book: A Source Book for Information and Communication Technologies and Cyber Law*. Dar es Salaam: Mkuki na Nyota Publishers, 2010, p. 155.

71 Shamir. Op. cit, p. 2.

72 Ibid.

instance, between two persons, between an individual and a group, and between two groups. In other countries, arbitration, as a form of ADR, 'had its origin in private commercial arbitration outside the formal court structure and it was used by merchants when disputing with each other.'⁷³ In addition, the labour movement, immigrant and religious communities in the US and societies in other parts of the world – Asia and Africa, in particular – 'have for a long time relied on consensual methods of dispute settlement.'⁷⁴

2.2.2 Rationale for the Emergence of Modern ADR

Historically, the "modern" ADR movement began in the US in 1970's⁷⁵ as a result of two main concerns in the US judicial system. First, there was call for better-quality processes and outcomes in the judicial system; and, second, there was a need for efficiency of justice.⁷⁶ These concerns are briefly discussed below.

(a) Need for Better-Quality Processes and Outcomes in the Judicial System

The call for better quality of dispute resolution processes was attributed to lack of responsiveness and sensitivity of the judicial system. There was also lack of participation of members of the community in the formal justice system. The ranges of outcomes provided by the formal justice system were pre-determined and limited [i.e. polarized, "win/lose" judgments]. At the same time, the justice system did not provide a continuing social relationship amongst disputants in certain matters [e.g. family, tenancy, or employment].

This concern necessitated advocates for reform in the justice system in the US in the 1960s and 1970s to campaign for better quality processes and outcomes.⁷⁷ There was a need, thus, for consensual (as opposed to adversarial) approach to problem-solving, and for processes that were more accessible and participatory, less formal, less expensive and less time-consuming, which would lead to more "win-win" results.⁷⁸

73 Kamau. Op. cit, p. 349 (note 68).

74 Ibid.

75 Menkel-Meadow, C., "Alternative Dispute Resolution." In Kritzer, H.M. (ed.), *Legal Systems of the World: A Political, Social and Cultural Encyclopedia*, 2002, p. 40.

76 Kamau. Op. cit, p. 349.

77 Ibid.

78 Menkel-Meadow. Op. cit, p. 41.

(b) Need for Efficiency of Justice

Parallel to the concern for better quality in the judicial processes in the US, there was a call for “efficiency” of justice. This was attributed by the fact that the judicial process was too expensive, overwhelmed by cumbersome rules of procedure. The judicial process was also seen as unnecessarily prolonged, resulting in being too expensive and time-consuming. Furthermore, it was argued that the judicial process was congested with, or over-loaded, by caseload. Hence, there was a need for a dispute settlement system that would divert cases from the court and reduce case backlogs and provide other and efficient ways of providing access to justice.⁷⁹

2.3 REFORM OF THE US JUSTICE SYSTEM IN FAVOUR OF ADR

In response to the foregoing concerns, in 1976 the then US Chief Justice (CJ), Warren Burger, convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (popularly known as the Pound Conference) to develop proposals for judicial reform. In his Keynote address, CJ Burger proposed an alternative dispute resolution method that would reduce the problems facing the judiciary: delays of cases, high costs and undue technicality.⁸⁰

As Kamau reminisces, in the aftermath of the Pound Conference, a number of remedial processes emerged aiming at revamping the judicial system in the US. “Multi-door courthouses”; community justice centres; small claim cases; court-mandated arbitration; and family mediation were initiated to propagate ADR at its formative stages. At the same time, parties ‘were also encouraged to include arbitration clauses for disputes arising from services provided by industries such as banking, health care, securities and communications.’⁸¹

Historically speaking, the first ADR method ‘to gain acceptance was arbitration, which shared many of its practices and procedures with the judicial system, including the judge (or arbitrator) deciding the outcome of the dispute.’⁸² To date, ‘ADR has matured and developed, and mediation is being received as a preferred alternative and has become widely accepted as a process providing more flexibility and

79 Kamau. Op. cit.

80 Ibid, p. 350. See also Burger, W., “Isn’t there a Better Way?” *American Bar Association Journal*. Vol. 274 No. 68, 1982.

81 Kamau. Ibid.

82 Shamir. Op. cit, p. 5.

less procedural complexity.⁸³ In addition, the US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help ‘communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, colour, or national origin.’⁸⁴ “Mediators” were asked to assist in resolving disputes of any sort, and not only to deal with issues of discrimination.⁸⁵ Yona Shamir argues that,

Throughout the United States and other countries, the courts became involved in mediation, following Professor Frank Sander’s (Harvard University) vision of a courthouse that would become a dispute resolution centre – a “multi-door courthouse” – where each case would be referred to a process most appropriate to it. The NJCs⁸⁶ became part of a city-based, court-based, or district attorney-based alternative dispute resolution service.⁸⁷

The American Bar Association (ABA) ‘took a proactive role in the process and created CPR – The Centre for Public Resources – which provides ADR services.’⁸⁸ More recently, following an act of Congress (1990), federal agencies are ‘obligated to use mediation in certain civil cases before going to court. Many states passed a law requiring mandatory mediation. In the private sector, many large US and multinational companies signed a mediation pledge, according to which they use mediation before going to court.’⁸⁹

2.4 THE SPREAD OF ADR BEYOND THE US

2.4.1 The Spread of ADR to Other Developed Countries

From the US, the ADR movement gradually spread to other Western countries: UK, Canada and Australia; and to other parts of the world. These countries are experiencing similar growth as it was in the US ‘while continuing to develop new and creative ADR processes

83 Ibid.

84 Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflicts*. Op. cit.

85 Goldberg, S. B. et al, *Dispute Resolution: Negotiation, Mediation, and other Processes*. Boston: Mass., Little Brown, 1992.

86 The US federal government funded Neighbourhood Justice Centres (NJC), provide free or low-cost mediation services.

87 Shamir. Op. cit.

88 Ibid.

89 Ibid.

and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field.⁹⁰ In the United Kingdom, for example, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 'to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the Lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged".⁹¹

2.4.2 The Spread of ADR to Africa

In Africa, modern ADR was transplanted by the developed Western countries as part of the globalization process in the 1980s through to 1990s. This period witnessed the superimposition (by the World Bank and developed Western countries) of socio-economic and political reforms that were packaged in the structural adjustment programs (SAP's), which were accompanied by 'demands for good governance, establishment of human rights framework, and legal sector reforms.'⁹² In effect, the requirement for reform in legal sectors in Africa meant the export of legal ideas and approaches from the Western world in what Kamau terms as 'in the form of legal transfers, including the global dissemination of ADR.'⁹³

Constituting "soft technology" transferred from the Western world, ADR was disseminated across Africa as one of the many social reform programmes spearheaded by the West. Thus, 'African countries have recently witnessed concerted efforts by representatives of Western legal institutions and NGOs to introduce ADR techniques and mechanisms into their legal polities as part of legal sector reforms.'⁹⁴ In Tanzania, for instance, the Civil Procedure Code (1966) was amended in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966). As we shall see in Chapters Three and Eight, the amendment to the CPC introduced new stages between the completion of pleadings and trial in civil cases.

90 Ibid.

91 Ibid. See also Acland, A. F., *Managing Conflict through Mediation*. London: Hutchinson Business, 1990.

92 Kamau. Op. cit, p. 337.

93 Ibid.

94 Ibid, pp. 337-8.

It should be noted at this juncture that the promotion of ADR techniques and mechanisms is 'a return to the model of dispute settlement used in the past by non-Western societies, utilizing a model of harmony and with the primary goal of preserving social bonds.'⁹⁵ However, as Kamau argues, this promotion of the ADR movement should be critically looked upon, because the "new" ADR movement, although "borrowed" from non-Western countries, has been "refined" in the Western and brought back to African societies that have different socio-economic, political and cultural structures from those in the West.⁹⁶ This criticism provides a thesis that African countries need to introduce ADR techniques that are concomitant with their socio-economic, political and cultural contexts.

All in all, the wide dispersion of "modern" ADR from the US to almost every part of the world signifies its effectiveness in informally dealing with disputes. As Shamir points out,

*The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve disputes.*⁹⁷

Although the search for efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, 'yet it has only been within the last thirty years or so that ADR as a movement has begun to be embraced enthusiastically by the legal system. More recently, ADR has become institutionalized as part of many court systems and system for justice as a whole throughout the world.'⁹⁸ Indeed,

*The ADR movement has been gaining popularity, and a movement that started as an answer to needs of the judicial system, has generated interest in a variety of fields (such as education, society, environment, international, and gender concerns). In the 1980s, the US National Association of Mediation in Education (NAME) was founded, and a large variety of ADR programs, including negotiation, problem solving, and mediation was introduced in schools.*⁹⁹

95 Ibid, p. 338.

96 Ibid.

97 Shamir. Op. cit, pp. 4-5.

98 Ibid, p. 5.

99 Ibid.

So, although it was transplanted from the Western world to Africa, “modern” ADR is very important to reducing some of the chronic problems that have been facing Africa’s justice systems from the time of independence – including heavy caseloads, unnecessarily long delays of finalization of cases, corruption and high costs involved in case management and litigation. These aspects are elucidated at some length in Chapter Four of this work.

2.5 THE BENEFITS OF ADR

ADR is generally regarded as having many benefits over the formal litigation mechanisms – ranging from being less expensive, speedier¹⁰⁰, less formal and more flexible. As Kamau points out: ‘The flexibility of ADR is said to lend itself to the crafting of “win-win” solutions rather than the “zero sum”¹⁰¹ game of litigation.’¹⁰²

In this regard, ADR suits and functions well in situations where the disputants are to maintain ongoing relationships even after the dispute is resolved. These situations include employer and employee, landlord and tenant, and family relationships. This is the main reason why all dispute settlement mechanisms introduced in Tanzania recently in these areas of the law make it mandatory to initially try to resolve by some form akin to ADR. For instance, under section 86 of the Employment and Labour Relations Act (ELRA) (2004),¹⁰³ all labour disputes should ordinarily be referred to the Commission for Mediation and Arbitration¹⁰⁴ (CMA) whose procedure requires a dispute first to be mediated and if mediation fails it should be arbitrated.

100 In a number of cases, the courts in Tanzania have held that resort to ADR reduces delays in determination of legal disputes. See particularly *CRDB Bank Ltd. v. Seif Ahmed Sharji*, High Court of Tanzania at Mbeya, Civil Case No. 11 of 2002 (Unreported); *David N. Mushi v. Joseph Massawe*, High Court of Tanzania at Dar es Salaam, Civil Case No. 109 of 2001 (Unreported); *M/S Greenway Co. Ltd. v. Tanzania Breweries Ltd.*, High Court of Tanzania at Dar es Salaam, Misc. Civil Case No. 4 of 1997 (Unreported); and *Tanzania Harbours Authority v. Mathew Mtakula & 8 Others*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 46 of 1999 (Unreported).

101 The “zero-sum” game means a situation whereby whatever is gained by one side is lost by the other. The definition is available at <http://www.answers.com/topic/zero-sum-game?cat=technology> (accessed 16 February 2012).

102 Kamau. Op. cit, p. 337.

103 Act No. 6 of 2004.

104 See particularly *Kwila Peter Nkwama v. General Manager, Marine Services Company Ltd.*, High Court of Tanzania (Commercial Division) at Mwanza, Labour Revision No. 229 of 2008 (Unreported).

In addition, section 101 of the Law of Marriage Act (1971)¹⁰⁵, as a general rule, obliges disputants in a marriage dispute to first refer the matter to the Marriage Conciliation Board, which should reconcile parties, upon failure of which it should certify the failure to the court. In terms of section 106(2) of this law, every petition for divorce to be filed in court must be accompanied by a certificate issued by the Board within six month.

ADR has been increasingly used alongside, and integrated formally, into legal systems internationally in order to capitalize on the typical advantages of ADR over litigation. In this purpose, ADR is suitable for multi-party disputes; and it is flexible in terms of procedure-the process is determined and controlled by the parties the dispute. Unlike formal litigation, ADR lowers costs to both the disputing parties and mediator in that it is less complex.

In ADR, parties choose a neutral third party to direct negotiations, which is of particular importance. In ADR there is a likelihood and speed of settlements and practical solutions are tailored to parties' interests and needs (not rights and wants, as they may perceive them). In addition, in ADR there is durability of agreements and parties to a dispute tend to feel they own them. There is also great emphasis of the principle of confidentiality; and the preservation of relationships; and the preservation of reputations of the disputing parties.

105 Cap. 29 R.E. 2002. This law is discussed at length in Mashamba, C., *Introduction to Family Law in Tanzania*. Dar es Salaam: nola/IPPL, 2010.

Chapter Three

Alternative Dispute Resolution (ADR) in the African Cultural Context

3.0 INTRODUCTION

In Chapter Two we observed that modern ADR mechanisms were borrowed, with modifications, from the traditional African justice systems that are entrenched on restorative justice. From Africa, ADR was refined, formalized and developed in the West to the extent and form seen today. To date, it is increasingly acknowledged that there is a close relationship between dispute resolution and cultural practices. Culture has an important role in shaping dispute resolution processes, practices and outcomes. In this chapter we, therefore, discuss the place of culture in dispute resolution in the African context.

3.1 THE ROLE OF CULTURE IN DISPUTE RESOLUTION

3.1.1 The Place of Culture in Conflict

Culture is an essential part of conflict and conflict resolution. Disputing is cultural behaviour and the normative framework in a society will shape the way people conceptualise problems, the ways they pursue them, and the kinds of solutions they look for. As Merry contends,

*[C]ulture can affect when and how parties enter into conflict, what conflict means for the individual and the community, the perception of when a conflict requires intervention of another person, and the expectations placed on the parties to work things out by themselves.*¹⁰⁶

As Michelle LeBaron observes: 'Culture is an essential part of conflict and conflict resolution. Cultures are like underground rivers that run through our lives and relationships, giving us messages that shape our perceptions, attributions, judgments, and ideas of self and others.'¹⁰⁷ Faure and Rubin define culture as 'a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, and other groups, and orient their behavior.'¹⁰⁸ According to Shamir,

106 Merry, S.E. "Disputing Without Culture." 100 *Harvard Law Review*, 1987. 2060.

107 LeBaron, M., "Culture and Conflict." Available at http://www.beyondintractability.org/essay/culture_conflict. Assessed 16 February 2011.

108 Faure, G. and Rubin, J., *Culture and Negotiation*. London: Sage, 1993.

*There are cultural differences between the individual and the collective. There are countries and cultures that stress the high value of collective responsibility and commitment to the group, while in others the stress is on individualism and responsibility to oneself.*¹⁰⁹

3.1.2 The Cultural Orientation of Parties to a Dispute

Anthropological studies have indicated, first, that when parties are bound together by multi-stranded social relationships they will seek a compromise for their differences, whereas parties who have only single-stranded social ties will tend to seek an adversarial approach.¹¹⁰ Among working-class and middle-class in America: while people are not necessarily eager to run to court for every infraction, they tend to view problems in terms of rights and principles. Second, that disputes in many African societies are viewed in terms of restoration of harmony in community, with emphasis on reciprocal obligations and duties, rather than vindication of individual's rights.¹¹¹ As Ann Skelton argues,

*With the emphasis on 'problems' rather than offences, traditional structures [in Africa] hear the stories of the parties involved and then make decisions regarding outcomes. These outcomes aim to heal relationships, and they ensure restitution or compensation to victims. Symbolic gestures such as sacrifice of animals and the sharing of a meal indicate that the crime has been expiated and the offender can now be reintegrated.*¹¹²

Kamau¹¹³ identifies two constructs in scientific studies on the role of culture in dispute resolution: individualism/collectivism and high-context/low-context.

(a) Individualism or Collectivism

This is characterised by individual's adherence to group norms and emphasis on group harmony and interests. In this regard, collectivistic cultures value duty, interdependence and obedience to the group/

109 Shamir. Op. cit, p. 12.

110 Gluckman, M., *The Judicial Process Among the Barotse of Northern Rhodesia*. 1955.

111 Skelton, A., "Restorative Justice in Child Justice Systems in Africa," in Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire, Ashgate Publishing Limited, 2008, pp. 129–146, at p. 131.

112 Ibid. See also Kgosimore, D., "Restorative Justice as an Alternative to Dealing with Crime." Report of a National Conference held on 18–20 November 2002 under the auspices of the National Crime Prevention Strategy. Available at www.childjustice.gov.za.

113 Kamau, W., "Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa." Op. cit.

community; whereby disputants look for solutions that promote the group's norms and well-being. Disputants resist solutions that cause other members of the group, particularly superiors, "to lose face."¹¹⁴

(b) High-context or Low-context or Individualism

This is characterised by emphasis on individual's personal goals over their group. Individualistic cultures prize self-reliance and independent thinking. In this sense, disputants look for solutions that promote personal [not group's] interest and well-being.

Therefore, while choosing an effective alternative dispute settlement method, one should understand the cultural context or orientation of the disputants. For instance, most of the African traditional justice systems are based on restorative justice and transformative principles in conflict resolution: emphasis is on achieving peaceful resolution of disputes rather than on adherence to rules as the basis of determining disputes.

3.1.3 Cultural Aspects are Prevalent in Every Conflict Situation

The explanation above, underpins the notion advanced by LeBaron in the context that: 'Cultures are embedded in every conflict because conflicts arise in human relations. Cultures affect the ways we name, frame, blame, and attempt to tame conflicts.'¹¹⁵ According to LeBaron,

Whether a conflict exists at all is a cultural question. In an interview conducted in Canada, an elderly Chinese man indicated he had experienced no conflict at all for the previous 40 years.¹¹⁶ Among the possible reasons for his denial was a cultural preference to see the world through lenses of harmony rather than conflict, as encouraged by his Confucian upbringing. Labelling of our interactions as conflicts and analyzing them into smaller component parts is a distinctly Western approach that may obscure other aspects of relationships.¹¹⁷

Thus, in most conflict situations culture is a vital factor, 'whether it plays a central role or influences it subtly and gently.'¹¹⁸ Even in conflicts that

114 Ibid.

115 LeBaron. Op. cit.

116 LeBaron, M. and Grundison, B., *Conflict and Culture: Research in Five Communities in British Columbia*. Victoria, British Columbia: University of Victoria Institute for Dispute Resolution, 1993.

117 LeBaron. Op. cit.

118 Ibid.

seem politically-grounded – like the Israeli-Palestinian conflict or the India-Pakistan conflict over Kashmir – there is the cultural factor that goes beyond the territorial boundary and/or sovereignty issues. These conflicts ‘are also about acknowledgement, representation, and legitimization of different identities and ways of living, being, and making meaning,’¹¹⁹ which form essential components of culture. Although culture does not cause conflicts, it is inextricable from conflict.

Indeed, ‘When differences surface in families, organizations, or communities, culture is always present, shaping perceptions, attitudes, behaviours, and outcomes.’¹²⁰ Seen in this context, culture should be acknowledged in conflict or dispute resolution. This is so argued because: ‘Unless we develop comfort with culture as an integral part of conflict, we may find ourselves tangled in its net of complexity, limited by our own cultural lenses. Cultural fluency is a key tool for disentangling and managing multilayered, cultural conflicts.’¹²¹

3.2 THE ROLE OF UBUNTU IN DISPUTE RESOLUTION IN AFRICA

3.2.1 The Place of Restorative Justice in Dispute Resolution in Africa

Before the imposition of the colonial justice system in Sub-Saharan Africa, African indigenous or traditional justice system was community-based and human-centred, which employed restorative justice and transformative principles in dispute settlement.¹²² Elechi observes that,

*The African indigenous justice system is community based, human centred and employs restorative and transformative principles in conflict resolution. Restorative justice is negotiative and democratic; hence it empowers the community to mediate in conflicts. Ideally, the African indigenous justice systems provide opportunities for dialogue amongst the victim, the offender, their families and friends, and the community. Conflict provides opportunities for primary stake-holders to examine and bring about changes to the society’s social, institutional and economic structure.*¹²³

119 Ibid.

120 Ibid.

121 Ibid.

122 Elechi, O., “Human Rights and the African Indigenous Justice System.” An unpublished paper presented at the International Conference of the International Society for the Reform of Criminal Law, Montreal, Quebec, 8–12 August, 2004. Available at www.isrd.org/pspers (accessed 13 January 2011).

123 Ibid.

To the contrary, as Bishop Desmond Tutu once remarked, the Western conception of criminal justice is largely retributive that relies heavily on punishing the offender. This sense of justice is contrary to the African restorative justice, which (as Bishop Tutu says) 'is restorative of the dignity of the people'.¹²⁴ Bishop Tutu says that retributive justice is largely Western, 'and the African understanding is far more restorative – not so much to punish as to redress or restore a balance that has been knocked askew'.¹²⁵ In this regard, Himonga notes that this sense of African justice has occupied a central role in the regulation of Africans' lives for hundreds of years.¹²⁶

According to a publication by Penal Reform International, entitled: *Access to Justice in Sub-Saharan Africa* (2001)¹²⁷, African non-state traditional justice systems have the following salient features:

- The problem is viewed as that of the entire community or group;
- There is an emphasis on reconciliation and restoring social harmony;
- Traditional arbitrators are appointed from within the community;
- There is a high degree of public participation;
- Customary law is merely one factor to be considered in reaching a compromise;
- The rules of evidence and procedure are flexible;
- There is no professional legal representation;
- The process is voluntary and the decisions made are based on agreement;
- There is an emphasis on restorative penalties;
- The enforcement of decisions is secured through social pressure; and
- The decision is confirmed through rituals aimed at reintegration.¹²⁸

Interestingly, Stevens adds yet another remarkable feature of African traditional justice system: i.e. like cases need not be treated alike.¹²⁹ That is to say, African traditional justice systems are not bound by

124 Quoted in Minow, M., *Between Vengeance and Forgiveness*. Boston: Beacon Press, 1998, p. 81.

125 Skelton, A., "Restorative Justice in Child Justice Systems in Africa." Op. cit, p. 132.

126 Himonga, C., "African Customary Law and Children's Rights: Intersections and Domains in a New Era." In Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire, Ashgate Publishing Company, 2008, pp. 73–90, p. 73.

127 Stevens, J., *Access to Justice in Sub-Saharan Africa*. London, Penal Reform International, 2001.

128 Skelton. Op. cit, p. 132.

129 Ibid.

the Western legal and procedural requirements like the common law doctrines of *stare decisis* and precedents¹³⁰.

3.2.2 The Place of Ubuntu in Dispute Resolution in Africa

The foregoing conception of the African indigenous justice system underpins the African communal value, which is better explained in the concept of *Ubuntu*.¹³¹ *Ubuntu*, as a significant factor in African community solidarity on survival and justice issues, was better judiciously defined in *S. V. Makwanyane*¹³² by the South African Constitutional Court as,

*[A] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.*¹³³

Ubuntu, as an important African communal ethic, was also given judicial consideration by the Court of Appeal of Tanzania in *DPP v. Daudi Pete*.¹³⁴ In this case, the Court considered the African communal ethic to be,

... the co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the [which in effect] means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa.

130 The doctrines of precedents and *stare decisis* entail that all courts and tribunals below the higher courts in Tanzania (i.e. the High Court and the Court of Appeal), are bound by decisions of the Court regardless of their correctness. See particularly *Jumuiya ya Wafanyakazi Tanzania v Kiwanda cha Uchapishaji cha Taifa* [1988] TLR 146 (CA); and *Dodhia v National Grindlays Bank Ltd. & Another* [1970] E.A. 195.

131 This Bantu word is also explained in some Bantu vernaculars as *Umntu*, *ubunhu*, *ngumuntu*, *ngabantu*, etc.

132 Op. cit.

133 Ibid, para. 224.

134 [1993] TLR 22 (CA).

In the view of Mokgoro, *Ubuntu* is a key social value which emphasises 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity.'¹³⁵ Connecting *Ubuntu* and the concept of extended family in Africa, Mokgoro points out that: 'a society based on *Ubuntu* places strong emphasis on family obligations.

3.3 COMPARISON BETWEEN FORMAL ADR AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA

3.3.1 Emphasis on Informality of Procedures

As we have already seen, modern or formal ADR has its roots in traditional African justice systems. Like traditional African justice systems, formal ADR operates outside the adjudicatory court process. Interestingly, all systems informally use mediation in resolving disputes, placing much emphasis on informality in procedure and the use of non-professionals in dispute resolution.¹³⁶ In principle,

*Both ADR and African systems of justice are, at least in theory, non-coercive and voluntary in their nature. ADR and African indigenous dispute settlement are both premised on the ideal of compromise and settlement rather than adjudication, and both-emphasize "win-lose" situations and prefer flexible mechanisms of obtaining fair results rather than following strict rules of law. Both systems are participatory in nature, and in general, disputants play a central role in the decision making process. There is emphasis on harmony and preservation of ongoing relations. Principles of restorative justice such as compensation, restitution and informal social pressures, rather than penal sanctions of fines and imprisonment, are employed.*¹³⁷

3.3.2 Methods of Dispute Resolution in Traditional Africa

The two systems of dispute resolution are distinguishable in a number of ways. Kamau contends that 'ADR draws from methods and mechanisms developed in the West, without certain assumptions about disputes.'¹³⁸ On the other hand, traditional African justice systems are developed locally and 'draw on local customs, norms and practices.'¹³⁹

135 Mokgoro, Y.J., "Ubuntu and the Law in South Africa." *Buffalo Human Rights Law Review*. Vol. 4, 1998.

136 Kamau. Op. cit, p. 354.

137 Ibid.

138 Ibid.

139 Ibid.

3.3.3 Neutrality of the Mediator in Traditional Africa Dispute Settlement

In terms of the concept of a mediator, the ADR model emphasizes that the mediators must be a neutral third party, who should have no connection to party. They should have undergone some special training in mediation, and in some jurisdictions they should have certification from the court.¹⁴⁰ In this regard, 'the authority of mediators is based on their training and expertise of mediation, and not on their status in society or knowledge of the dispute or the parties.'¹⁴¹ In modern ADR,

A mediator is valued for his or her ability to remain detached from the conflict, asserting a commitment only to the value of the process itself.¹⁴² Thus mediators in the ADR model North America are required to be strangers to the disputants in order to secure their neutrality and impartiality. This means that the mediator has no previous knowledge of the dispute or its history, or the character of the disputants, and must struggle to develop a coherent account from conflicting and ambiguous stories, and to assess the characters of both parties on the basis of their talk and presentation in the mediation session itself.¹⁴³

To the contrary, mediators in traditional African justice are respected and influential members of the community 'with experience and acknowledged expertise in settling disputes. They are not outside authorities but leaders of kin groups, age grades, and other social groupings, and are usually of higher social status than the disputants.'¹⁴⁴ Kamau points out that,

Being experts in village social relationships and genealogies, they bring to the dispute a vast store of such knowledge. Their authority to intervene in conflict situations rests on kinship connections, political position, religious merit, previous experience, and knowledge of customs and community.¹⁴⁵ Mediators in the African context, although generally neutral, are rarely disinterested in the dispute, and are not complete strangers to the disputants. Their impartiality is secured by cross-cutting ties that link them to both sides. Neutrality

140 Ibid, pp. 354–5. See also Merry, S.E. "Disputing Without Culture." 100 *Harvard Law Review*, 1987. 2060.

141 Kamau. Ibid, p. 355.

142 Merry. Op. cit.

143 Kamau. Op. Cit, p. 355. See also Merry. Op. cit.

144 Ibid.

145 Merry. Op. cit.

*is also enhanced by their positions as representatives of an entire village or community or of an important component, such as a lineage or age group.*¹⁴⁶

Nonetheless, this does not necessarily mean that mediators in the traditional African justice system are not always biased. In most cases, traditional African mediators are tasked to impose a decision, unlike in Western ADR where mediators are not 'expected to impose a decision on the parties even in the event that the parties are unable to resolve the dispute themselves.'¹⁴⁷

3.3.4 The Notion of Privacy and Confidentiality *vis-à-vis* Conflict of Interest of Mediators in the African Traditional Dispute Resolution

Another difference between the Western ADR and traditional African mediation systems is found in the notion of privacy and confidentiality of proceedings. Whereas in the Western ADR sessions and proceedings are strictly private and generally for only disputing parties to appear before the mediator, in the African mediation setting other (particularly family) members are allowed to participate in the sessions.¹⁴⁸ In addition, the role of the mediator in the ADR process is to achieve 'a lasting settlement than enforcing societal norms. During their training, mediators are enjoined by their trainers not to make moral statements or judgments and are encouraged to seek a mutually acceptable outcome, regardless of their notions of relevant laws or norms.'¹⁴⁹ They are not expected to have a shared value system or agreement on normative standards, and such mediators are 'not able to or expected to operate in terms of a shared moral system.'¹⁵⁰

By contrast, mediators in the African situation 'tend to represent the norms and values of their communities and usually advocate a settlement that accords with commonly accepted notions of justice, couched in terms of custom, virtue and fairness, and reflecting community judgments about appropriate behaviour.'¹⁵¹ As Merry points out, unlike

146 Kamau. Op. cit, p. 355.

147 Ibid. See also Weller, J.A., et al, "Fostering Culturally Responsive Courts: The Case Family Dispute Resolution for Latinos." *Family Court Review*. Vol. 39 No. 185, 2001, pp. 188–89.

148 Kamau. Ibid, pp. 355–6.

149 Ibid, p. 356.

150 Ibid. Pp. 356. See also Merry. Op. cit, p. 33.

151 Kamau. Ibid.

in Western ADR, mediators in the African setting usually deliver moral lectures to the disputants.¹⁵² In the Western setting, mediators tend to keep parties focused on the particular issues to be resolved¹⁵³, which ‘may be contrasted with the holistic approach taken in African dispute resolution, in which other issues are often tied up with the issue at the dispute forum.’¹⁵⁴

3.3.5 The Need to Maintain Cohesion and Collaboration

Kamau argues that ‘disputants in Western societies are rarely embedded in a close cohesive social system where they need to maintain co-operative relationships, and even where they are from the same neighbourhood, their conflict in one relationship does not necessarily have repercussions for other relationships.’¹⁵⁵ In this regard, ‘the community pressure necessary to induce disputants to accept a compromise settlement is generally lacking.’¹⁵⁶ Thus: ‘In the absence of societal pressure, mediators in the West employ the coercive powers of the State apparatus, particularly courts, to back up or “give teeth” to mediated settlements.’¹⁵⁷

This is in contrast with the African mediation, where ‘the overriding need in African societies to maintain harmonious relationships renders the disputing process amenable to the exertion of social pressure on disputants even without the backup of formal State structures.’¹⁵⁸ In this context, the mediator or negotiator is thus ‘able to exert his or her influence on the parties in order to bring the parties to a point of settlement, while community pressure in the form of gossip, scandal, threat of ostracism and fear of supernatural sanctions serve as a powerful incentive to restoring amicable relations.’¹⁵⁹

152 Merry. Op. cit.

153 Weller, et al. Op. cit, p. 196.

154 Kamau. Op. cit.

155 Ibid.

156 Merry, S.E., “The Social Organisation of Mediation in Nonindustrial Societies: Implications for Informal Community Justice in America.” In Abel, R.L. (ed.), *The Politics of Informal Justice: Comparative Perspectives*. 1982, p. 39.

157 Kamau. Op. cit, p. 357.

158 Ibid.

159 Ibid.

Chapter Four

Transplanting ADR into Tanzania from the West

4.0 INTRODUCTION

As we saw in Chapters One and Two, modern ADR is a modification of African traditional ways of dispute settlement, which were advanced by the West in the 1970s and later transplanted back to Africa. As the late Francis Nyalali, former Chief Justice of Tanzania, once remarked,

The use of customs, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over.

As in other African countries, the introduction of ADR in Tanzania was just reinforcing the already existing traditional ways of settling disputes. As we discussed in Chapter Two, ADR was transplanted into the African legal systems in the 1980's and 1990's as a result of the liberalisation of the economies, which was accompanied by such conditionality as reform of the justice and legal sectors, under the Structural Adjustment Programmes (SAP's).

However, most of the methods of ADR that are being promoted by the Western countries to be included in the African legal systems are similar to the post-colonial African dispute settlement mechanisms that encourage[d] restoration of harmony and social bonds in the justice system. This Chapter, therefore, briefly discusses the introduction and the practice of modern ADR in the justice system in Tanzania since 1994 to date. It also discusses the challenges facing the practice of ADR in Tanzanian courts since then.

4.1 RETENTION OF THE COLONIAL LEGAL SYSTEM AND ITS IMPACT OF DISPUTE RESOLUTION IN AFRICA

4.1.1 General Overview

In Chapter One we observed that the introduction of colonialism in Africa brought with it the introduction of the European model of formal legal institutions for settlement of disputes largely in the form of courts of law. Notably, the 'new judicial system introduced formality, complex and complicated procedures almost incomprehensible

to the average [African] litigant.¹⁶⁰ Tanganyika (which later in 1964 united with Zanzibar to form Tanzania) was not spared from this kind of development. When the British colonialists occupied Tanganyika after the World War II in 1919, they brought with them the law and justice institutions that were based on the common law system as applied in Great Britain or its dominions/colonies such as Nigeria and India.

Tanganyika (as was the case with other Sub-Saharan African countries) retained the colonially inherited laws in a dual legal system at independence; by particularly codifying customary laws, abandoning the duo court system and abolishing the customary courts altogether. In this respect, the colonial justice system was retained with “minor” modifications. Read argues that in Sub-Saharan African countries under the British colonial rule, newly independent states retained the colonial justice system in two senses: first, by adhering to the principles of English law; and, second, by retaining the rules of interpretation prevalent in the English law.¹⁶¹

4.1.2 The Rationale for the Retention of the Colonial Justice System

Shaidi¹⁶² and Bowd¹⁶³ offer a philosophical explanation on the reason behind the retention of colonially inherited justice systems in post-independent Sub-Saharan Africa. It is ironic, viewed from the face of the matter, that African leaders adopted the colonial legal regimes irrespective of the fact that during colonialism in Africa colonial rulers enacted laws and established criminal justice agencies that coerced, repressed and helped to exploit Africans.¹⁶⁴ As Shaidi argues, at independence most of Sub-Saharan African states retained these coercive, repressive and exploitative justice systems because

160 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Dar es Salaam: Project for the Court of Appeal of Tanzania, 2010.

161 Read, J.S., “Criminal Law in the Africa of Today and Tomorrow.” *Journal of African Law*. Vol. 7 No. 1, 1963, pp. 5–17.

162 Shaidi, L.P., “Traditional, Colonial and Present-day Administration of Criminal Justice.” In Mushanga, T.M. (ed.), *Criminology in Africa*. UNICRI Series: Criminology in Developing Countries, Publication No. 47, 1992.

163 Bowd. Op. cit, pp. 41–48.

164 Ibid. See also Shivji, I.G., “State and Constitutionalism in Africa: A New Democratic Perspective.” *International Journal of Sociology of Law*. 18, 1990, pp. 381–408; Alemika, E.E.O., “Colonialism, State and Policing in Nigeria.” *Crime, Law and Social Change*. 20, 1993, pp. 187–219; and Sumner, C. (ed.), *Crime, Justice and Underdevelopment*. London, Heinemann, 1982.

they were ‘found to be useful by the new ruling class, [though] the subordinate classes could only accept the arrangement from a position of weakness.’ To him, as post-colonial states ‘are based on a very shaky foundation, coercion is more widely practiced compared to more stable developed countries.’¹⁶⁵

Profoundly, Bowd contends, the new African elites retained and continued to apply the coercive colonial criminal laws, for example, ‘because throughout the period of colonialism it was these elites who had been tasked with the management of the country under supervision of a semi-absent landlord.’¹⁶⁶ To Bowd, in maintaining the existing colonial legal systems, these elites,

*found themselves in advantageous position from which they could, with relative ease, ensure their position and consolidate their power: not always for the benefit of the populations they were meant to be serving.*¹⁶⁷

4.1.3 The Implications of the Retention of the Colonial Justice System in Dispute Resolution in Africa

Interestingly, the colonially inherited laws in post-independent Africa¹⁶⁸ have undergone certain developments in response to various challenges and problems facing the continent. Some of the problems facing the countries in Sub-Saharan Africa cited by the United Nations Office on Drugs and Crime (UNODC), include those caused by high income inequality, rapid urbanisation, high youth unemployment and poorly resourced criminal justice systems.¹⁶⁹

Besides, the retention of the colonial criminal justice systems in post-independent Sub-Saharan African states has only brought about adverse ramifications on preservation of peace, harmony and security in society. Bowd points out that, this inherited colonial criminal justice law insisted on protecting those in power at the expense of their subjects. For instance, the philosophical underpinnings of this criminal justice system lean on retributive prosecution and punishment of a poor thief, while upholding the value of private property of those in power or wealthy individuals in society.¹⁷⁰

165 Shaidi. Op. cit, p. 16.

166 Bowd, R., “Status quo or Traditional Resurgence: What is Best for Africa’s Criminal Justice Systems?” Op. cit, p. 43.

167 Ibid.

168 Bowd. Op. cit, p. 41.

169 UNODC, “Crime and Development in Africa.” Available at http://www.unodc.org/pdf/Africa_report.pdf (accessed 14 January 2011).

170 Ibid.

In the long run, this kind of socio-legal relationship tends to degenerate into a growing gap between the *have's* and the *have-not's* in society, rendering this kind of criminal justice system a perpetrator of social problems instead of maintaining order and peace as well as facilitating to resolution of disputes. But for the elites in Sub-Saharan Africa, this kind of criminal justice system helped (and it still helps) them to hold the 'ability to preserve their position through control of systems that can contribute to structural and political violence.'¹⁷¹

The foregoing argument by Bowd can be vindicated by the fact that crime rate in Sub-Saharan Africa – including Tanzania – has been on the increase, and the harsher punishments provided for in the colonially inherited criminal laws¹⁷² have never been able to wield enough clout to prevent this situation.¹⁷³

So, as Bowd argues, this situation has an implication of situating the colonially inherited justice system 'with the referent being the individual, thus removing justice from the social [fabric].'¹⁷⁴ To Bowd,

*In pursuing an aggressive retributive ... justice, there is a danger of undermining the social fabric of African communities. ... [I]justice, rather than being held in the domain of the community in order to restore societal relations and protect social cohesion, becomes rooted in the ideals of individualism.*¹⁷⁵

As already explained above, the retention of the retributive and socially-insensitive justice system after independence has resulted in increased litigation that does not match with the case disposal rate by our courts. Indeed,

*This increase in litigation, compounded by delays in disposal of cases by our courts at all levels, often attributed to time-consuming intricate and technical rules of procedure obtaining in the traditional judicial system hitherto relied on for the settlement of civil disputes, compounded by scarce resources, had precipitated an almost choking congestion of cases at all levels of the court system. All these have contributed not only to delays in justice delivery in our courts but also adversely affected the quality of that justice.*¹⁷⁶

171 Ibid.

172 Coldham, S., "Criminal Justice Policies in Commonwealth Africa: Trends and Prospects." *Journal of African Law*. Vol. 44, 2000, pp. 218–238, p. 218.

173 UNODC. Op. cit.

174 Bowd. Op. cit, p. 44.

175 Ibid.

176 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

These problems “compelled” the Government to take some measures, both statutory and administrative, to improve the situation. In the subsequent parts we briefly look at these measures.

4.2 PRELUDE TO THE INTRODUCTION OF ADR IN TANZANIA

4.2.1 Early Measures to Reduce Caseloads in Civil Courts

In order address the problems facing the justice system in Tanzania, several measures were devised and put into action, including the enactment of the Ward Tribunals Act in 1985. *Inter alia*, this law vests limited judicial power onto ward tribunals, emphasising the need to use mediation as much as possible in resolving disputes brought before them. As a recent evaluation report notes: ‘The effect of this [law], to say the least, was minimal.’¹⁷⁷

Furthermore, the minister responsible for justice ordered the Law Reform Commission of Tanzania to carry out a study on delays and backlogs of civil cases in 1986. The study was envisaged to find out the major causes of the inordinate delays in determination of civil cases and advise on how to get rid of this problem. The study found, *inter alia*, that delays in disposing civil cases as well as the mounting case backlogs were increasingly becoming unbearable and an immediate lasting solution was needed to address these problems.¹⁷⁸

Another measure undertaken to address the challenges facing the legal system in the country was the gazetting of Government Notice No. 508 of 1991, which severely ‘restricted the granting of adjournments in civil cases.’¹⁷⁹ Administratively, there was devised the Shift System, which was introduced ‘to ensure maximum use of the available resources by having morning and afternoon court sessions. That was soon followed by the Individual Calendar system whereby a case assigned to a particular Judge had to be dealt with by that Judge to its finality so as to reinforce accountability and reduce confusion and misplacement of case files.’¹⁸⁰

177 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Op. cit.

178 United Republic of Tanzania, “Delays in the Disposal of Civil Suits.” Dar es Salaam: Law Reform Commission of Tanzania, 1986, p. 4.

179 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Op. cit.

180 Ibid.

Along these administrative measures, there was devised another administrative action relating to the setting up of Case Management Committees from district level to national level that involve the Judiciary, Police, Prisons and the Office of the Attorney General, who 'are charged with the task of finding out causes of delay in each case and suggesting measures to tackle the problem. These committees have achieved some measure of success. Their emphasis, however, has been on criminal rather than civil cases.'¹⁸¹ Remarkably, the evaluation report notes that,

*'In spite of all these measures and others, public outcry grew about court congestion and inordinate delays in the dispensation of justice in the country. This brought to the fore the concept of finding alternative methods of resolving civil disputes to complement the traditional judicial system.'*¹⁸²

4.2.2 The Need for ADR in Tanzania

One of the measures that were to be devised at this stage was ADR. In the next section, we look briefly at the early efforts for the resort to modern ADR and later at the legal incorporation of ADR in the civil justice system in Tanzania. As we have just observed above, although the Government and the Judiciary introduced both legislative as well as administrative measures, still the civil justice system continued to grapple with a number of chronic problems, including inordinate delays in disposing cases and caseload congestion. This meant that the Tanzanian Judiciary and the Government had to continue the search for appropriate and effective dispute resolution mechanisms.

During one of his visits to the United States of America, the late Chief Justice of Tanzania, Francis Nyalali, came across the practice of ADR in the Superior Court of Washington, DC, which appealed to him.¹⁸³ Consequently, in April 1993 he invited two Judges¹⁸⁴ from the Superior Court of Washington, DC, to attend a Judges' Conference held in Arusha.¹⁸⁵ At that Conference, the two American Judges presented Papers on the practice of ADR in the US. That presentation inspired the participants of the Conference, who resolved, *inter alia*,

181 Ibid.

182 Ibid.

183 Ibid.

184 Namely, Judge Nun Huhn and Judge Robert Shuker.

185 Mroso, J., "ADR as a Tool of Administration of Justice." *Tanzania Lawyer*. February–May 1997, p. 16.

that Tanzania should find out if some forms of ADR would fit local circumstances¹⁸⁶ as part of the Judiciary's bid to get rid of delays in disposal of cases.

As a follow up on this resolution, the Chief Justice appointed a Committee of three High Court Judges chaired by Hon. Mr. Justice Mroso (now retired).¹⁸⁷ Among the Terms of Reference of the Committee were: first, to compile and recommend strategies and tactics to be used in a "Programme" for elimination of court delays in the disposal of cases in the High Court and courts subordinate thereto. Second, to consider the possibility of adopting in the country a system of administering justice by using ADR mechanisms in the form of negotiation, conciliation, and arbitration as part of the civil justice system or outside the court system (out of court settlements) as practised in the Superior Court of Washington, DC. Third, to consider how the strategies and tactics used so far in Tanzania can continue in operation parallel to the ADR.¹⁸⁸

Eventually, the Mroso Committee recommended the adoption of ADR in the form of negotiation, conciliation, mediation, case evaluation, and arbitration, which was already given legislative recognition in the Arbitration Act¹⁸⁹. Consequently, this recommendation was adopted; and so ADR was to be introduced in the in those forms 'but, as it turned out, with emphasis on mediation, and that such mediation would be court-annexed with Judges and Magistrates as the Mediators.'¹⁹⁰

4.3 INTRODUCTION OF ADR IN TANZANIA

4.3.1 General Overview

In Tanzania ADR was introduced in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966)¹⁹¹ as a result of the Mroso Committee's

186 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

187 Other committee members were Judge William Maina (retired) and Judge Anthony Bahati (retired).

188 Ibid.

189 Cap. 15 R.E. 2002.

190 Global Justice Solutions, "Alternative Dispute Resolution (ADR) Training Manual." Op. cit.

191 Cap. 33 R.E. 2002. See particularly Civil Procedure Code (Amendment of Schedules) Rules (1994), which were published in the Tanzania Government Gazette under G.N. No. 422 of 1994; and came into operation on 1st November, 1994.

recommendation. However, the Mroso Committee did not recommend the incorporation of ADR in the civil justice system. But it was decided that in order to give ADR some sort of legal authenticity it should be incorporated in the Civil Procedure Code.¹⁹² This move brought in amendments to Orders IV, V, and VIII, and introduced new Orders – i.e. Orders VIIIA, VIIIB and VIIC to the First Schedule. The provisions of Order VIIIA ‘can be said to be the main provisions which statutorily introduced ADR in the Tanzania civil justice system.’¹⁹³

4.3.2 Consequences of the 1994 Amendments to the Civil Procedure Code

One of the major legal consequences of the foregoing amendments to the CPC is the mandatory requirement for civil cases to be first referred to mediation before full trial is conducted. The amendment to the CPC introduced new stages between the completion of pleadings and trial in given cases.¹⁹⁴ However, not all types of cases are amenable or suitable for mediation; there are some types of cases which,

*... by their very nature, are unsuitable for mediation. These include, cases in which constitutional relief is sought, cases in which a definitive interpretation of the law is necessary, cases in injunctive relief or [where] declaratory judgments are sought, and in applications for prerogative orders. These types of cases constitute only a small fraction of all cases filed in the courts. So, the majority of the cases are amenable to mediation and so have to go through the mediation process.*¹⁹⁵

In Tanzania’s court-annexed mediation, ‘a case is said to be ready for mediation when all the pleadings have been duly filed and there are no pending applications or any other preliminary matter to be disposed of. In effect, it is when the case would ordinarily be said to be ready for trial.’¹⁹⁶

Just before the coming into force of Government Notice No. 422 of 1994, a few Judges and Magistrates were sent to the United States of America to be trained as Mediators. Subsequently: ‘In 1994, some four Judges of the High Court and two Resident Magistrates were sent

192 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Op. cit.

193 Ibid.

194 Chipeta, B.D. Op. cit.

195 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Op. cit.

196 Ibid.

to the United States of America where they were trained as Mediator Trainers. On their return, they taught other Judges and Magistrates as Mediators.¹⁹⁷

However, as the evaluation report of the ADR practice noted in 2010, 'following retirements, only one remains'¹⁹⁸ out of the four judicial officials. It was only recently that an extensive training of judicial officers took place under a World Bank-supported project.¹⁹⁹ The objectives of this project were:

- To provide the Judiciary, Ministry of Justice and Constitutional Affairs, and Tanganyika Law Society with an evaluation of the successes and failures of the ADR mechanism to date. To thereafter provide recommendations of any legislative, procedural, administrative, or managerial improvements to the ADR mechanism set out in the Civil Procedure Code 1966;
- To develop a plan for sustaining long term ADR training in Tanzania;
- To design a comprehensive training programme for the training of ADR trainers; and
- To conduct training of 50 trainers as selected by the Client.²⁰⁰

Apart from conducting an in-depth evaluation of the ADR practice in Tanzania, under this project about 50 officials of the court were instructed in a capacity- building tailor-made training programme on ADR. The major aims of this training were,

- To provide participants with appropriate knowledge of ADR concepts, principles and techniques; and
- To provide the participants with the opportunity to acquire skills in facilitating ADR training programmes and to enhance their abilities as trainers in order to enable them to transmit their knowledge and experience of ADR to others.²⁰¹

However, the amendment did not provide guidance on the procedure for practising ADR.

197 Ibid.

198 Ibid.

199 Ibid.

200 Ibid.

201 Ibid, pp. 7–8.

4.4 CHALLENGES FACING ADR IN TANZANIA: FINDINGS OF THE ADR EVALUATION REPORT

The ADR evaluation report released by Global Justice Solutions and Open University of Tanzania in 2010 contains the following key findings:

- Government Notice No. 422 of 1994 which amended the Civil Procedure Code of 1966 only affected the First Schedule in particular Order VIIIA (and not the substantive part of the Act) and therefore did not impact on the efficacy of the ADR mechanism in Tanzania.
- The Second Schedule to the Civil Procedure Code permits resort to arbitration in Rule 1(1) where the parties agree that any matter of difference between them shall be referred to arbitration at any time before judgment is pronounced. This may be done by applying to the court for an order of reference; and, in such case, the court is required not to deal with the matter pending the finalization of arbitration. To date, however, these provisions have not been commonly applied in practice.
- To some extent the ADR mechanism in Tanzania has been successful and the objective fulfilled from the perspective of the Judges and Magistrates as mediators. However, the success rate is not as high as might have been expected. ADR, as currently practiced in Tanzania, has not substantially resulted in expeditious disposal of cases. One contributing factor is lack of effective case management practices; a situation that does not correspond with ADR international best practice.
- ADR successes in the Commercial Court can be attributed to support to the program by the Chief Justice and commitment by Judges to mediate and success at Kisumu RM's Court can be attributed to the fact that ADR was piloted in that location between 1994 and 1999 and Magistrates received had some training in mediation.
- When the ADR program was formally introduced in the country in 1994, only four judges and two magistrates were trained and equipped with ADR skills and only one of whom remained in active practice by end of 2010.
- ADR training has not been sustained in Tanzania and has therefore not prepared sufficient numbers of skilled mediators.
- Lack of skills and interest on the part of mediators and lack of training may have significantly contributed to failure of some mediation cases in Tanzania.

- The value of Judges and Magistrates mediating has also been questioned. 75 % of questionnaire respondents believed that ADR should be conducted by officers other than Judges and Magistrates, but the ADR mechanism should remain court annexed. Of the 41 relevant judicial stakeholders consulted only one person supported the prospect of an ADR mechanism external to the court.
- Although ADR ordinarily refers to mediation, negotiation, arbitration and conciliation, in Tanzania only mediation is actively practiced by the courts under the auspices of the Civil Procedure Code as it was amended by Government Notice No. 422 of 1994.
- Tanzania has not explored other potential support options such as the use of professional organizations like the Tanzania Institute of Arbitrators, Contractors Registration Board or the Tanzania Chamber of Commerce, Industries and Agriculture to resolve disputes through mediation and/or arbitration. These bodies could play a significant role in soliciting and preparing a pool of personnel (other than Judges and Magistrates) who could discharge the ADR function.²⁰²

4.5 RECOMMENDATIONS OF THE ADR EVALUATION REPORT

As a step forward in addressing the foregoing challenges, the ADR evaluation report provided the following recommendations:

- The strategy for sustaining long-term ADR training in Tanzania developed during the execution of this project should be adopted and applied;
- In the interests of sustainability, a review and evaluation of ADR understanding and practices should be performed within the first 3 months of 2011 to determine the effectiveness and impact of the ADR training implemented by this project;
- ADR training should be provided to additional Judges, Magistrates, State Attorneys and Advocates and this should be achieved by optimizing the resources developed during the course of this project. That is, utilising the trainers trained to facilitate and deliver further training through the application of the ADR Training Curriculum and Training Manual;
- In order to sustain the pool of skilled trainers and practitioners, periodic ADR training should be provided;

202 Ibid, pp. 6–7.

- Refresher training should, at some point, be provided to those already trained to ensure that contemporary ADR knowledge and skills are maintained and emerging issues are addressed;
- A submission should be made to the Council for Legal Education to suggest inclusion of the subject of Arbitration as one of the compulsory subjects within Diploma level courses to provide graduating Primary Court Magistrates with the relevant foundational knowledge;
- The ADR mechanism in Tanzania should remain court-annexed; however, the introduction of a model which sees cases referred to mediators who are not serving Judges or Magistrates should be considered. If adopted, this model should still require the court to determine if a case is amenable to mediation, refer cases to the mediators and make enforcement determinations if required;
- An ADR Case Management Officer should be appointed by the Chief Justice to manage and record cases within an ADR system, monitor mediation progress and identify any emerging issues or shortfall within the ADR mechanism;
- The Tanganyika Law Society (TLS), Tanzania Institute of Arbitrators (TIA), the Tanzania Chamber of Commerce, Industries and Agriculture (TCCIA) and the Contractors Registration Board should be engaged to establish the administrative steps required to enable practitioners and retired Judges and Magistrates to act as mediators and arbitrators and an independent body should be established to regulate the conduct of those practicing mediation and arbitration on behalf of the court;
- The court should continue to require parties to undertake a mediation process;
- Judges and Magistrates should be made aware of the provisions of Rule 1(1) of the Second Schedule to the Civil Procedure Code and if possible be encouraged to apply it; and
- A marketing strategy is required urgently to sensitise the judicial community and general public. Information communicated through various media should include the importance of ADR, an overview of the ADR mechanism and the proactive steps which have been taken to enhance ADR in Tanzania.²⁰³

203 Ibid. P. 11.

Part II

Theories and Principles of Alternative Dispute Resolution (ADR)

Chapter Five

Theories and Principles of Negotiation

5.0 INTRODUCTION

Negotiation is one of the three common forms of ADR in modern times. The other common forms are mediation and arbitration. This Chapter examines theories and principles of negotiation by particularly looking at the meaning, dimensions and approaches applied in negotiation; principles and models applicable in negotiation; and skills pre-requisite to negotiators.

5.1 MEANING AND DIMENSIONS OF NEGOTIATION

Goldberg, Sander, and Rogers²⁰⁴ define negotiation as ‘communication for the purpose of persuasion.’ Negotiation is a process in which parties to a dispute discuss possible outcomes directly with each other. Parties exchange proposals and demands, make arguments, and continue the discussion until a solution is reached, or an impasse declared. It ‘involves the parties themselves or with their advisers in which the Parties negotiate and try to settle their dispute without the involvement of a third party.’²⁰⁵

5.2 APPROACHES TO RESOLVING DISPUTES THROUGH NEGOTIATION

There are three approaches in the practice of negotiation in modern ADR: interest-based, rights-based, and power-based. Each of the approaches has a different orientation and focus and can result in different outcomes.²⁰⁶ In the following sections we discuss these approaches one after another.

5.2.1 Interest-based Approach

This approach shifts the focus of the discussion from positions to interests. As Shamir points out: ‘Because there are many interests underlying any position, a discussion based on interests opens up a range of possibilities and creative options, whereas positions very

204 Goldberg, S.B., et al, *Dispute Resolution: Negotiation, Mediation, and other Processes*. Boston: Mass./Little Brown, 1992.

205 Global Justice Solutions, “Alternative Dispute Resolution (ADR) Training Manual.” Op. cit.

206 Ury, W., et al, *Getting Dispute Resolved*. Harvard University, PON, 1993.

often cannot be reconciled and may therefore lead to a dead end.”²⁰⁷ The dialogue on interest should be transparent, in order for the parties to arrive at an agreement that will satisfy the needs and interests of the parties. While interest-based negotiations ‘have the potential of leading to the best outcomes, the parties may not adopt it, and therefore we often find that negotiations are “rights-based” or “power-based.”’²⁰⁸

5.2.2 Rights-based Approach

The rights-based approach comes to play when negotiations between parties fail whereby the parties may then attempt to resort to what they consider to be their rights. Notably, this means ‘appealing to the court (local, national, or international) and will result in a legal process in which the law is the dominant feature.’²⁰⁹

5.2.3 Power-based Approach

This approach is applied when parties resort to threat or even violence as a way of communication for the purpose of persuasion (for example, the posture of the Americans in the Cuban missile crisis). It should be noted that: ‘Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.’²¹⁰

5.3 COMPETITIVE AND INTEGRATIVE MODELS IN NEGOTIATION

In principle, negotiation is characterized by polarity between two extremes: i.e. competition-cooperation; and opposing interests-common interests.²¹¹ In the material world, competition and opposing interests ‘lead to a requirement by the parties to divide the assets or resources under dispute. They lead to “dividing the pie” or “claiming value,” in other words a “zero-sum game.” On the other hand, when negotiations are based on cooperation and identification of common interests, this can lead to seeking opportunities for “increasing the pie” (which is also called “creating value”).’²¹²

207 Shamir, Y., *Alternative Dispute Resolution Approaches and their Application*. UNESCO, 2003, p. 6.

208 Ibid.

209 Ibid.

210 Ibid.

211 Ibid.

212 Ibid, pp. 6–7.

5.3.1 Integrative or Collaborative Model

This model is manifested when negotiations are based on common interests, cooperation, and joint problem solving. This model, developed through the Project on Negotiation (PON) at Harvard University in the US in the early 1980s, ‘is useful for parties to negotiate over a number of issues or resources, since they can try to create value and maximize benefits by trade-offs between them.’²¹³ In principle,

*This is because the order of priority among these issues for one party may differ from that of the other and provide an opportunity for exchanges. Therefore, the parties find ways to increase gains through creativity, originality, and linkage between issues to enlarge the overall pie, thereby creating value.*²¹⁴

In this context, the integrative or collaborative model is a very useful model in the negotiation process.

5.3.2 Adversarial, Distributive, or Competitive Model

This model is manifested when negotiation is based on “rights” or “power” and falls under the “adversarial, distributive, or competitive model,” ‘where the parties try to get the best deal for themselves at a cost to the others. A gain for one side means a loss for the other.’²¹⁵

Practically, living in a society in which competition is part of the daily experience, ‘we tend to think of competition as the only way to reach our goals.’²¹⁶ In the material world, competition ‘is almost always at the expense of someone else. In the “conventional way,” a negotiation is “zero-sum game” – whatever one side wins the other side loses. Both of the parties assume that it would be best to ensure that they end the negotiation at the positive side of the equation.’²¹⁷

5.4 PRINCIPLES OF NEGOTIATION

5.4.1 The Goals of Negotiation

Some scholars have argued that the reason to negotiate ‘is to produce something better than the results that you can obtain without negotiation.’²¹⁸ According to Shamir, the goal of negotiation ‘is to reach

213 Ibid, p. 7.

214 Ibid.

215 Ibid.

216 Ibid.

217 Ibid.

218 Fisher, R. et al, *Getting to Yes*. London: Penguin, 1991.

an agreement that is acceptable to all parties, to which they remain committed, and which they indeed implement. This is the essence of interest-based negotiations.²¹⁹

5.4.2 Basic Principles of Negotiation

As we have just observed above, negotiation is essentially interest-based, which has the following principles: interests-needs; alternatives; options; standards and criteria; communication; relationship; and agreement and/or commitment to abide by the terms and conditions of the agreement. These principles are described in the section below.

(a) Interests–Needs

As we saw in Chapter One, quite often conflicts do arise or revolve around interests – opposing or competing – of parties. In fact, interests ‘are needs (food, shelter, security, and so on), desires, aspirations, fears, hopes, and concerns. Positions are what we want and demand. The interests are the reasons behind the position.’²²⁰ Viewed in this sense, in negotiating on the basis of interests, parties will need to: first, distinguish between positions and interests; second, move from positions to interests; third, list all the interests according to priority; and, last, think of positions as only one of many solutions to the problem.²²¹

(b) Alternatives

In the negotiation process, alternatives are those actions that one can take outside the negotiations, alone or possibly with a third partner, but without the party with whom one negotiates. The alternative that yields the best outcome in the negotiation process is called the *Best Alternative To a Negotiated Agreement* (BATNA). Notably,

*The BATNA is the “best alternative to a negotiated agreement.” If any of your alternatives without negotiation is better than the deal on the negotiating table, you will obviously go to the best alternative. If however the deal on the table is better than any of your alternatives, it will be your BATNA. It is important to make sure that the alternatives are indeed realistic, and try to improve your BATNA, because the BATNA influences the way in which you conduct the negotiations.*²²²

219 Shamir. Op. cit.

220 Ibid, p. 8.

221 Ibid.

222 Ibid.

Having a BATNA provides us with the ability to negotiate effectively, and provide the answers to the following,

- What are our alternatives if this negotiation reaches a dead end?
- Do we have an alternative at all if the negotiations fail?

Which agreement do we consider (the one which is at least as good as our BATNA)?²²³

(c) Options

Options are a range of outcomes that the parties agree to consider during the negotiations, which can enlarge the pie and create value with little or no extra cost to the parties. In developing the options, the following criteria can be used,

- Use brain-storming among the parties to generate a list of options;
- Look to the interests in order to generate a broad range of options to choose from; and
- Include options that will answer both parties' needs and interests.

(d) Standards and Criteria

In the negotiation process, objective standards and criteria can be used 'to enable both parties to perceive the process as fair and legitimate.'²²⁴ Objective standards and criteria include,

- market value of an asset or a resource;
- the law regarding the matter being discussed;
- precedents;
- opinion of an expert; and
- priority of human water consumption over other users (in water issues, for instance).

(e) Communication

In the negotiation process, communication refers to all the means by which the parties communicate with each another, including spoken words, level and tone of speech, body language, and any other means that parties use to signal to one another.²²⁵ Communication is important in the negation process because part of the message is not just the words, but also in the manner in which it is delivered. To consider

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

these aspects one must: be attentive to all signals of communication; and speak clearly and exercise “active listening.”²²⁶

(f) Relationship

In negotiation, relationship refers to the interpersonal and inter-group dynamics between all the parties to the negotiation. Proper consideration of these elements requires that one: first, separate the people from the substance; that is, not to allow oneself to become personal, but stick to the matters being discussed; and, second, consider that there are differences in the way in which people in other cultures value interpersonal relationships as a precondition to holding negotiations.²²⁷

(g) Agreement and Commitment

In the negotiation process, an agreement is required to be specific, realistic, operational, clear, and understood by all parties. It should be specific as to who will do what, how, when, and where. In the agreement the parties should commit to what they have agreed. Before signing an agreement one should ask the following questions,

- Does the agreement anticipate future contingencies, to avoid surprises and disappointments that may result in motivation not to uphold it?
- Do we have the authority to sign this agreement?
- Does the other side have the authority to sign this agreement?
- Do we want a tentative agreement, subject to final approval?
- Do we want an interim agreement that covers only part of the issues and leaves the rest for a further and final agreement?²²⁸

In interest-based negotiation one should strive to reach an agreement that will satisfy: all or most of the parties' interests; and the other parties' interests in a way that will be acceptable to them. One needs to ensure that the other parties' interests are met 'to a degree that will satisfy their interests because their interests are inextricably tied to one's own and both needs have to be met in order for the agreement to hold.'²²⁹ In this case, cognizance is made 'of parties that are absent from the negotiations who will be affected by them or have an influence on their outcome.'²³⁰

226 Ibid, p. 9.

227 Ibid.

228 Ibid.

229 Ibid.

230 Ibid.

5.5 BASIC SKILLS NEEDED IN NEGOTIATION (AND MEDIATION)

Negotiation (as well as mediation) is one of the oldest forms of conflict or dispute resolution in the world, having been practised by many communities from the time when society became complex and started to experience conflicts. Traditionally, negotiators were, and remain in some societies, untrained in formal dispute settlement. However, due to the increasing complexity of disputes and a blend of parties to them, modern negotiators need to possess a certain amount of skills to enable them to effectively facilitate the negotiation process. In this section we briefly discuss the basic skills needed in negotiation.

5.5.1 Communication Skills

(a) Active Listening

Communication skills, particularly active listening, are a very central part not only in the negotiation but also in the mediation processes. It is one of the most important and difficult skills for a negotiator and a mediator. In Shamir's phraseology: 'Active listening as a skill and technique are taught to, and applied by, negotiators and mediators to enhance their effectiveness during the process.'²³¹ It means 'stopping our inner voices, and truly listening to the other person. Listening will enable you to hear important information, and learn a great deal about the other party.'²³²

Shamir is of the view that, by listening attentively the negotiator or mediator shows,

- interest in what the other party has to say;
- understanding to the way they feel, their positions and underlying issues, hidden agendas, demands, and priorities (showing understanding does not mean that you agree with what was said);
- acknowledgment that people like to be listened to, and when you listen, you create a positive atmosphere;
- hope it may clarify many issues;
- understanding of the other side's point of view, and show respect to the other party's needs, hopes, and fears; and
- hope as it may help to improve the relationship, and break the cycle of arguments.²³³

²³¹ Ibid, p. 10.

²³² Ibid.

²³³ Ibid.

(b) Talking Clearly and Precisely

Negotiation is largely a process of facilitating disputing parties to come to an agreement through dialogue; and, as such, it is essential that the negotiator is an effective communicator of options, alternatives to solutions or agreements. Viewed in this sense, effective negotiation is also making sure that whatever the negotiator says is understood in the manner that he or she intends. To achieve this end, the negotiator must speak clearly, phrase his or her sentences carefully, make sure that the other party listens to whatever is said, and confirms with the other party to make sure that they correctly understand what is said.

Therefore, the negotiator must send messages that are comprehensive, and explain where they are coming from, their needs, hopes, and fears. While talking they have to assess if the other party is listening, and how they hear/receive the message.

5.5.2 Re-Framing Positions as Interests

Re-framing, in negotiation and mediation, 'is a way of giving feedback, and showing that you listened and understood what the other party said. It is restating and capturing the essence of what the other party said. One removes the negative tones, and translates the statements of positions into statements of interests and needs. When we start negotiating we have to identify the issues at the table.'²³⁴ In this way, the issues have to be defined in a neutral and acceptable way to all, and not to include any suggestions of the outcome, or judgment of any kind.²³⁵

Characteristically, parties commence the negotiation process by explaining their position, and their conclusion. If the one party opens the negotiation in this manner, that is, by stating a position, 'it is very helpful to re-frame it as an interest. It helps the parties to identify their interests, and move from position to interests.'²³⁶

5.5.3 Understanding and Perception

In the material world, our perceptions and our interpretation of reality largely influence the negotiation process. Empirically, perceptions are influenced by many aspects of life: personal experience, emotional state of mind, and cultural background.²³⁷ In real life, every

234 Ibid.

235 Ibid.

236 Ibid.

237 Ibid.

individual person has a different way of perceiving and understanding things or issues: for instance, four different people who witnessed the same event may give four different accounts of what happened.

In negotiation and mediation, the negotiator has to keep this fact in mind and make sure the disputing parties' perceptions are clearly understood and given due consideration. In this sense, the negotiator and mediator would be required to possess requisite skills in facilitating this, which include keeping eye contact, listening carefully, and making sure that they understood exactly what the other party said. This may be concretised by the negotiator's or mediator's constant reframing of what was said in order to make sure that what was said was understood and was indeed what was meant. As such, in a negotiation or mediation process, the negotiator or mediator must ensure that 'what was said was understood correctly, and that the other party knows you have understood.'²³⁸

This is emphasised here because for obvious reasons, conflicting parties have different ways of perceiving things and contexts. For instance, when you negotiate in the Sukuma context, "*ya! ya!*" does not mean "*yeah! ... yeah!*" in English, although they might sound similar in tone! Whereas *ya! ya!* for a Sukuma speaker means "no", for an English speaker *yeah! ... yeah!* means "yes"! Similarly, when negotiating in the Indian context and the other party nods his head: this does not mean "yes"? In India it means "No." For most non-Indian speakers, nodding necessarily connotes "yes!"

5.5.4 Asking Open Questions

As we have already discussed above, in negotiation and mediation, communication plays a pivotal role in reaching or failing to reach an agreement. Quite often, a successful negotiation or mediation necessarily presupposes proper use of communication skills. One of the main components of a successful communication is proper framing of questions. As Shamir notes: 'Questions are an essential skill for the negotiator and mediator. When asking a closed question, we get "yes" or "no" for an answer. Often these types of questions are also leading questions "Would you agree that ...", "Didn't you think that it was unfair ..."'²³⁹

²³⁸ Ibid, p. 11.

²³⁹ Ibid.

In effect, closed and leading questions do not provide essential information needed at the negotiating table and they tend to close down the discussion. “Do you want to buy this house?” will provide us only with a “yes–no” answer, which does not include all the important information regarding the intention/ability/willingness/readiness of the buyer. “What are the problems that concern you?” is a question which will provide us with important information as to how they feel about it, what are their concerns, their plans, and so on. “How do you view the offer Mr. Juma has just made concerning the price for this house?” is an open-ended question, while “Do you like Mr. Juma’s offer?” is a closed question.

In both negotiation and mediation, open-ended questions such as: “What are, in your opinion, the possible advantages and disadvantages regarding his offer?” or “What would you need to clarify prior to your counter-offer?” provide us with important information that can help the process rather than bring it to a dead end. The negotiator or mediator has to be aware of his or her prejudices, values, and biases when asking the questions, so that if he or she has any they will not be evident from his or her tone or body language.²⁴⁰

5.5.5 Separating the Person from the Problem

Conventionally, as we have seen in Chapters One and Two, parties to a dispute or conflict carry with them positions and grudges. They disagree because of opposing or competing interests and/or positions; and the purpose of negotiation or mediation is to help the disputing parties to move from polarised interests and/or positions to win-lose position. It is important, therefore, to understand the other party’s point of view, needs, interests, and concerns. One does not have to agree with the other point of view; but he or she has just to understand that it is legitimate to have a different point of view, needs, and concerns.

In order to facilitate successfully the negotiation or mediation process, one has to separate the people from the problem. Shamir is of the view that: ‘Removing the person usually does not remove or solve the problem. However, trying to separate the person from the problem is not always practicable. There are societies in which personal relationships have a very high value, and separating the two is difficult.’²⁴¹ So, this should be carefully done in order to effectively facilitate the negotiation process.

240 Ibid.

241 Ibid.

Chapter Six

Theories and Principles of Mediation

6.0 INTRODUCTION

As we discussed in Chapter Four, in Tanzania mediation is the most common form of ADR used in courts. It has been made part of the civil procedure and practice in courts. Worldwide, it is widely used in all sorts of disputes, ranging from matrimonial disputes to civil lawsuits; to very complex public policy problems; and to international conflicts. Many disputes that have not responded to an initial attempt at negotiation can still be settled through mediation.

Even when conflicts are seemingly intractable, they sometimes yield to mediation. Mediation is of particular importance in long-running, deep-rooted conflicts, as these types of conflict are rarely resolved without such outside assistance. Even if the full range of grievances cannot be resolved, mediation is often useful for dealing with particular limited aspects of the wider conflict.²⁴² This Chapter, therefore, discusses theories, principles and practice of mediation.

6.1 MEANING AND SCOPE

James Melamed has a very interesting description of what mediation entails. He points out that: ‘Mediation may be thought of as “assisted negotiation.” Negotiation may be thought of as “communications for agreement.” Hence, mediation is “assisted communications for agreement.”’²⁴³ Simply defined,

*Mediation is a process in which a [neutral] third-party assists in resolving a dispute between two or more other parties. It is a non-adversarial approach to conflict resolution. The role of the mediator is to facilitate communication between the parties, assist them in focusing on the real issues of the dispute, and generate options that meet the interests or needs of all relevant parties in an effort to resolve the conflict.*²⁴⁴

242 Honeyman, C. and N. Yawarajah, “Beyond Intractability: A Free Knowledge Base on More Constructive Approaches to Destructive Conflict.” Available at <http://www.beyondintractability.org/essay/mediation> (accessed 29 March 2011).

243 Melamed, J., “What is Mediation?” Available at <http://www.mediate.com/articles/what.cfm> (accessed 30 March 2011).

244 Honeyman and Yawarajah. Op. cit.

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. In essence, mediation is a process close in its premises to negotiation, as it 'is an assisted and facilitated negotiation carried out by a third party.'²⁴⁵

In the mediation process, the mediators may be hired, appointed, or volunteer to help in facilitating the mediation process. They should have no direct interest in the conflict and its outcome, and no power to render a decision. In practice, mediators have control over the process, but not over its outcome. Power is vested in the parties, who have control over the outcome: they are the architects of the solution.²⁴⁶

Essentially, mediation is a voluntary process (except where there is a law making it mandatory for mediation in dispute resolution processes like in the Commission for Mediation and Arbitration [CMA] proceedings).²⁴⁷ The parties agree to the process, the content is presented through the mediation, and the parties control the resolution of the dispute.

6.2 ROLES AND RESPONSIBILITIES OF THE MEDIATOR

Mediation is a form of ADR whose success or failure depends on a mediator. This is principally because mediation 'is an assisted and facilitated negotiation carried out by a third party.'²⁴⁸ Viewed in this context, the mediator's role in the mediation process is central and cannot be over-emphasised. In this section we, thus, highlight the mediator's general and specific roles and responsibilities in facilitating the mediation process.

6.2.1 General Roles and Responsibilities of a Mediator

Generally, the mediator has a multiple role in the mediation process: to help the parties think in new and innovative ways; to avoid the pitfalls of adopting rigid positions instead of looking after their interests; to smoothen discussions when there is animosity between the parties that renders the discussions futile; and, in general, to steer the

245 Goldberg, S. B., et al, *Dispute Resolution: Negotiation, Mediation, and other Processes*. Boston/Mass. Little Brown, 1992.

246 Shamir. Op. cit, p. 23.

247 See section 86 of the Employment and Labour Relations Act (2004).

248 Goldberg, S. B., et al. Op. cit.

process away from negative outcomes and possible breakdown towards joint gains.²⁴⁹

In order to achieve this end, the mediator should study the substance of the dispute, and try to identify the issues in conflict, using tools such as re-framing, active listening, open-ended questions, and his/her analytical skills. Therefore,

*Unlike the process of facilitation, where the third party merely hosts the parties and encourages them to continue negotiating in a neutral, welcoming environment, the mediator plays a more active role. The mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.*²⁵⁰

From this premise, the mediator acts like a captain of a ship, whose skills and mastery are essential to the safe arrival of the vessel.

6.2.2 Specific Roles and Responsibilities

As with the general roles and responsibilities, the mediator also has specific multiple roles and responsibilities in the mediation process. In this regard, the mediator has the mandate to,

- help to coordinate mediation sessions;
- introduce the parties in a mediation session;
- explain the mediation process to the parties;
- set the agenda and rules applicable in the mediation process;
- create a cease-fire environment between the parties;
- open communication channels amongst the parties in the mediation process;
- gather information and identify obstacles to facilitate the mediation process;
- allow the parties to express feelings and vent emotions in the mediation process;
- help the parties to identify and understand their interests and priorities in the mediation process;
- help the parties with brainstorming creative options and solutions in the mediation process;
- help the parties in the mediation process in defining acceptable objective criteria;

²⁴⁹ Shamir. Op. cit, p. 24.

²⁵⁰ Ibid.

- help the parties in the mediation process to understand the limitations of their demands through what is known as “a reality test”;
- help the parties in the mediation process in evaluating alternatives;
- allow the mediation process to move forward according to the needs and pace of the parties;
- help the parties in the mediation process in crafting the agreement; and
- help in validating the agreement by the courts – if there is a court that has jurisdiction to enforce an agreement emanating from a mediation process.

6.3 THE IMPORTANCE OF MEDIATION

To date, mediation has become a very important and viable alternative to adjudication and arbitration in many legal systems around the world. Its prominent application is evident in labour, family, business, and commercial disputes. In some countries, like Tanzania, certain laws have made mediation a mandatory stage in dispute resolution, ‘as a way to encourage the parties to the dispute to use the mediation process as a preferred way to resolve disputes.’²⁵¹

Mediation has been made mandatory in proceedings before the Commission for Mediation and Arbitration (CMA) and all civil proceedings under O. VIIIA, O. VIIIB and O. VIIC of the Civil Procedure Code (CPC).

6.4 THE NATURE OF MEDIATION

As we have seen above, the participation of the parties and the mediator in the mediation process is voluntary, even where laws make reference of disputes to mediation first mandatory. In this context, the parties and/or the mediator have the freedom to either proceed with or leave the mediation process at any time. In some instances, the mediator may decide to stop the process ‘for ethical or other reasons, and the parties may decide that they are not satisfied with the process.’²⁵²

From the voluntary nature of the mediation process, we see a very strong aspect of mediation where the parties thereto tend to own the outcome (mediation agreement) and are responsible for implementing it. To this end, the court’s role is to validate or ratify the mediation agreement: meaning that, in certain mediation processes, like those

251 Ibid.

252 Ibid.

under the CPC in Tanzania, the court normally recognises a mediation agreement as a decree of the court.

As we have already noted, in mediation there is a third party, a mediator, who facilitates the resolution process in a fair and faithful manner. In this regard, 'mediation works when parties have full trust in confidentiality of the proceedings which enables them to participate with frankness.'²⁵³ The mediator may even suggest a resolution, typically known as a "mediator's proposal", but does not impose a resolution on the parties.

6.5 THE ADVANTAGES OF MEDIATION

As is the case with all forms of ADR, mediation 'has a special advantage when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers.'²⁵⁴ As such, mediation is 'very useful in family relations, disputes between neighbours, in labour relations, between business partners, and adjacent political entities. Mediation creates a foundation for resuming the relation after the particular issue has been resolved.'²⁵⁵

In addition, Shamir²⁵⁶ enlists the following advantages of the mediation in resolving disputes:

6.5.1 Flexibility

The mediation process can be adapted to meet the needs of the parties during the process and in formulating a solution. This may involve the choice of location of the mediation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process. Most important, mediation is not conducted under a fixed set of rules, as is the case in a court of law.

6.5.2 Informality

Mediation is an informal process, designed to suit the needs of the parties, allowing the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. Mediation is

253 *Per Rweyemamu, J., in Bulyanhulu Gold Mines Ltd. v James Bichula*, High Court of Tanzania (Land Division) at Mwanza, Labour Revision No. 313/2008 (Unreported). At p. 5 of the typed Ruling.

254 Shamir. Op. cit, p. 24.

255 Ibid.

256 Ibid, pp. 24–5.

a form of guided dialogue, where the parties have the ability to express their feelings, not only facts, so that venting anger can help in reaching an agreed solution.

6.5.3 Confidentiality

Mediation is confidential, off the record, and away from the public eye and the press. The mediator is bound not to divulge any of the information he/she hears from one party to the other or to anyone else without permission, so the parties can feel free to confide in the mediator. The mediator will not share the confidential information, not even with a judge. Mediators can meet with each party in separate and private caucus, to assist them in understanding their own underlying interests and those of the other party.

6.5.4 Non-binding Nature

Mediators assist the parties to reach a negotiated settlement, an agreement, which is then usually put in writing. If the parties are not happy with the process or the outcome, they have not relinquished the right to use another dispute resolution mechanism in order to resolve their dispute – for example, they can go to court or to an arbitrator upon failure of mediation.

6.5.5 Economic

Mediation is generally faster than the judicial process, it is less costly, and saves resources (time, money, and energy). It can often be scheduled at the convenience of the parties, avoiding long court delays and associated costs. In mediation, the focus is on the future, but it does not ignore the past, which provides the information about the issues and the causes of the dispute. This minimizes non-productive justifications, assessment of “who is right,” and differing views of “the truth.”

6.5.6 Maintenance and Often Improvement of Relationship

One of the main reasons for using mediation as an alternative to the judicial process is to preserve and potentially improve relationships between the parties. The mediation process works well in the case of a long-term relationship or interest-based disputes. In the process, the parties gain understanding of each other's motives, needs, and interests. This understanding can often improve the relationship between them. When the relationship is maintained and improved through the resolution of the conflict, the parties have an increased capacity both to maintain the agreement and to resolve future conflicts.

6.6 POSITIVE RESULTS OF MEDIATION

In a nutshell, the mediation process, if handled well, may result in the following positive aspects,

- It helps to identify the true issues of the dispute.
- It resolves some or all of the issues.
- Agreement can be reached on all or part of the issues of the dispute.
- The needs and interests of the parties are met (in part or in full).
- The parties reach an understanding of the true cause of the dispute.
- The parties reach an understanding of each other's needs and interests.
- It provides the possibility of preserving the relationship.
- An improved relationship may result.²⁵⁷

6.7 SKILLS AND TOOLS OF A GOOD MEDIATOR

As we have already observed, the success or failure of a mediation process depends greatly on the mediator. For the mediator to be effective in discharging his or her duty in the mediation process, he or she must have the following skills,²⁵⁸

- listening skills, particularly active listening;
- strong negotiating skills (because mediation is facilitated negotiation);
- the ability to create trust among the parties;
- the ability to identify the issues of the dispute;
- patience, endurance, and perseverance;
- thoughtfulness, empathy, and flexibility;
- common sense and rational thinking;
- a likeable personality;
- experience, education, and training;
- neutrality and impartiality;
- problem-solving skills and creativity;
- ability to reframe the parties' views in softer terms and summarizing what was said;
- good public relations skills; and
- asking open-ended questions.

6.8 TECHNIQUES AND STRATEGIES USED IN MEDIATION

As a general rule, mediators use a variety of strategies and techniques in the mediation process. They develop their personal style, depending

²⁵⁷ Ibid, p. 25.

²⁵⁸ Notably, these skills are also applicable in negotiation.

on their personality, experience, and beliefs in the role of mediation. In principle,

*The mediators have no power as far as what the outcome of the process will be, but they have the responsibility to design the process, set the agenda, and control it. They have to bring the parties to trust them, and guide them towards a settlement.*²⁵⁹

In order to manage to do this, mediators 'may use experts and expertise in certain disputed issues, and seek guidance for resolution of the dispute on the basis of law, industry practice, and so on.'²⁶⁰ In addition, mediators may use the facilitative and evaluative strategies in facilitating the mediation process. These strategies are enumerated below.

6.8.1 Facilitative Strategy

Through this strategy, the mediator uses approaches and techniques of facilitating and assists the parties to understand their situation and interests, and encourages them to communicate, create options, and reach an agreement. During the mediation process, the focus is on the future, but the process does not ignore the past, which provides the information about the issues and the causes of the conflict.

Mediators elicit ideas from each side for possible resolution, and assist the parties to develop a negotiated settlement, an agreement, which is usually put into writing, and can be ratified by the court.

6.8.2 The Evaluative Strategy

During the mediation process, the mediator will focus on the legal demands, evaluate the case, offer an opinion, and predict the outcome of the case in court. In such an approach, the mediators do not concern themselves with the process or the relationship of the parties. They focus on the settlement of the case and suggest solutions to the problem.

6.9 MODELS AND APPROACHES APPLICABLE IN MEDIATION

6.9.1 Models of Mediation

Both in principles and practice, there are several different models to mediation, but the three listed below are the most common and relevant to this discussion:

²⁵⁹ Ibid, pp. 26–7.

²⁶⁰ Ibid, p. 27.

- the co-mediation model;
- the single mediator model; and
- the panel of mediators model.

(a) The Co-mediation Model

In certain instances, mediation may be facilitated by more than one mediator. This is because: 'Mediation is not an easy process, and co-mediation has many advantages which are very beneficial, but only if the mediators are compatible and know how to work together.'²⁶¹ In this regard, the mediators:

- should complement each other (in divorce cases; for instance, a lawyer with a psychologist or social worker can be very effective; one can strategize and the other can reframe positively);
- can divide the tasks (one can listen and the other can take notes);
- can strategize and brainstorm together;
- if one gets "stuck," the other can proceed; and
- can compare their perception of what was really said by the parties, and so on.

(b) The Single Mediator Model

If it happens that the mediators do not know one another, or are not compatible, the process may work better with a single mediator. In fact, this issue has made single mediation to be a very common model, which 'is used for economic reasons, and because mediators enjoy working alone and being in control of the process. Experienced mediators who work alone are doing excellent work.'²⁶²

(c) The Panel of Mediators Model

The model of a panel of mediators is used in very complex cases that involve multi-party mediation, and in cases of environmental mediation. In this regard, mediation is facilitated by a panel of mediators with relevant skills and experience.

From the foregoing analysis of the models applicable in mediation, one can rightly contend that: 'The models vary in terms of the methods, techniques, and the process of mediation, and in the particular circumstances of the dispute in question.'²⁶³

261 Ibid.

262 Ibid.

263 Ibid.

6.9.2 Approaches to Mediation

As with models of mediation, there are several approaches to mediation. But in this discussion we highlight only two approaches: evaluative and transformative approaches. While the special characteristics and aims of mediation,

*'remain the same, they can be achieved in different ways, by different approaches ... The mediator needs to adopt one of these approaches, or a combination, depending on the specifics of the case and the nature of the parties, as well as his/her own beliefs, experience, and expertise.'*²⁶⁴

(a) The Evaluative Approach

Evaluative mediation is a process where the mediator 's the one who provides guidance as to the appropriate grounds for settlement, on the basis of the law or her/his experience and knowledge in a specific field of expertise.'²⁶⁵ In the mediation process within the legal framework,

*Evaluative mediators are usually legal practitioners, often with an expertise in a particular area of law relevant to the conflict. They will provide the parties with an evaluation of the strengths and weaknesses of their case with respect to their legal positions. If asked they may also advise as to a likely outcome at [the] court. They may also offer direction towards settlement options. There is a strong drive towards equitable settlement as an efficient and economic alternative to legal measures.'*²⁶⁶

In practice, the evaluative mediator influences and directs some – and sometimes all – of the outcomes of the mediation. In achieving this end, the mediator,

*'may study relevant documents in order to understand the nature of the dispute, its substantive issues, and professional aspect, and suggest areas of agreement, solutions, and even compromise, urging the parties to accept a particular settlement.'*²⁶⁷

(b) The Transformative Approach

The transformative approach in mediation is a process in which the mediator's role is to help and assist the parties to reach an agreement.

264 Ibid, pp. 27–8.

265 Ibid, p. 28.

266 Available at <http://www.stevhindmarsh.co.uk/models-of-mediation/> (accessed 15 April 2011).

267 Ibid.

In the opinion of Folger and Bush²⁶⁸, a conflict or dispute offers an opportunity for solving problems through transformation. Folger and Bush believe that conflicts store the potential for valuable transformation in two aspects: empowerment of the parties, and recognition.

To them, through *empowerment* the parties to the mediation process believe in themselves and their value(s). They believe that they have the ability and capability to identify and define their issues, and it is their responsibility to find a mutually acceptable solution to their problem. Through *recognition*, the parties have the ability to understand the other party's point of view, and why they proposed the solution that they did (without necessarily agreeing to it). A transformative mediation has an educational value for the parties. By gaining the ability to reflect on the process, the parties may be able to use the same techniques in order to avoid future disagreements and disputes. The parties learn to use the opportunity of a conflict or dispute as an event from which both parties may benefit.²⁶⁹

The potential effects of this approach are valuable in the long run, both for the parties and for society because,

*This approach provides and enhances moral growth and the ability to handle disputes in a cooperative way in the future. The mediator may help the parties to identify and analyze their interests, and gain greater clarity about their goals, resources, options, and preferences. This will help them reach effective decisions, and develop a better and more efficient outcome.*²⁷⁰

A transformative/facilitative mediator leaves the responsibility with the parties.

In this respect, the mediator 'assumes that the parties are best placed to know what is right for them and have the ability and good sense to reach the most suitable outcome regarding their situation.'²⁷¹ Viewed in this context,

The mediator would not be judgmental as to the parties' claims or positions, or choice of outcomes. The mediator would encourage the parties, and facilitate the process through which they will come up with creative proposals and options, as an outcome of their understanding

268 Folger, J. and R. Bush, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.

269 Ibid.

270 Shamir. Op. cit, p. 28-9.

271 Ibid, p. 29.

*of the situation. Transformative mediation empowers the parties by developing a sense of their own ability to deal with the issues and problems of the dispute.*²⁷²

The mediator knows that,

*'if the roots of the conflict are to be understood, it is impossible to make short cuts; transformation and a true dialogue are what is aimed for, in the belief that this would lay the grounds for creative, freely-made, and constructive choices and solutions.'*²⁷³

6.10 LEGAL IMPLICATIONS OF A MEDIATED AGREEMENT

In principle, parties who enter into mediation,

*'do not forfeit any legal rights or remedies. If the mediation process does not result in settlement, each side can continue to enforce their rights through appropriate court or tribunal procedures.'*²⁷⁴

But, if a settlement has been reached through mediation, legal rights and obligations are affected in differing degrees. In some situations,

*... the parties may only wish to have a memorandum or a moral force agreement put in place; these are often found in community mediations. In other instances, a more comprehensive deed of agreement is drafted and this deed serves to bring a legally binding situation.*²⁷⁵

Charlton and Dewdney²⁷⁶ point out that, universally, a mediated agreement may be registered with the court to make it legally binding and it is advisable to have a lawyer prepare the form or, at the very least, to obtain independent legal advice about the proposed terms of the agreement.

In many jurisdictions around the world, mediation has opened the door for parties in conflict to resolve their differences through non-traditional judicial forums. Over the last few decades, mediation has brought to light the processes, or alternatives to litigation, that enable parties to resolve their differences without the high cost associated with litigation. In some Western jurisdictions, for instance,

272 Ibid.

273 Ibid.

274 http://en.wikipedia.org/wiki/Mediation#Legal_implications_of_mediated_agreements (accessed 15 April 2011).

275 Ibid.

276 Charlton, R. and Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners*. 2004, p. 126.

*Court systems are eager to introduce mandatory mediation as a means to meet their needs to reduce case loads and adversarial litigation, and participants who understand the empowerment of mediation to self-determine their own agreements are equally as eager to embrace mediation as an alternative to costly and potentially harmful litigation.*²⁷⁷

So, by mutually and voluntarily participating in the mediation process, the parties therein are expected to be bound by, and committed to, the mediated agreement.

²⁷⁷ Spencer, D. and T. Altobelli, *Dispute Resolution in Australia: Cases, Commentary and Materials*. Riverwood NSW: Ligare Pty Ltd, 2005, p. 223.

Chapter Seven

Theories and Principles of International Arbitration

7.0 INTRODUCTION

Arbitration has been used to resolve disputes all over the world for a long time. In many jurisdictions, arbitration is treated as one of the processes falling under the umbrella of alternative dispute resolution (ADR) mechanisms. This is so because it is, in effect, an alternative to the traditional judicial process of settlement of civil disputes. Recently, international arbitration has increased due to the ongoing proliferation in global investment and trade. Most of the arbitration cases emanate from the provisions of investment treaties and foreign investment contracts. Ever more, international arbitration has been used to resolve disputes that raise important questions about public policy choices related to sustainable development, realisation of human rights as well as combating of corruption at the international stage.

This Chapter discusses the evolving issues in international arbitration law and practices. The Chapter commences by defining arbitration in international commercial and investment contracts. It also briefly traces the genesis and evolution of international arbitration law, particularly in most common law countries, Tanzania inclusive, which are influenced by developments in this area in England. In this regard, the Chapter revisits the influence of international arbitration law on domestic arbitration in many countries around the world. Further, the Chapter sheds some light on the types of international arbitration tribunals, where there are two main types of international commercial arbitral tribunals: *permanent* and *ad hoc* tribunals.

In addition, the Chapter examines the basic principles of international arbitration law, which include the nature and functions of an arbitration clause or agreement in international arbitration law and practice. Other principles discussed in this Chapter include the doctrine of survival and separability of the arbitration clause in a contract; the doctrine of privacy and confidentiality; the doctrine of party autonomy; and the doctrine of finality of an arbitral award. It also analyses choice of law in international arbitration as well as the advantages and disadvantages of arbitration.

One of the critical and evolving issues in international arbitration is corruption. In a very special way, this Chapter critically discusses evolving standards devised by international arbitral tribunals in dealing with corruption. These standards include using the principle of international *public order* to combat corruption in international arbitration; and the arbitrator's duty to uphold international public policy against corruption. Other standards are the use of the doctrine of separability of the arbitration clause and the doctrine of *Kompetenz-Kompetenz* in dealing with corruption in international arbitration. Evidentiary proof is also used by international arbitral tribunals in detecting corruption and is discussed in this Chapter.

Reality has just shown that what is at stake in much recent and ongoing international arbitration is more than a mere commercial interest, but also a challenge on the realisation of certain human rights. This Chapter, therefore, examines the human rights implications of international arbitration.

7.1 DEFINITION OF INTERNATIONAL COMMERCIAL ARBITRATION

Arbitration may be defined as a mechanism for resolution of civil disputes which takes place, usually in private, pursuant to an agreement between the parties to the dispute, under which the parties agree to be bound by the decision to be given by the arbitrator according to law, after a fair hearing, such decision being enforceable at law. Under the common law, there is an older version of the definition of arbitration that was made in 1850's by Ramilly, M.R., in *Collins v. Collins*²⁷⁸ to the effect that: 'An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties.'

However, this definition could apply to any other form of ADR as it does not clearly state the role of the arbitrator in the dispute resolution.

Specifically, international commercial arbitration refers to the settlement of a dispute between the investor and the host state together with its public bodies/corporations or between international private parties by an impartial third party – a sole arbitrator or, more commonly, a panel of (usually three) arbitrators²⁷⁹. International

278 (1858) 26 Beav. 306, 312 reported in English cases at 916–919.

279 Cotula, L., "International Arbitration". *Briefing* 5. International Institute for Environment and Development. Available at <http://pubs.iied.org/pdfs/17016IIED.pdf> (accessed 28 April 2011).

arbitration forms part of the broad subject of international commercial arbitration, which also includes settlement of disputes between international private parties on sales and other commercial transactions. International commercial arbitration is distinguishable from other forms of international arbitration used to specifically resolve disputes between states – for instance on boundaries, etc. As in local arbitration, the legal basis for international commercial arbitration is normally provided by the terms of foreign investment contracts (the “arbitration clause”) or of other legal instruments (e.g. domestic legislation or bilateral investment treaties).

7.2 EVOLUTION OF MODERN INTERNATIONAL COMMERCIAL ARBITRATION LAW AND PRACTICE

7.2.1 The Genesis of International Commercial Arbitration Law

Modern arbitration law in most of common law countries has its root in the developments in this area in England. Statutorily, England enacted the 1889²⁸⁰, the 1950 and later 1979 Arbitration Acts, which were repealed and replaced by the 1996 Arbitration Act. The 1996 Arbitration Act contains a coherent and modern framework of international arbitration not only for England but for those countries under the common law. At the international arena, modern arbitration law developed further with the adoption of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (the New York Convention).²⁸¹ This Convention superseded the 1927 Geneva Convention on the Execution of Foreign Awards.²⁸² The New York Convention, which was enacted in the English 1975 Arbitration Act and upon which the 1996 English Arbitration

280 The English Arbitration Act of 1889 is the basis of the Tanzanian Arbitration Act, Cap. 15 R.E. 2002. See particularly *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported). At p. 34 of the typed judgment dated 28th September 2011.

281 This Convention was adopted in New York in June 1958.

282 See particularly *Dowans Holding SA & Dowans Tanzania Ltd. v Tanzania Electric Supply Co. Ltd* [2011] EWHC 1957 (Comm). At p. 3.

Act is based²⁸³, is considered as 'the cornerstone of international disputes resolution.'²⁸⁴

The New York Convention also influenced most of the provisions in the English 1979 and 1996 Arbitration Acts as well as development in modern arbitration laws in other countries around the world, where legislation has been put in place to give it municipal application.

Further developments at the international level concerning arbitration law were marked with the adoption of the Model Law on International Commercial Arbitration in June 1985 by the United Nations Commission on International Trade Law (UNCITRAL).²⁸⁵ This law is commonly known as the UNCITRAL Model Law. As Sutton et al contend, the Model Law was 'the result of a comprehensive study into the various arbitration laws throughout the world and was intended to provide a model that would lead to greater uniformity.'²⁸⁶ To date, many countries around the world have adopted the UNCITRAL Model Law through amending their arbitration laws to take account of its provisions.

Parallel to the UNCITRAL Model Law, the UNCITRAL Rules of Arbitration were adopted in 1976²⁸⁷ and contain a standard set of rules of procedures for the conduct of international arbitration and are meant to assist formulation of specialised house rules of procedures by such international arbitration bodies like the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

7.2.2 Types of International Commercial Arbitral Tribunals

Today, there are mainly two types of international commercial arbitral tribunals: *permanent* and *ad hoc* tribunals. Permanent or standing tribunals are those attached to institutions which are established on a permanent basis. Today, there are several major arbitration for a in the world, including:

283 Ibid. P. 4.

284 DAC Report of February 1975, para 347. The report is quoted in Sutton, et al. Op. cit, p. 19 (note 21).

285 Adopted on 21st June 1985 by UNCITRAL, the UNCITRAL Model Law is contained in United Nations document A/40/17, Annex 1.

286 Sutton, D.J. et al, *Russell on Arbitration*. 21st edn., London: Sweet & Maxwell, 1997, p. 640.

287 The Rules were promulgated by Resolution 31/98, adopted by the UN General Assembly on 15th December 1976.

- International Court of Arbitration of the International Chamber of Commerce (ICC);
- London Court of International Arbitration (LCIA);
- Organization for the Harmonization of Business Law in Africa (OHADA);
- International Centre for Settlement of Investment Disputes (ICSID);
- Arbitrations under Bilateral Investment Treaties (BITs); and
- American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR).

Ad hoc arbitral tribunals are those tribunals established to settle a specific dispute, most of which commonly apply the rules of procedures laid down in the 1976 UNCITRAL Arbitration Rules. These kinds of tribunals have been used to resolve several major international commercial or investment disputes like the *Liamco*²⁸⁸, *Texaco*²⁸⁹, *Aminoil*²⁹⁰ and *BP*²⁹¹ awards.

7.3 PRINCIPLES OF INTERNATIONAL COMMERCIAL ARBITRATION

7.3.1 Object and Scope of Arbitration

Arbitration, as one of the forms of ADR, has been practiced by common law courts for centuries.²⁹² Thus, under the common law,

288 *Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic*, 20 IL.M. 1 (1981). In this case, an *ad hoc* tribunal by a sole arbitrator (Dr. Sobhi Mahmassani) was constituted on 27 January 1975 when the arbitrator was appointed. On 12 April 1977 the arbitral award was delivered. A full text of this case is available at <http://www.trans-lex.org/261400> (accessed 28 April 2011) and its summary is available at http://www.biicl.org/files/3939_1977_liamco_v_libya.pdf (accessed 28 April 2011).

289 *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v Government of the Libyan Arab Republic* (1977) 53 ILR 3869 (1979). Available at <http://www.jstor.org/pss/20691828> (accessed 28 April 2011). This case, like the LIAMCO, involved nationalized private property owned by an international (US) oil company. In this case, for the first time in international arbitration relating to economic development contracts, an arbitral tribunal held that the injured parties were entitled to *restitutio in integrum* and that a sovereign state was obliged to perform specifically its contractual obligations with foreign investors.

290 *The Government of the State of Kuwait v The American Independent Oil Company* (1984) ILR 518.

291 *BP Exploration Co. (Libya) Ltd. v Government of Libya Arab Republic*, 53 ILR 297 (1979).

292 In the earlier common law, arbitration used to be known as *arbitrament* and appeared in the Year Books. See, for instance, Anon (1468) Y.B., 8 Edw. IV, fo. 1, p1.

the object of arbitration is 'to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.'²⁹³ In this context, this object entails three contexts: first, unnecessary delays and expenses in arbitration should be avoided without compromising the fair resolution of disputes; second, in arbitral proceedings, the need for an impartial tribunal is paramount; and, last, autonomy of the parties to arbitral proceedings is equally important.²⁹⁴

Unlike other forms of ADR, in arbitration the scope and requirement for resorting to an arbitration process is premised in the mandatory prerequisite for an agreement expressly contained in a contract requiring the parties to refer a dispute arising in the execution of such contract to arbitration. Again, the arbitral proceedings are strictly private and the decision therefrom is final.

7.3.2 The Nature and Functions of the Arbitration Agreement

An arbitration clause or agreement within a commercial contract 'provides how some or all disputes under the contract in which it is contained are to be resolved.'²⁹⁵ This means that for parties to refer the matter to an arbitration process there must be an express clause in the contract requiring them to refer disputes arising out of the execution of such contract to arbitration. In principle, an arbitration clause normally defines the dispute or type of disputes to be referred to arbitration. Viewed in this context, the arbitration clause,

*'contains the [arbitral] tribunal's mandate. It may also specify how the tribunal is to be appointed and, expressly or by implication, the procedure to be adopted in the proceedings. It is this agreement which gives rise to the consensual and predominantly bilateral nature of arbitration to the exclusion of third parties.'*²⁹⁶

The true nature and function of an arbitration clause was well-explained by Lord Macmillan in *Heyman v Darwins Ltd.*²⁹⁷ as follows,

I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the

293 Sutton, D.J. et al, Russell on Arbitration. Op. cit, p. 4.

294 Ibid.

295 Ibid, p. 1.

296 Ibid, p. 5.

297 (1942) AC 356 at p. 375.

obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement

7.3.3 The Doctrine of Survival and Separability of the Arbitration Clause in a Contract

It is a generally acceptable principle of law that an arbitration clause in a commercial agreement or contract,

‘is an agreement inside an agreement. The parties make their commercial bargain ... but in addition agree on a private tribunal to resolve any issues that may arise between them.’²⁹⁸ Quite often, the legal effect of an arbitration clause is exhibited when the parties experience a dispute over the contract. And this normally happens when the contract is brought to an end, for example by breach. In order to provide some safeguard to the parties, the arbitration law requires that the clause survive because it was agreed and inserted in the contract by the parties ‘for the very purpose of providing the means by which disputes about the contract, including breach, would be determined.’²⁹⁹

The survival of the arbitration clause is known as the Doctrine of Separability. This doctrine underscores that the arbitration clause ‘is separate and independent from the contract in which it is contained.’³⁰⁰ This doctrine evolved from caselaw at common law and has currently been made part of statute law in many common law countries such as the English Arbitration Act (1996) in England.³⁰¹ It has also been

298 *Per Saville, J. in Union of India v McDonnell Douglas Corporation* [1993] 2 Lloyd’s Rep. 48.

299 Sutton, et al. Op. cit, pp. 32–3.

300 Martin, A.T., “International Arbitration and Corruption: An Evolving Standard”. *International Energy and Minerals Arbitration*, Mineral Law Series, Vol. 2002 (Spring 2002).

301 Section 7 of the UK Arbitration Act (1996): Cf Article 17(1) of the Model Law.

recognized in institutional rules such as Article 6(4) of the ICC Rules of Arbitration³⁰², which states that,

The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void.

The reason for the Doctrine of Separability, under common law, was clearly put forward by Lord Macmillan in *Heyman & Others v Darwins Ltd.*³⁰³ In this celebrated case, Lord Macmillan held that the a contract ‘survives for the purpose of measuring claims arising out of the breach, and the arbitration clauses survives for determining the mode of their settlement. The purposes of [this] contract have failed, but the arbitration clause is not one of the purposes of the contract.’³⁰⁴ Viewed in this context, then the arbitration clause ‘constitutes a self-contained contract collateral or ancillary to the underlying or “main” contract.’³⁰⁵ Case law also established, a long time ago, that ‘an arbitration contract could also survive invalidity of the underlying contract.’³⁰⁶

As Martin remarks, the legal effect of this doctrine is ‘that the arbitration clause will survive and continue to be valid, even if the arbitral tribunal decides that the main contract is null and void because it involves bribery.’³⁰⁷ Today, many international commercial arbitral tribunals have recognised the principle of separability of the agreement clause. For instance, in the three landmark arbitral awards made by *ad hoc* arbitral tribunals against the Government of Libya Arab Republic’s nationalisation of private business and property in the 1970s, this principle was given profound considerations. In *Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic*³⁰⁸ the tribunal held that: ‘it is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of

302 Rules of Arbitration of the International Chamber of Commerce came into force on 1st January 1998.

303 Op. cit.

304 Ibid, para 374.

305 Sutton, et al. Op. cit. P. 34. See also *Bremer Vulkan Schiffbau und Maschinefabrik v. South India Shipping Corporation Ltd.* [1981] 1 Lloyd’s rep. 253 at 259.

306 Sutton, et al. Ibid. See also Gross, P., (QC), “Separability Comes of Age in England: *Harbour v Kansa* and Clause 3 of the Draft Bill.” *Arbitration International*, Vol. 11 No. 85, note 1.

307 Martin. Op. cit.

308 Op. cit.

the contract in which it is inserted and continues in force even after termination [of the contract].’

In his preliminary award in *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v Government of the Libyan Arab Republic*³⁰⁹, the sole arbitrator expressly referred to the principle of separability of the agreement clause in rejecting the Libyan government’s contention that nationalization had rendered the oil concession contracts between the parties thereto void. In his authoritative view, the sole arbitrator held that the arbitration agreement survived the unilaterally terminated concession contracts. Parallel to the Doctrine of Separability is the agreement clause in rejecting the Libyan government’s contention that nationalization had rendered the oil concession contracts between the parties thereto void. In his authoritative view, the sole arbitrator held that the arbitration agreement survived the unilaterally terminated concession contracts.³¹⁰

Parallel to the Doctrine of Separability is the Doctrine of Implied Terms of Contract, which states that, an arbitration clause,

*‘can continue to be implied as one of the terms of the relationship between the parties after the formal expiry of an agreement between them containing an arbitration clause: typically, this is found in leases and partnership deeds.’*³¹¹

Besides, there is a presumption under the common law arbitration practice which stipulates that by inserting an arbitration clause in a contract ‘parties have agreed to one round of dispute resolution, arbitration, and not several, including the courts themselves.’³¹² English Courts, which developed this presumption, have termed it as the presumption of “one-stop” adjudication in the sense that it ‘merely reassures one that the natural meaning of the words [of an arbitration agreement] produce a sensible and business result.’³¹³

309 Op. cit.

310 See also *BP Exploration Co. (Libya) Ltd. v Government of Libya Arab Republic*. Op. cit; and *Elf Aquitaine Iran v National Iranian Oil Co. (NIOC)*, XI Y.B. COM. ARB, 97 (1986).

311 Sutton, et al. Ibid. See also *Morgan v William Harrison Ltd* [1907] 2 Ch. 137.

312 Sutton, et al. Ibid.

313 *per Hoffmann, L.J. in Harbour Assurance Co. (UK) Ltd. v Kansa General International Insurance Co. Ltd* [1993] 1 Lloyd’s Rep. 455 at 470. See also *Rix, J. in Aggeliki Charis Compania Maritima SA v Pagnan SpA* [1994] 1 Lloyd’s Rep. 168 at 172.

7.3.4 The Doctrine of Privacy and Confidentiality

Unlike in court proceedings which are held in public, arbitral proceedings are held in private and are principally confidential. As a general rule, it is only the parties, their advocates and/or representatives who are allowed to participate in an arbitral tribunal. Interestingly, while witnesses are allowed to testify in the arbitral tribunal, their evidence is only 'heard by those persons allowed to be present'³¹⁴; that is, the parties and their representatives/advocates. The implication of this principle is that the public is excluded from attending before an arbitral tribunal³¹⁵; nor is the media allowed to report the proceedings as such. This generally entails that the arbitral 'tribunal and the parties owe general duties of confidentiality to each other.'³¹⁶

In recent years, however, international arbitral tribunals have allowed the participation of third parties, such as interested NGOs, in the arbitral proceedings, particularly in international trade and investment dispute settlement processes³¹⁷. For instance, the WTO Tribunal's procedural order dealing with transparency matters allowed NGO participation in several investment arbitration cases. This also happened in *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*³¹⁸ whereby, through Procedural Order No. 5 of 2 February 2007, the International Centre for Settlement of Investment Disputes (ICSID) granted *amicus curiae* status to Lawyers' Environmental Action Team, Legal and Human Rights Centre, Tanzania Gender Networking Programme, Centre for International Environmental Law and International Institute for Sustainable Development. On 26th March 2007, these international and local NGOs filed in the ICSID an *Amicus Curiae* Submission in support of the Government of the United Republic of Tanzania's case.

In *Biwater Gauff* the NGOs' brief argued that Biwater Gauff's acts and omissions 'caused its investment to fail and that investors in the water sector have a heightened level of responsibility because the

314 Sutton, et al. Op. cit, p. 5.

315 See particularly *Oxford Shipping Co. Ltd. v Nippon Yusen Kaisha (The "Eastern Saga")* [1984] 2 Lloyd's Rep. 373.

316 Sutton, et al. Op. cit, p. 93.

317 See particularly Odumosu, I.T., "Revisiting NGO Participation in WTO and Investment Dispute Settlement: From Procedural Arguments to (Substantive) Public Interest Considerations." In McRae, D.M., *The Canadian Yearbook of International Law*, 2006.

318 ICSID Case No. ARB/05/22.

success of a business venture in this area has a direct impact on the achievement of an essential human right – the right to clean and safe water.’³¹⁹ The brief further argued that: ‘taking into consideration human rights and sustainable development, termination of the contract by a government, if done in good faith to prevent the worsening or abuse of human rights, should not be found to be a contractual breach, especially when a contract’s purpose was to promote and enhance the achievement of such rights’³²⁰. On 24 July 2008, the arbitral tribunal issued its final decision in this case, declaring that the Tanzanian Government had violated the terms of its bilateral investment treaty with the UK. However, the tribunal declined to award BGT the monetary damages requested³²¹.

This development has partly resulted from the concerted pressure that international and local NGOs have continuously been exerting on the international trade and investment bodies. The latter have recently been forced to adopt rules to allow participation of NGOs in trade and investment settlements, particularly in arbitral proceedings. For instance, in April 2006, the ICSID amended its Arbitration Rules³²² to ‘largely reflect recent jurisprudence of investment arbitration tribunals on such transparency measures as the participation of non-disputing parties in arbitration proceedings.’³²³ Odumosu opines that,

*The rules mostly amount to institutionalisation of inclusive measures that civil society has clamoured for as well as the clarification of somewhat conflicting arbitration jurisprudence on the extent to which prevailing confidentiality principles inherent in investment dispute settlement can be relaxed.*³²⁴

Mostly, NGO participation in international investment arbitration bodies has largely been through submission of briefs, especially in cases involving public interest and human rights violations. Increasingly, the international investment dispute settlement bodies have been

319 Available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/Biwater-Tanzaniaarbitration> (accessed 28 April 2011).

320 Ibid.

321 The ICSCID decision in this case is available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC770_En&caseId=C67 (accessed 28 April 2011).

322 See ICSID Arbitration Rules, ICSID/15, April 2006.

323 Odumosu. Op. cit, p. 354.

324 Ibid.

treating these briefs seriously; because these bodies ‘often recognise that many of these cases deal with matters of substantial importance to millions of people and allude to their implications in considering NGO submissions.’³²⁵

7.3.5 The Doctrine of Party Autonomy

Parallel to the doctrine of privacy and confidentiality of the arbitration process, in the arbitral proceedings parties are autonomous to choose arbitrators. In most common law jurisdictions, including England³²⁶, the doctrine of party autonomy has not only been enshrined in arbitration laws, but is also applied in practice. In this context, the arbitral tribunal functions independent of court intervention, save for limited powers of the court to intervene in the arbitral tribunal’s proceedings.

7.3.6 Choice of Law in International Commercial Arbitration

(a) Law Applicable to the Arbitration Agreement

As we discussed above, an arbitration Agreement is a separate agreement from the contract in which it is contained. One of the implications of the doctrine of separability of an arbitration clause is that the parties may agree to be governed by a different law from that which governs the contract in which it is contained. This can be done through use of either of the two approaches: by parties themselves indicating the law to govern the arbitration agreement or by invoking the “conflict of law rule” (i.e. the norms of national and international law that determine which legal system governs a transaction). The law applicable to an arbitration agreement may also be determined by the rules regulating the arbitration (e.g. Article 42 of the ICSID Convention, which requires arbitrators to apply the domestic law of the host state and relevant norms of international law). It should be noted in this context that: ‘Arbitrators are not bound by precedent – i.e. previous judgments or arbitral awards. But in practice they do tend to take account of, and refer to, previous arbitral decisions.’³²⁷

In sum, there are four alternatives to law governing the arbitration agreement: (i) the law chosen by the parties themselves to govern the

325 Ibid, p. 355.

326 Section 1(b) of the English Arbitration Act, 1996.

327 Cotula. Op. cit.

arbitration agreement itself; (ii) the law governing the parties' main contract; (iii) the law of the forum in which judicial enforcement of the agreement is sought; and (iv) the law of arbitral *situs*.

(b) Procedural Law Applicable to Arbitral Proceedings

The arbitral proceedings, as a process, are governed by sets of rules of procedure. Essentially, the rules of procedure in arbitration deal with the manner of appointing and qualifications of an arbitrator, the qualifications and professional capacity and/or responsibilities of the representatives of the parties, the procedural conduct of the arbitration, the extent of judicial intervention in arbitral proceedings, and form of the award. Many national laws have also set out different rules of procedures to be applied in their jurisdictions, with some limiting the appearance of foreign lawyers in arbitration conducted in their territories.

7.3.7 The Doctrine of Finality of An Arbitral Award

Another underlying feature of the arbitration process is the doctrine of finality of an arbitral award. In arbitration, there are quite limited chances of challenging an award issued by the arbitral tribunal. Under section 16 the Tanzania Arbitration Act, for instance, an arbitral award may be set aside by the High Court for *only two* grounds: first, where the arbitrator or umpire has misconducted himself; or, second, where an arbitration or award has been improperly procured.

7.4 ADVANTAGES AND DISADVANTAGES OF ARBITRATION

7.4.1 Advantages

One of advantages of arbitration is the opportunity available to the parties to choose the arbitrator(s). Besides, the proceedings in the arbitral tribunal are held in privacy and are highly confidential as opposed to conventional court proceedings. The parties to the arbitration process can also benefit from the flexibility of the process itself. This is because arbitration is much more flexible both in time and procedure. In practice,

*If the dispute needs urgent resolution, the parties can choose a tribunal who will act promptly than wait their turn in queue. As arbitration is consensual, the parties can choose the most suitable procedure. Neither they nor the tribunal are tied to inflexible rules of court.*³²⁸

Furthermore, arbitration provides a neutral ground for the parties, particularly where they come from different jurisdictions. In this context, arbitration offers the parties thereto 'neutrality in the choice of law, procedure and tribunal. The parties may agree upon the law and procedure of a third country or leave the choice to the tribunal.'³²⁹ They can appoint an arbitrator from another country or request an international arbitral institution to assist them to obtain an arbitrator. For instance, the ICC Rules of Arbitration states expressly that where the circumstances so demand the sole arbitrator, or a chairman of the tribunal, shall be of different nationality to that of the parties.³³⁰

Of late, arbitration has been used by international investors for "diplomatic protection"; whereby an investor would request its home state to bring arbitral proceedings against the host state on its behalf, 'based on alleged breach of international investment law.'³³¹ For instance, in the case concerning *Elettronica Sicula S.p.A. (ELSI)*³³², the International Court of Justice (ICJ) permitted the US to bring a claim against Italy on behalf of US shareholders in respect of their wholly owned Italian company, ELSI. In fact this claim was based on bilateral 1948 *Treaty of Friendship, Commerce and Navigation Treaties between Italy and the United States*. The claim emanated from the fact that the Italian authorities prevented the US shareholders from shutting the ELSI operations and liquidating the assets of their investment.

Finally, arbitration is advantageous when it comes to the enforcement of the arbitral award. As opposed to the enforcement of court judgments at the international level, arbitral awards are recognised and enforceable in many more countries, particularly through the New York Convention. This is the principal international law instrument which provides for recognition and enforceability of awards made in various countries around the world.

328 Ibid, p. 10.

329 Ibid.

330 See particularly Article 2.6 of the ICC Rules. Compare article 3.3 of the LCIA Rules.

331 Cotula. Op. cit.

332 *US v. Italy*, 1989 I.C.J. 15.

7.4.2 Disadvantages

As is the case with all processes surrounding humanity in the material world, arbitration as a process has several disadvantages. One of them is the question of delays of the arbitral proceedings especially at the initial stage of appointing an arbitral tribunal. This issue is, in certain cases, exacerbated by the high expenses involved in arbitration, particularly in international arbitration. As Lorenzo Cotula argues,

*International arbitration tends to be significantly more expensive than domestic litigation in most low and middle-income countries. In arbitral proceedings, parties to disputes must cover the arbitrators' fees and other costs associated with establishing an arbitral tribunal – costs that are not usually incurred in domestic litigation.*³³³

This hurdle is exacerbated by the fact that the expertise needed to handle international arbitration 'may also be more expensive than that usually required in many low and middle-income countries.'³³⁴ In addition, international arbitration attracts substantially huge amounts of compensation than those awarded by domestic courts. For instance, in *Ceskoslovenska Obchodni Banka v Slovakia* the investor was awarded the record setting amount of US\$ 867 million.³³⁵

Another equally disadvantageous aspect of arbitration is its exclusion of members of the public to attend hearing in the arbitral tribunal. This may have adverse effect to the public where the contract from which an arbitration clause is a subject matter of arbitration revolves around public interest; say, where one of the parties to the arbitral proceedings is a public body. By preventing members of the public to participate in the arbitral proceedings, the public may fail to intervene in a situation where there is claim of fraud or corruption.

Another disadvantage of arbitration is the failure to recognise invalidity of the arbitration clause where the founding contract or agreement is deemed invalid. This problem is shielded by the doctrine of separability or survival of the arbitration clause even where the contract has been found to be invalid.

In most international arbitral proceedings, arbitrators are chosen amongst leading experts from commercial law firms, 'who may be more familiar with the needs of multinational companies – their main

333 Cotula. Op. cit, p. 2.

334 Ibid. See also *Ceskoslovenska Obchodni Banka A.S. v Slovak Republic*, ICSID Case No. ARB/97/4.

335 Cotula. Ibid.

clients – than with those of host states.³³⁶ In this regard, Cotula is of the view that: ‘the choice of the arbitrators can significantly influence the outcome of the arbitration.’³³⁷ Seen in this context, one may argue that:

In practice, arbitrators enjoy a margin of discretion in identifying and interpreting relevant norms and in applying them to the facts of the case. This fact, coupled with the arbitrators’ own value systems, may influence their decisions. On several occasions, different arbitrators have reached significantly different conclusions on disputes presenting very similar facts (e.g., in the parallel Liamco³³⁸ and Texaco³³⁹ cases).³⁴⁰

As a result of this fact, most international arbitrators would tend to lean on the international investors’ side, which reflects the nature of international arbitration, which ‘is designed as a safeguard for investors against host state action.’³⁴¹ Seen in its implicit nature, international arbitration has attracted a great amount of confidence of international investors as it creates favourable environment to them as opposed to the host states.

To make international arbitration more disadvantageous to host states, arbitral awards are not subject to appeals as are court judgments. Although the ICSID arbitrations involve an annulment procedure against certain arbitral awards, this is only in respect of few major defects like corruption and manifest excess of powers on the part of the arbitral tribunal. This coupled with the fact that where a host state fails to comply with the award, ‘the investor may seek enforcement before the domestic courts of a third country where the [defaulting] host state holds interests, for instance, through seizing goods or freezing bank accounts.’³⁴²

This principle is well entrenched in the New York Convention, which requires third-country courts to enforce the award, except where specific grounds invalidate the arbitral proceedings, or where such enforcement would be contrary to public policy of the third country. In some cases, failure to enforce arbitral awards has negatively impacted on the host country’s political economy, including reducing the host state’s capacity to attract foreign investment.

336 Ibid.

337 Ibid.

338 *Libyan American Oil Co. (Liamco) v The Government of the Libyan Arab Republic*, 12 April 1977, 62 ILR 140.

339 *Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v The Government of the Libyan Arab Republic*, 19 January 1977, 53 ILR 389.

340 Cotula. Op. cit.

341 Ibid.

342 Ibid.

7.5 INTERNATIONAL ARBITRATION AND CORRUPTION

As explained at the beginning of this Chapter, arbitration has been used to resolve disputes at the international arena, particularly those of commercial nature, for a long time. In terms of commercial disputes, arbitration is said to have been there ‘since the dawn of commerce.’³⁴³ Unfortunately, another side of commercial transactions that has been around a long time is corruption. Corruption has ‘appeared in international commercial arbitration cases’³⁴⁴ for a long time too.

For the past twenty years the international arbitration community has been grappling with the ever-increasing number of corruption allegations in international commercial arbitration. In spite of the existence of international conventions against corruption³⁴⁵, international arbitration has found itself confronted with incidents of corruption. This has led to the evolution of principles in international arbitration that aim at dealing with corruption as elucidated herein below.

7.5.1 International Public Order *vis-à-vis* Corruption in International Arbitration

One of such principles includes the *international public order* conception by which ‘arbitral tribunals and the courts that have enforced or annulled their arbitral awards have consistently stated that there is an international public order, which makes bribery contracts invalid and contrary to *bonos mores*.’³⁴⁶

One of the leading early bribery authorities in this aspect is ICC Case No. 3913 (1981)³⁴⁷, whereby the arbitral tribunal reinforced the trend of arbitrators in condemning corruption in international transactions. The defendant in this ICC case was a French firm attempting to win business with the government of an African country. The claimant was a British firm which had entered into a consulting

343 Musthill, L., “Arbitration: History and Background”. *Journal of International Arbitration*. Vol. 6, 1989, p. 43.

344 Martin, A.T., “International Arbitration and Corruption: An Evolving Standard.” *Op. cit.*, p. 1.

345 See particularly the United Nations Convention Against Corruption (2003), the African Union Convention on Combating and Prevention of Corruption (2003), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), and the OAS Inter-American Convention Against Corruption (1996).

346 Martin. *Op. cit.*

347 Collection of ICC Arbitral Awards 1974–85, 497.

agreement with the defendant to assist them in winning business with that African government.

In this arrangement, the claimant provided services to the defendant in terms of provision of information and facilitating the winning of business deals, negotiating and carrying out the deal between the defendant and the government authority. The fee payable to the claimant under the Consulting Agreement was 8% of the amount of the business deal, excluding material and charges.

Although the letter of the contract did not indicate any illicit or immoral activity, certain statements from the parties and their witnesses along with other evidence produced in the arbitral proceedings explicitly pointed to the fact that 'the written contractual obligations were quite different from what was the actual intent of the parties.' In the course of hearing in the arbitral tribunal, one of the witnesses stated that the commission provided for in the contract was 'intended to remunerate the (African) counterparties.' Further evidence indicated that the claimant was a financial intermediary 'who received money to redistribute to members of a network consisting of local persons in decision-making positions.' This piece of evidence implied that the commission under the Consulting Agreement was intended to pay "*pots-de-vin*" or bribes.

Although the published report does not indicate whether or not the parties chose to use French law in the resolution of dispute under the Consulting Agreement, it can be assumed from the stated facts that upon their resort to the ICC they chose to be arbitrated under French law. In its findings, the arbitral tribunal held that under French law, bribes were illicit and immoral. Under French law, there were both criminal provisions criminalising corruption as well as there existed extensive civil jurisprudence 'confirming that contracts involving bribery were null and void.' As Martin notes: 'These principles of law not only conformed to French internal public order, but also arose from international public order as recognised by most nations.'³⁴⁸

The ICC arbitral tribunal was of further view that the international business community and most governments around the world oppose all such corrupt practices. In this regard, in 1977 the ICC adopted its Rules of Conduct on Bribery in International Business Transactions. Therefore, the ICC arbitral tribunal held that 'the enforcement of an award that strayed from these principles could, under the 1958 New

348 Martin. Op. cit.

York Convention, be refused by the judicial authorities of the country in which it is submitted.³⁴⁹ In this case, having found the parties to have knowingly entered into an illicit contract, the ICC tribunal held the Consulting Agreement to be null and void and that the parties could not require performance of the contract or seek restitution under it.

In addition to this reasoning by the ICC, a sole arbitrator in ICC Case No. 3916 (1982)³⁵⁰ held that ‘civilised nations recognise the legal principle that agreements that seriously breach acceptable standards of behaviour or international public order are void and cannot be enforced. That is true even if in certain countries corruption of public officials is generally accepted as a way to conduct business affairs.’³⁵¹ Accordingly, international interests and the general interest in a normal functioning of international trade ‘appear to coincide and to justify the conclusion that there does exist a principle of truly international or transnational public policy which sanctions corruption and “bribery-contracts”’³⁵²

7.5.2 The Arbitrator’s Duty to Uphold International Public Policy against Corruption

Parallel to the *international public order* principle is the duty of an arbitrator to uphold international public policy, which prohibits corruption in international investment transactions. The public policy claim in international arbitration is grounded in the provisions of the New York Convention that state as herein below,

*Recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that ... the recognition or enforcement of the award would be contrary to public policy of that country.*³⁵³

Corruption has been made one of the conducts that are contrary to public policy worldwide. So, when this happens in an international tribunal, the arbitrator would be under a duty to uphold the law

349 Martin. Op. cit.

350 Sentences Arbitrales, Chambre de Commerce Internationale, 930. 111 *Journal du droit international* (1984) 930. Collection of ICC Arbitral Awards 1974–85, 507.

351 Martin. Op. cit.

352 Lalive, P., “Transnational (or Truly International) Public Policy and International Arbitration.” In Sanders, P. (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*. ICCA Congress Series No. 3, 1987, p. 276.

353 Article V of the Convention on the Recognition of and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958 .

prohibiting violation of public policy 'above and beyond the duty to the parties'.³⁵⁴ As Martin argues,

*Given the clear confirmation that bribery is bonos mores and illegal in international law and that the duty of arbitrators is to uphold such law, arbitrators need to clearly set the indicators of bribery that would invalidate a contract. They then need to be proactive in determining whether such indicators exist and draw the appropriate conclusions.*³⁵⁵

Contrary to this perspective, 'it is possible that an arbitral tribunal may be used to validate the legality of a contract that a state prosecutor would view as illegal and the participants as criminal'.³⁵⁶

7.5.3 The Doctrine of Separability *vis-à-vis* Corruption in International Arbitration

A review of cases decided by international arbitral tribunals indicates that the doctrine of separability or autonomy or survival of an arbitration clause has been challenged in many corruption arbitral awards. As we observed above, this doctrine states that an arbitration clause is separate and independent from the contract or agreement in which it is contained. It further entails that the arbitration clause survives even where the contract in which it is contained is invalid. However, in the practice of the international arbitral tribunals, one may ask does the arbitration clause survive even where the entire contract in which it is contained is invalid on ground of corruption? This question was determined in *Westinghouse International Projects Company (USA) and Burns & Roe Enterprises Inc. (USA) v National Power Corporation (Philippines) and Republic of the Philippines*³⁵⁷. In this ICC case, the arbitral tribunal held that 'there might be instances where a defect going to the root of the agreement between the parties affects both the main contract and the arbitration clause, an example being a contract obtained by threat'.³⁵⁸

However, in this case the tribunal stated that it did not have to decide on the effect of bribery on the validity of the arbitration clause since it found, on the facts, that the defendants 'had failed to prove their allegations of bribery'.³⁵⁹

354 Martin. Op. cit.

355 Ibid.

356 Ibid.

357 ICC Case No. 6401 (Westinghouse-1991). 7 Mealey's International Arbitration Report. Issue No. 1, January 1992. Section B., p. B-1.

358 Martin. Op. cit.

359 Ibid.

7.5.4 Using the Doctrine of *Kompetenz-Kompetenz* to Curb Corruption in International Arbitration

The doctrine of *Kompetenz-Kompetenz* relates to the competence or jurisdiction of the arbitral tribunal to determine arbitral proceedings before it³⁶⁰. The practice of most international arbitral tribunals indicates that before a tribunal commences hearing an arbitration case, it must be seized with jurisdiction to determine it. Article 16 of the UNCITRAL Model Law (1985) and Article 21(2) of the UNCITRAL Arbitration Rules (1976) support this practice. The relevant UNCITRAL Arbitration Rule provides that,

Article 21

1. *The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.*
2. *The arbitral tribunal shall have power to determine the existence or the validity of the contract of which an arbitration clause forms part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

This doctrine has been used in a number of international arbitral cases to deal with corruption, whereby the tribunal may refuse to seize its jurisdiction if it is of the view that the contract was tainted with bribery. For instance, this was the issue in ICC Case No. 1110(1963).³⁶¹ As one of the first reported international arbitral awards to deal with corruption, this case has been widely cited and frequently criticised for how it dealt with corruption basing on the doctrine of *Kompetenz-Kompetenz*. The claimant, in this case, was a local Argentinean engineer who acted for as an agent for the respondent, a British company, which wanted to sell electrical equipment to the Argentinean government during the Peron era. In 1950, the parties agreed to enter into an

360 See particularly *Westinghouse International projects Company v. National Power Corporation*, ICC Case No. 6401, reported in 7 *Mealey's International Arbitration Report*, Issue No. 1, 1992. Section B, at pp. 17–18.

361 Yearbook Comm. Arb'n, XXI (1996) 47. The case is summarised in Martin. Op. cit. Pp. 12–4.

arrangement whereby the claimant would act as the agent for the respondent in Argentina at a commission of 10% on the value of the order split into 5%, 2.5% and 2.5%. The commission was transferable to an unnamed third party.

The claimant acted in such capacity until 1955 when he was compelled to go to Germany for medical treatment, within which period the respondent did not make any sales to the Argentinean government. In 1958, through a partnership, the respondent sold nearly 28 million sterling pounds of electrical equipment to the Argentinean government. Through this partnership, an agent was retained to assist in that transaction and was paid about 1 million sterling pounds for this work. Subsequent to this payment, the claimant demanded to be paid 10% of the total sale under the 1958 contracts based upon the 1950 commission agreement.

In the course of the hearing of this arbitral case, the respondent stated that the main reason for retaining the claimant was 'the quite remarkable degree of influence which he had with the political appointees of the Peronista Government.' Several other witnesses revealed that the claimant had intimated that he would only retain 2% of the commission with the remainder being distributed to his collaborators in the government.

In his findings, the sole arbitrator, Judge G. Lagergren, found that the evidence adduced in the course of the arbitral proceedings 'plainly established ... that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business' and that the amounts involved were huge. Examining *suo moto* the question of his jurisdiction to decide upon a contract "condemned by public decency and morality", Judge Lagergren referred to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides that the competent authority may refuse *ex-officio* the recognition or enforcement of an award that would be contrary to the public policy of that country.³⁶²

Referring to French law, which was the seat of the arbitration (*lex fori*), and to Argentine law, which was the place where the contract was to be performed (*lex locus solutiones*), the sole arbitrator concluded that both Argentine and French law would not allow this case to be arbitrated because, to use his own wording,

362 Article V(2)(b) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

... there exists a general principle of law recognised by civilised nations that contracts which seriously violate bonos mores or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. ... care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.

Declining his jurisdiction to determine this arbitration, the sole arbitrator was of the view that: a case such as this, involving such gross violations of good morals and international public policy, cannot be countenanced in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal.'

7.5.5 Evidentiary Proof *vis-à-vis* Corruption

International arbitral tribunals have also been grappling with the bribery elements in international commercial investments by properly scrutinising illicit elements therein. The tribunals have applied properly the well-established principle of evidentiary proof that requires a party alleging a claim (corruption in this case) to prove it. This rule of evidence is also contained in Article 24(1) of the UNCITRAL Arbitration Rules (1976), which states that: 'Each party shall have the burden of proving the facts relied on to support his claim or defence.'

This rule of evidence may, however, be reversed by international arbitral tribunals under certain circumstances. This may happen in such circumstances as where the alleging party has adduced evidence that is not conclusive; in which case the tribunal may require the other party to bring counter evidence. If the other party 'failed to do so, the tribunal could then conclude that the alleged facts were true.'³⁶³

So, where allegations for corruption are made in an arbitral tribunal, a higher standard of proof would be required. For instance, in the *Westinghouse* case³⁶⁴, it was noted that the American jurisprudence requires "clear and convincing evidence". Equally, English judges have required standard of proof of allegations of corruption basing on 'a degree of probability which is commensurate with the occasion.'³⁶⁵ As Rossell and Prager observe,

363 Martin. Op. cit, p. 7. See also ICC Case No. 6497, Yearbook Comm. Arb. XXIV (1999) 71.

364 ICC Case No. 6401 (1991). The case is reported in *Mealey's International Arbitration Report*. Vol. 7 Issue No. 1, January 1992. Section B, p. B-1.

365 Eveleigh, E., "General Standards of Proof in Litigation and Arbitration Generally". *Arbitration International*. Vol. 10 No. 3, 1994, p. 334.

*In international arbitrations it makes sense to impose a heightened standard of proof on a party raising a defence based on an allegation of bribery. In particular, if the burden of proof is shifted from the defendant to the claimant with respect to the performance of the contract, it is only fair that the defendant carry a higher than usual burden with respect to its defence based on an allegation or suspicion of bribery. Otherwise, it would be temptingly simple for the defendant to raise an allegation of bribery, without any supporting evidence, merely in order to shift the burden of proof to the claimant and thus to improve its chances of avoiding payment obligations under the contract.*³⁶⁶

Although it may be seen as a hurdle to overcome bribery to be found by the arbitral tribunal, the requirement for heightened standard of proof helps the tribunal to ascertain itself of the corruption allegation before it because it does not have investigative tools at its disposal. This is more complicated by the fact that in most cases involving illicit activities in international commercial investments, the parties may have potentially participated in such activities.³⁶⁷ Or, in some cases, one of the parties may invoke illicit activities on its counterpart in order to frustrate the contract or as ‘a last desperate attempt to invalidate a contract’³⁶⁸ as was the case in ICC Case No. 7047³⁶⁹ (the *Westacre* case). This was a very controversial arbitration case, which was appealed against in two countries and enforcement sought in three different countries.

In this ICC arbitral matter, the 1st defendant entered into a sales contract with the Kuwaiti Ministry of Defence in 1989 to sell the latter military equipment. In 1988 the 1st defendant entered into a consultancy agreement with the claimant whereby the latter would assist the former in the sale of the specified military equipment at a consultancy fee of 15% of the value of the sold equipment. In this regard, the 2nd defendant acted as a guarantor for the consultant’s fee under the consultancy agreement.

Prior to the conclusion of the sale contracts, the Kuwaiti Ministry of Defence served on the 1st defendant a circular requesting, *inter alia*,

366 Rossell, J. and H. Prager, “Illicit Commissions and International Arbitration: The Question of Proof”, *Arbitration International*. Vol. 15 No. 4, 1999, p. 348.

367 Martin. Op. cit. p. 8.

368 Ibid. p. 48.

369 *Westacre Investment Inc. (Panama) v Judoimport-SDPR Holdings Co. Ltd. & Beogradska Banka (all Yugoslavian)*, ICC Case No. 7047 (1994). This case is reported in *ASA Bulletin*. Vol 2, 1995. p. 301.

the latter to refrain from paying money to an agent or intermediary. Subsequent to this circular, the 1st defendant gave the claimant a written notification that it was terminating their consultancy agreement as it was, *inter alia*, violative of the mandatory Kuwaiti law as set out in the circular.

Consequently, the claimant instituted arbitral proceedings in ICC in Geneva as the consultancy agreement was governed by Swiss law and required disputes arising out of it to be instituted there. In the course of the hearing, the arbitral tribunal rejected the 1st defendant's argument that it did not require the services of the claimant and therefore no fee was payable to the claimant. The tribunal held the consultancy agreement to be valid and it did not require the claimant to prove its activities; thus, it was exonerated from such a burden of proof.

Surprisingly, on the last day of arbitration the defendant pleaded that the consultancy agreement was void for it was found in illicit activities of the claimant. Rejecting this plea, the tribunal held that the defendant failed to demonstrate and prove that the circular issued by the Kuwaiti Ministry of Defence was part of the mandatory law of Kuwait, but rather it was only shown to be a contractual condition of the sale contract between the defendant and the Kuwaiti Ministry of Defence. In reaching at this decision, the tribunal held that the consultancy agreement would be null and void if the parties had intended to obtain the sale contract with the Kuwaiti Ministry of Defence by illicit means, such as bribery. The defendant also alleged that the consultancy agreement was void because of illicit lobbying, which was rejected by the tribunal, holding that lobbying was not an illegal activity and thus did not invalidate the consultancy agreement.

It should be noted that the bribery allegation was not pleaded in the written pleadings, but was alleged at the oral hearing. To this anomaly, the tribunal expressed the following view:

The majority ... hold that bribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defence, nullifying the claims arising from a contract. The consequences of this are decisive.

If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed

to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The word "bribery" is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate [it]. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate.

If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere 'suspicion' by a member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the fact of the case, is entirely insufficient to form such a conviction of the Arbitral Tribunal. [Underlining in the original text].

Thus, the tribunal held that the claimant was entitled to be paid its fees as set out in the consultancy agreement, as the same did not violate international public order or *bonos mores*.

Subsequent thereto, the defendants appealed against this ICC award to the Swiss Supreme Court, contending that it was against public policy in that it was contrary to or evaded Kuwaiti law or it was a contract to pay bribes; and was thus immoral and void. In 1996, the Swiss Supreme Court rejected these contentions and upheld the ICC award, holding that the arbitral tribunal did not err in holding the consultancy agreement to be valid.

Subsequent to the failure of the appeal in the Swiss Supreme Court, Westacre obtained an order to enforce the ICC award from the Kuwaiti Commercial Court. It also sought enforcement of award in Cyprus and English courts. In 1995 the English Court granted Westacre an *ex-parte* order, against the defendants applied to the English High Court of Queen's Bench to be set aside. At this stage, the defendants invoked the issue of bribery by Westacre, which was rejected by the court observing that it was inappropriate, in the context of the New York Convention, for the enforcement court to be invited to retry a matter that was not pleaded and proved in the arbitral tribunal in the context of a public policy submission.

Dissatisfied by this decision, in 1999 the defendant appealed to the English Court of Appeal (Civil Division), which dismissed it on the ground that the arbitrators' finding of fact in the bribery issue could not be challenged in the enforcement proceedings.

7.6 INTERNATIONAL ARBITRATION *VIS-À-VIS* THE HUMAN RIGHTS CLAIM

As we have seen above, international arbitration was largely designed as a safeguard for investors against host state's action in international commercial investment arrangements. In this regard, its main preoccupation is to always ensure that the international investor is protected against any adverse conduct of the host state in executing an international commercial investment undertaking.

From this nature of international arbitration, there is now a serious challenge in international arbitration as to the extent to which arbitration proceedings 'can effectively balance all the interests involved in the dispute – including both commercial and non-commercial interests.'³⁷⁰ Reality has just shown that what is at stake in many recent and ongoing international arbitrations, is more than a merely commercial interest, but also a challenge on the realisation of certain human rights.

For instance, privatisation of water services in many developing countries in the world has witnessed a rising wave of wide-ranging involvement of foreign private water service providers. This trend has witnessed an equally rising number of international arbitrations concerning water concessions or privation schemes³⁷¹ that have raised 'issues of great relevance to the progressive realisation of the right to water, which is protected under international law.'³⁷²

In addition, international investment disputes may arise from the host state's action geared at protecting public or human rights interests of its citizens that are likely to be affected in the course of the execution of an international commercial investment. By implication, the arbitration of such disputes may more or less touch on the public or human rights interests of the host state's citizens. As Cotula puts it,

Because of these issues, the outcome of arbitration proceedings may significantly affect the lives of large numbers of people. ... Taking these broader issues into account means ensuring that arbitral tribunals cover expertise in all the significant branches of law at stake, including

370 Cotula. Op. cit, p. 2.

371 See, for instance, in *Electronica Sicula S.p.A.* (the "ELSI Case") – US v Italy, ICJ, 20 July 1989, where the US brought a case in the ICJ against Italy, on behalf of its national private investors.

372 Cotula. Op. cit. See also Peterson, L.E. and K.R. Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration." Winnipeg: IISD, 2003.

*investment, environment and human rights law. Yet international arbitrators tend to come from a commercial law background, and may not be best placed effectively to take broader public or third-party interests into account.*³⁷³

Therefore, this challenge has brought about the need for international arbitral tribunals to take into accounts the human rights or public interest account in their work. This has been achieved particularly from the relaxation of the strict adherence to the doctrine of privacy and confidentiality of arbitration by some of the international arbitration bodies to allow third parties to bring before them *amicus curiae* submissions.

The ICSID, for example, has recently amended its Arbitration Rules to empower arbitrators to allow persons not party to the dispute to file written submissions³⁷⁴; and, if the parties consent, to allow these persons to attend oral hearings³⁷⁵. In most cases, persons filing *amicus curiae* submissions have been organisations or institutions with proven specialised expertise in the field around which the dispute revolve.³⁷⁶

This is a very progressive approach to contemporary international arbitration law and practice; because, 'States cannot "sell-off" the human rights of their citizens through contracts with investors, as this would violate their obligations under international human rights treaties.'³⁷⁷ So, where the dispute to be determined by an international arbitral tribunal has adverse impacts on public interests or human rights of the host state's citizens, an international arbitral tribunal should open up its proceedings to public access and scrutiny.

373 Cotula. Ibid, p. 3.

374 Rule 37(2) of the ICSID Rules of Arbitration.

375 Ibid. Rule 32(2).

376 See particularly *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, 2 February 2007. See also *Methanex v US*, North American Free Trade Agreement (NAFTA) Free Trade Commission Case, 15 January 2001.

377 Cotula. Op. cit.

7.7 CONCLUSION

Arbitration has been used to resolve disputes all over the world for a long time as one of the basic methods of alternative dispute settlements to traditional judicial process of settlement of civil disputes. Recently, international arbitration has increased due to the ongoing proliferation in global investment and trade. This Chapter has endeavoured to discuss the evolving issues in international arbitration law and practices. It has also defined arbitration in international commercial and investment contracts.

The Chapter has also briefly traced the genesis and evolution of international arbitration law, particularly in most of common law countries whereby it was enrooted in the developments in this area in England. In this regard, the Chapter has revisited the influence of international arbitration law on domestic arbitration in many countries around the world. Further, the Chapter has shed some light on the types of international arbitration tribunals, where there are mainly two types of international commercial arbitral tribunals: *permanent* and *ad hoc* tribunals.

Moreover, the Chapter has examined the basic principles of international arbitration law, which include the nature and functions of an arbitration clause or agreement in international arbitration law and practice. Other principles discussed in this Chapter include the doctrine of survival and separability of the arbitration clause in a contract; the doctrine of privacy and confidentiality; the doctrine of party autonomy; and the doctrine of finality of an arbitral award. It also analyses choice of law in international arbitration as well as the advantages and disadvantages of arbitration.

One of the critical and evolving issues in international arbitration is corruption. In a very special way, this Chapter has critically discussed evolving standards devised by international arbitral tribunals in dealing with corruption. These standards include using the principle of international *public order* to combat corruption in international arbitration; and the arbitrator's duty to uphold international public policy against corruption. Other standards are the use of the doctrine of separability of the arbitration clause and the doctrine of *Kompetenz-Kompetenz* in dealing with corruption in international arbitration. Evidentiary proof is also used by international arbitral tribunals in detecting corruption and is discussed in this article.

Reality has just shown that what is at stake in much recent and ongoing international arbitration is more than a mere commercial interest, but also a challenge on the realisation of certain human rights. This Chapter, thus, has examined the human rights implications of international arbitration.

Part III

Law and Practice of ADR in Tanzania

Chapter Eight

ADR Practice in Tanzanian Courts

8.0 INTRODUCTION

In Tanzania, court-annexed ADR is mainly practiced in the form of mediation. This mode of dispute settlement was introduced in Tanzania by GN No. 422 of 1994, amending the 1st Schedule to the Civil Procedure Code (CPC).³⁷⁸ This amendment introduced certain stages/procedures between the completion of pleadings and a given trial. These ADR stages have been embedded in the civil court practice in Tanzania, as discussed in this Chapter.

8.1 THE 1994 AMENDMENT TO THE CPC INTRODUCING ADR

8.1.1 The Implications of the 1994 Amendment to the CPC

In Tanzanian civil courts ADR is commonly practised in the form of mediation, which was introduced in Tanzania by GN No. 422 of 1994, amending the 1st Schedule to the CPC. This amendment introduced certain stages between the completion of pleadings and a trial in civil cases. This amendment introduced three new orders: Order VIIIA; Order VIIIB; and Order VIIIC. By GN No. 196 of 1995, Order VIIIA and Order VIIIB of the CPC were made applicable to Arusha, Dar es Salaam and Mwanza Regions only as “pilot areas”, exempting the rest of the High Court Registries, Resident Magistrates’ Courts and District Courts for a year. Since then, ADR has been applied in all trial courts in civil cases in Tanzania.

The implication of the 1994 amendment to the CPC is that all civil cases filed in courts must first be referred to ADR in the form of mediation. This legal position was buttressed in *Fahari Bottlers Ltd. & Another v Registrar of Companies & Another*,³⁷⁹ where the Court of Appeal of Tanzania held that the requirement for a suit to be referred to mediation first before full trial begins is a mandatory one under the CPC. In this case, the plaintiff had filed winding up proceedings (Civil Case No. 98/1998) in the High Court of Tanzania, Dar es

³⁷⁸ Cap. 33 R.E. 2002.

³⁷⁹ Court of Appeal of Tanzania at Dar es Salaam, Civil Revision No. 1 of 1999 (Unreported).

Salaam Registry. But the matter proceeded to hearing without first being referred to mediation in contravention of Orders VIIIA, VIIIB and VIIIC. On revision, the Court of Appeal ordered that mediation is mandatory.

8.1.2 The Significance of ADR in Civil Courts in Tanzania

As discussed in Chapter Four, the demand for alternative ways to deal with legal disputes other than the conventional courts arose out of the ever-increasing heavy caseloads and backlogs in the Tanzanian civil cases. So, the prime rationale for the introduction of ADR in Tanzania was to reduce the heavy caseloads as well as the backlogs. It was also meant to avoid resort to unnecessary procedural technicalities prevalent in traditional courts as well as reducing expenses involved in pursuing litigation in courts of law.

In this regard, the court-annexed ADR system in Tanzania was designed in an informal way to allow parties to participate easily in this process and ensure that the relationship between the parties is preserved after they had undergone the ADR process.

8.2 PRELIMINARY STEPS IN THE ADR PROCESS IN TANZANIAN COURTS

8.2.1 Initial Notice

This is a document issued by the court under Orders IV, V, VIIIA, VIIIB and VIIIC of the CPC. It is sent to parties, together with the summons and plaint (for the defendant). It informs the parties about the judge assigned and date for the mediation; and the future activities of the matter – including filing of a written statement of defence (WSD), affidavits, the First Pre-trial Settlement and Scheduling Conference.

8.2.2 First Pre-Trial Settlement and Scheduling Conference

This conference is presided over by the judge or magistrate assigned to hear the case under Order IV rule 3 of the CPC. Parties to the case or their recognized agents must attend at the conference. This event must be held within 21 days of the conclusion of the pleadings. At this event, in consultation with the parties or their recognized agents, the judge or magistrate (as the case may) determines the Speed Track of the case. Then the judge or magistrate (as the case may) makes a Scheduling Order.

(a) Speeds Tracks of Cases

This is the categorization of cases according to their relative complexity. It is used to determine the period within which cases in particular categories should be completed. Under Order VIIIIB rule 3(3) of the CPC there are four speed tracks of cases. Speed Track One: this is for simple cases that need fast determination and do not exceed 10 months. Speed Track Two: is for normal cases, which take not more than 12 months to be determinate. Speed Track Three: is for complex cases that take not more 14 months to be determined. Speed Track Four: is for special or very complex cases that take not more than 24 months to be determined.

(b) Scheduling Order

This order is made by a judge or magistrate (as the case may) after fixing the speed track of a case. It sets out future events in the case from the date of the Conference on ward: such as disposal of preliminary applications; filing of affidavits or counter-affidavits; filing of notices; and resort to ADR. It also specifies whether the case will proceed for arbitration, mediation or trial and by which dates those steps must be completed having regard to the speed track of a case already determined. As a general rule of civil procedure and practice, the scheduling order should not be departed from, unless the court is satisfied that it is necessary to so order.³⁸⁰

(c) Failure to Appear at the Conference or to Comply with the Scheduling Order

If a party or its advocate or its legal representative fails to appear at the conference or is not prepared to participate, the court may make an adverse order against such party as it deems fit, including an order for costs. This applies also to non-compliance with a scheduling order. The adverse order may not be made if there are exceptional circumstances.³⁸¹

The application of this rule of civil procedure has been somewhat problematic. Notably, in the earlier days of piloting ADR in Tanzanian

³⁸⁰ Rule 4, Order VIIIA of the CPC.

³⁸¹ Rule 5, Order VIIIA of the CPC. For instance, in *Charles Mussa Msoffe v NBC Holding Corporation*, High Court of Tanzania at Arusha, Civil Case No. 36 of 1995 (Unreported) an order for costs for non-appearance in this case was issued by the mediator in the High Court. However, the order was reversed by the Court of Appeal, using its revisional jurisdiction, when the matter was on appeal [that is, *Charles Mussa Msoffe v NBC Holding Corporation*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 33 of 1996 (Unreported)].

civil courts, there was perceived misconception of mediation where some magistrates and judges of the High Court acted as if they were presiding over in ordinary civil trials. They dismissed the suits in case the plaintiff did not appear at a mediation session; or entered default judgment where the defendant did not appear. This was evidenced in *National Bank of Commerce Holding Corporation v Robson Makoke and Others*³⁸², for instance, where the High Court entered default judgment for the plaintiff due to non-appearance of the defendant on the day when the matter was coming for mediation.

However, this holding of the High Court was faulted by the Court of Appeal of Tanzania in *Tanzania Harbours Authority v Mathew Mtakula & 8 Others*,³⁸³ where it was held that mediators are not allowed to enter judgment in default or the dismissal of the suit where one of the parties was absent during the mediation session. So, from this authoritative decision of the Court of Appeal, now it is a settled cardinal rule of civil procedure that the proper course of action for the court to embark on when one of the parties is absent is to mark mediation as failed; and, so, the matter should be set for hearing in a full trial.

This rule of civil practice has been consistently applied in a number of cases on mediation where one of the (or both) parties has not entered appearance on the date when the matter is fixed for mediation. For instance, in *A.G. v M/S JP International Ltd.*³⁸⁴, when the case was called for mediation on 15th June 2006, Kalegeya, J. (as he then was) held mediation to have failed due to non-appearance of the defendant at the mediation session; consequent to which His Lordship ordered the matter to proceed to full trial.

In another case, *Biswald Selenda Msuya v A.G.*³⁸⁵, Justice Kalegeya held mediation to have been failed due to the absence of the defendant at the mediation that took place on 15th June 2006. The defendant did not even bother to communicate the reasons for his absence from court. The same conclusion is to be reached to cases where the parties appear in court on the day fixed for mediation, but they are not ready for mediation or they are not prepared to settle the matter through mediation.³⁸⁶

382 High Court of Tanzania at Dar es Salaam, Civil Case No. 230 of 1999 (Unreported).

383 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 46 of 1999 (Unreported).

384 High Court of Tanzania at Dar es Salaam, Civil Case No. 158 of 2002 (Unreported).

385 High Court of Tanzania at Dar es Salaam, Civil Case No. 173 of 2005 (Unreported).

386 See particularly *TPM (1998) Ltd. v The Minister for Agriculture and Food Security & Others*, High Court of Tanzania at Dar es Salaam, Civil Case No. 15 of 2004

The power vested on the court to make adverse order, including an order for costs, against the defaulting party under Order VIIIA Rule 5 of the CPC has also been clarified on by the Court of Appeal of Tanzania in a number of cases. For instance, in *Charles Mussa Msoffe v NBC Holding Corporation*,³⁸⁷ the Court of Appeal of Tanzania provided a purposive interpretation of the phrase “unless there are exceptional circumstances for not making such order”. In this appeal case, the Court of Appeal was compelled to exercise its revisional jurisdiction under section 4(2) of the Appellate Jurisdiction (Amendment) Act (1984) and reversed the High Court’s order for costs made against the respondent who had refused to participate in a mediation session in the High Court.

It is in record that, when the matter came for mediation on 5th December 1995 before a mediator in the High Court counsel for the respondent (then the defendant) addressed the court to the effect that,

*I have instructions from my client not to participate in the mediation exercise because it would be against their principles. All my attempts to explain the advantages of settling the case through the mediation process were in vain.*³⁸⁸

Upon this submission, the mediator made the following order against the respondent (then the defendant),

Order:-

The defendants [sic] are condemned in costs in any event in this case as a penalty under O. 8A Rule 5 of the CPC, 1996 as amended by G.N. No. 425 [sic] of 1994.

*The case is returned to the trial judge for further proceedings as per the scheduling order.*³⁸⁹

The Court of Appeal found this order to be “very harsh” and decided to give it a look in the context of the cited Order of the CPC. The mediator in the High Court had condemned the respondent to costs for the reason that the respondent was obstructive to the mediation process on the strength of its counsel’s submission to the court at the mediation session on 5th December 1995. To this reasoning, the Court of Appeal wondered,

(Unreported); and *Tanzania Union of Industrial and Commercial Workers v PRV Nil and Another*, High Court of Tanzania at Dar es Salaam, Civil Case No. 156 of 2004 (Unreported).

387 Court of Appeal of Tanzania at Arusha, Civil Appeal No. 33 of 1996 (Unreported).

388 Ibid. At p. 8 of the typed judgment.

389 Ibid.

*In what way were the respondents being obstructive to the mediation process when they gave what we consider a very good reason based on their operating principles?*³⁹⁰

The Court of Appeal was also surprised by the respondent's counsel statement that his "attempts to explain the advantage of settling the case through the mediation process were in vain". The Court was of the view that,

*Counsel should have protected his clients by stating very firmly the reasons why his clients could not go through the mediation process. Had he done so, the Mediator would not have found his clients obstructive [and thus] condemn them to costs in any event. The Mediator would have found in these reasons "exceptional circumstances for not making such orders." The respondent bank was certainly in the circumstances of this case not "willfully and without good cause defaulting or unprepared to take part in the mediation process". If the respondent bank had been properly advised, it would have cross-appealed against the order condemning them to costs in any event.*³⁹¹

Nonetheless, the Court of Appeal used its revisional jurisdiction and set aside the mediator's order condemning the respondent to costs in any event on the ground that the order made was erroneous and not in conformity with Order VIIIA rule 5 of the CPC.

8.3 PROCEDURE IN MEDIATION SESSIONS

The CPC does not provide for the procedures at mediation sessions in courts. But the procedures are contained in the *Manual for Mediation Training in Tanzania*, which states that,

*Procedures in conducting mediation proceedings vary from one jurisdiction to another. But those variations would appear to be in details rather than in substance.*³⁹²

So, in Tanzania the procedure on the conduct of mediation in Tanzanian courts is governed by the Manual.

8.3.1 Notice of Mediation Session

Upon fixing of a date for mediation, a Notice of Mediation Session (NMS) is sent to the parties or their advocates. It informs them the date,

390 Ibid. At p. 10 of the typed judgment.

391 Ibid. At pp. 10–11 of the typed judgment.

392 Global Justice Solutions. Op. cit. P. 54.

time and place of mediation, and before whom the mediation session is to take place. In case of firms or co's., it may also inform them who should attend – i.e. people with authority to make a final decision in the case.³⁹³

The NMS must also inform parties (i) to bring with them relevant documents; (ii) strict adherence to confidentiality of the mediation proceedings; and (iii) failure to attend may result in sanctions.

Calculation of time set for mediation is done from the date when the case was ordered for mediation by a Judge or Magistrate, not from the time of filing of the suit in court.³⁹⁴

8.3.2 Mediator's Introductory Remarks

On the mediation day, the mediator should undertake the following preliminaries:

- (i) welcoming the parties to the mediation session;
- (ii) introduce him/herself and the parties;
- (iii) ascertain if the parties have authority to make final decision in the case; and
- (iv) make a brief, but comprehensive introductory statement known as the *Mediator's Initial Remarks*.³⁹⁵

In the *Mediator's Initial Remarks* the mediator will tell the parties:

- (i) what the mediation process is all about;
- (ii) what is the role of the mediator and/or parties;
- (iii) how the parties should conduct themselves;
- (iv) the importance of the confidentiality of the mediation proceedings;

393 *Guru Engineering Works Ltd. v CORECU*, High Court of Tanzania at Dar es Salaam, Civil Case No. 320 of 1996 (Unreported).

394 See particularly *CRDB Bank Ltd. v Seif Ahmed Sharji*, High Court of Tanzania at Mbeya, Civil Case No. 11 of 2002 (Unreported); *Azania Bancorp Ltd. v Frederick Oldenburg*, High Court of Tanzania at Dar es Salaam, Civil Case No. 234 of 2001 (Unreported); *David N. Mushi v Joseph Massawe*, High Court of Tanzania at Dar es Salaam, Civil Case No. 109 of 2001 (Unreported); *Zamda Salum Bozen v Front Party & 2 Others*, High Court of Tanzania at Dar es Salaam, Civil Case No. 3 of 2001 (Unreported); *Konoike Construction Co. Ltd. v Mechanical Heavy Industries SDN BNF*, High Court of Tanzania at Dar es Salaam, Civil Case No. 342 of 2000 (Unreported); and *Flora Kilasi & Sikit Kilasi v Safeguard (T) Ltd.*, High Court of Tanzania at Mbeya, Civil Case No. 5 of 2001 (Unreported).

395 Global Justice Solutions. Op. cit, pp. 57–61.

- (v) the advantages of mediation as opposed to other modes of dispute settlement (including litigation); and
- (vi) consequences of success or failure of mediation.

8.3.3 Statement of Understanding

Upon ascertaining that the parties or their advocates have clearly understood the privileged confidential nature of mediation and the consequences of success or failure thereof, the mediator will ask the parties to sign a Statement of Understanding.³⁹⁶

8.3.4 Mediation Session

The Manual sets out three Mediation Sessions: First Joint Session; Separate Sessions (or Caucuses); and Final Joint Session. The three sessions are set out below.

(a) First Joint Session (FJS)

In the first joint session, the mediator meets with both or all the parties to the dispute for the first time. So as soon as the mediator has finished his Introductory Statement, he will call upon one of the parties, usually the plaintiff or claimant, to briefly state his case. Thereafter, the mediator will call upon the defendant or respondent to do the same. At this stage, the mediator gathers information from both sides; so, he or she will not interfere with the party's narrative.

The mediator also uses the FJS to start developing his or her strategies to enhance settlement opportunities; to try to detect hidden interests and motives of the parties, and identify the *wants* and *needs* of the parties as well as the real issues in the dispute. *Wants* means those things which are desirable to have but are not crucial or necessary to a party; and *needs* refers to those things which are necessary and basic to a party and so should be taken care of. After a party has made his brief presentation, the mediator will summarize what has been said and, in so doing, also clarify what appears to have been left obscure.

Three things should be noted during the FJS: first, at this stage parties will still be angry at each other, labouring under their prejudices of winning the case; second, the mediator should be patient at this stage (he or she should not think that the mediation is likely to fail); and, third, if the parties are angry and furious, the mediator should adjourn the Joint Session and move into Separate Sessions.

396 Ibid, p. 61.

(b) Separate Sessions (or Caucuses)

This is a meeting between the mediator and one of the parties in the absence of the other. A mediator uses Separate Sessions for many different reasons, depending on the circumstances of the case and the parties. S/he may break into separate sessions in order to calm frayed tempers; or so as to probe more into the facts of the case and hidden motives behind a party's negotiating strategy more closely; or to discover the real needs of the party; or to enable a shy and withdrawn party to talk more freely in private and reveal his or her hopes and fears, and so on.

It is in separate sessions that mediators often make headway: timid parties talk more freely, secrets are more easily revealed, and definite or tentative offers made. Again, it is in separate sessions that the Mediator tries to persuade the parties to judiciously brainstorm and share information which will assist them to, as we say, "expand the pie" so that each party may get as much as possible of what he would like.

Furthermore, it is in separate sessions that the mediator translates and transmits offers, clears wrong impressions and suggests options. The mediator also uses this session to again reassure the parties that a settlement will be reached if they tackle the process in a positive manner. A mediator can, thus, hold as many separate sessions as he or she wishes, so long as he or she believes he is making progress towards reaching a resolution of the dispute. For the same reason, there is no limit to the number of Joint Sessions which the mediator may hold.

(c) Final Joint Sessions

Final Joint Sessions are held at the conclusion of the mediation process, whether the mediation has succeeded or failed. In case of successful mediation, an agreement must be carefully drafted and all its aspects carefully tested with each party in a separate session. It should be noted that the Final Joint Session must be held only when there is a whole agreement or there is no amicable settlement and there are no chances of reviving the mediation session, at which the mediator will announce that the mediation has failed and thank the parties for their effort to settle the matter out of the adversarial judicial process.

In case mediation succeeds, the mediator will then congratulate the parties for their efforts, give a copy of the agreement to each of them, shake hands with them and then bid them farewell.

8.3.5 Consent Settlement Order

When mediation succeeds, the mediator will fill in the Consent Settlement Order Form (CSOF), containing:

- (i) the name of the court;
- (ii) the number of the case;
- (iii) the names of the parties, and
- (iv) the full terms of the agreement.

Then the CSOF must be signed by the parties and the mediators (in his capacity as judge or magistrate).

8.4 THE NATURE OF A MEDIATED AGREEMENT

A mediated agreement must meet the following criteria:-

- (i) it must satisfy the parties;
- (ii) it must deal with all issues in dispute;
- (iii) it must be workable and practical; and
- (iv) it must minimize the possibility of future conflict.

It is important that each party to the mediation process must comply with his/her obligations under the agreement. So, the agreement must spell out: who has the obligation to do what? When should it be done? Where should it be done? And how should it be done? In Tanzania's court-annexed mediation, bearing in mind that such an agreement is in the nature of a court decree, the mediator must ensure that there is a default clause in the agreement and that the parties understand fully its legal effect.

8.5 LEGAL EFFECTS OF THE SETTLEMENT AGREEMENT

The signed Consent Settlement Order Form must be filed in the court for record, where it will be recognized as a decree; because it has the same legal force as an ordinary court decree; so, it can be executed as a decree in case of default by any party. As it is in the nature of a judgment by consent, the Consent Settlement Order is usually not appealable, but it may be reviewed on such grounds as fraud or misrepresentation.

For instance, in *Guru Engineering Works Ltd. v CORECU*³⁹⁷, a Consent Settlement Order was successfully challenged and reviewed by the High Court for misrepresentation. Those who attended the mediation session in this case did not have authority to make final

³⁹⁷ Op. cit.

decisions for the applicant firm. So, the order was set aside and the court ordered for another mediation session. This judicial reasoning is akin to the position in labour dispute mediation in which it is the law that where one of the parties is a corporate body, the representative must have the mandate and capacity to make final decision in the mediation process.

The requirement for the representative to have mandate and capacity to make final decision relating to the mediation agreement in labour disputes was examined at some detail by Mandia, J. (as he then was) in *Miombo Safaris Ltd. v Jumanne Hamisi*.³⁹⁸ In this case, the respondent and an official of the applicant company entered into, and subsequently signed, an agreement before the Commission for Mediation and Arbitration (CMA), for the payment of terminal benefits to the respondent. However, immediately after the signing of the agreement, the applicant company filed an application in the Labour Court for review on ground that the representative who signed the agreement on their behalf exceeded his mandate.

After hearing the parties in this case, Mandia, J. (as he then was) held that the representative of the applicant company, acting as a disclosed agent of the company, had the mandate and capacity to make a decision and sign the agreement on behalf of the applicant. It was the court's view that,

If the agent exceeded his mandate, this does not vitiate the proceedings before the Commission. As long as the applicant put out Christopher Mmaniki as his agent, the applicant is bound by the actions of Christopher Mmaniki. There is no evidence of fraud in the way the agreement was entered into, and any insinuation of excess of authority is a matter between the applicant/employer and Christopher Mmaniki.

Consequently, the Labour Court dismissed the application for review for lacking merit.

8.6 PARTIAL SETTLEMENT

When parties agree only on some issues and disagree on others, the mediator should draw up a Consent Settlement Order only in respect of matters agreed upon. It will then be signed as the fully-agreed Consent Settlement Order. The mediator will refer the issues disagreed for trial in terms of Rule 4 of Order XIV of the CPC.

³⁹⁸ High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 8 of 2008 (Unreported).

8.7 FAILURE OF MEDIATION

If mediation fails, the matter will be assigned to another judge or magistrate as the case may be for trial. In *Charles Mussa Msoffe v NBC Holding Corporation*³⁹⁹ the mediator in the High Court (Munuo, J. [as she then was]) marked mediation as failed on submission made by the defendant's counsel to the following effect,

I have instructions from my client not to participate in the mediation exercise because it would be against their principles. All my attempts to explain the advantages of settling the case through the mediation process were in vain.

The mediating judge, thus, returned the case 'to the trial judge for further proceedings as per the scheduling order.'⁴⁰⁰

After the matter is returned, the judge or magistrate, as the case may be, will convene a *Final Pre-trial Settlement and Scheduling Conference*, whereby parties are given a last chance to resolve the dispute by an amicable settlement. If this fails, the court will then make another Scheduling Order at that Conference for future events and steps, including the date(s) of trial. This will be guided by the Speed Track to which the case was allocated at the First Pre-trial Settlement and Scheduling Conference.⁴⁰¹ At this Conference the court may also frame issues⁴⁰² in consultation with the parties or their advocates.

399 High Court of Tanzania at Arusha, Civil Case No. 36 of 1995 (Unreported).

400 Order dated 5th December 1995.

401 Order VIII Rule 3(2)(3); and Order VIII Rule 3(1)(2) of the CPC

402 *per* Order XIV of the CPC.

Chapter Nine

Arbitration Law and Practise in Tanzania

9.0 INTRODUCTION

Although the Arbitration Act⁴⁰³ was enacted in the 1930s, it is only recently that arbitration has become popular in Tanzania, mainly as a result of an increase in commercial agreements providing for recourse to arbitration in case of disputes arising from such contracts. Apart from the increase in commercial agreements having arbitration clauses, the last twenty years or so has also witnessed a growing number of statutes which contain clauses for recourse to arbitration in one form or another.

The importance of arbitration has also been noticed by most Universities in Tanzania which have now included Alternative Dispute Resolution practices in their curricula.⁴⁰⁴ Of interest here are the provisions of the Arbitration Act and the Second Schedule to the Civil Procedure Code under which the majority of arbitrations are conducted.

This Chapter, therefore, outlines the law and practice relating to arbitration in Tanzania by tracing the sources arbitration law in Tanzania, Tanzania's compliance with international arbitration law and the nature and legal effect of the arbitration agreement or clause in Tanzania. The Chapter also looks at the ethical rules of an arbitrator as well as pleadings and procedure in arbitral proceedings in Tanzania. Finally, the Chapter discusses the nature and legal effects of arbitral awards in Tanzania.

9.1 SOURCES OF ARBITRATION LAW IN TANZANIA

9.1.1 Main Sources of Arbitration Law

Generally, in Tanzania arbitration has been practiced since the enactment of the Arbitration Ordinance (now called Act)⁴⁰⁵ in 1931.⁴⁰⁶ As discussed in Chapter Seven, the Arbitration Act derives its basis from

403 Cap. 15 R.E. 2002.

404 The Consolidated National Curriculum for Legal Training in Higher Learning Institutions in Tanzania (2010) has incorporated arbitration in ADR as a compulsory subject.

405 Cap. 33 R.E. 2002.

406 Ordinances Nos. 26 of 22nd May, 1931 and 32 of 1932. It was amended vide Act No. 10 of 1971.

the English Arbitration Act of 1889⁴⁰⁷, which has been repealed and replaced by a number of arbitration laws, the most recent being the 1996 Arbitration Act. There are also provisions in the Civil Procedure Code (CPC) providing for arbitration in certain circumstances, contained in the Second Schedule to the CPC. As Mushi, J. stated in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁴⁰⁸,

Both pieces of legislation provide for arbitration, as an alternative mechanism for dispute (especially commercial disputes) resolution, out of court litigation, with the view that, parties, on their own agreement, would reach an amicable and speedy solution to their disputes, and that the solution would be final and binding upon them.

These main sources of arbitration law in Tanzania are discussed in the preceding section.

(a) The Arbitration Act as the Main Source of Arbitration Law in Tanzania

The Arbitration Act was enacted during British colonialism; and, as such, it is modelled on the English law of that time. There are also Arbitration Rules of 1957 made under this Act.⁴⁰⁹ Unlike in England where it originated, the Tanzanian Arbitration Act has 'largely remained unchanged, with only a minor amendment in 1971 granting the court power to extend time for getting arbitration proceedings underway.'⁴¹⁰ Currently, England has the Arbitration Act of 1996 that repealed and replaced the 1979 Arbitration Act, which had previously repealed and replaced the 1950 Arbitration Act, which was in turn amended by the 1975 Arbitration Act.⁴¹¹

Under the Tanzania Arbitration Act, arbitration commences only where there is an arbitration clause requiring a dispute to be

407 See particularly *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

408 Ibid.

409 GN No. 427 of 1957.

410 "Arbitration in Africa." Available at www.nortonrose.com (accessed 24 April 2011). This amendment gives 'the court power, in certain cases, to allow arbitration proceedings to start after the contractual deadline agreed by the parties in the arbitration clause has expired.'

411 See particularly Sutton, D.J., et al, *Russell on Arbitration*. 21st edn. London: Sweet & Maxwell, 1997, pp. 19-20.

referred for arbitration, commonly referred to as a “submission to arbitration” clause.⁴¹²

(b) The Civil Procedure Code as a Source of Arbitration Law

The CPC also has provisions, in the Second Schedule, regulating arbitration: that is, the Civil Procedure (Arbitration) Rules. Unlike in the Arbitration Act, under these rules arbitration commences after a suit is filed and is pending in court. It takes place where the parties have agreed to go to arbitration in the course of the court proceedings, subsequent to which the court should permit them to resort to arbitration under the Second Schedule to the CPC. In practice, the court supervises the arbitration process, whereby the award ensuing from this process must be communicated to the court for it to mark the dispute formally concluded. Where arbitration in this regard fails, the matter would proceed for full trial.

(c) The Differences between the Arbitration Act and the Civil Procedure (Arbitration) Rules under the CPC

(i) Arbitration under the Arbitration Act

Under the Arbitration Act, arbitration is almost entirely done without court intervention, because there is no case from which arbitration proceedings may commence. In this regard, the matter is *handled* by the parties themselves and their arbitrator. As a cardinal rule, the *foundation* of arbitration is the Arbitration Agreement or Clause, contained in the founding contract requiring the parties to refer any dispute arising in the course of the performance of the contract to arbitration. When an arbitral award is granted, it should be registered in the High Court and given force of law as a decree of the court.

(ii) Arbitration under the Civil Procedure (Arbitration) Rules

As we have seen above, arbitration under the Civil Procedure (Arbitration) Rules (contained in the Second Schedule to the CPC) is usually put in motion by one party filing a case in a court, and if both parties agree that the matter had better be referred to arbitration, the parties make an application in writing to the court in which the case has been filed for an order of reference

⁴¹² See the definition of this clause in section 2 of the Arbitration Act, Cap. 15 R.E. 2002.

to arbitration. Should the court grant the application, it will refer the case to arbitration. Thereafter, the procedure to be followed is similar to the procedure of arbitration under the Arbitration Act, *mutatis mutandis*. When the award has been rendered, the arbitrator files it in the court and it becomes a court decree in the case.

9.1.2 Other Sources of Arbitration Law

Of late, arbitration has been recognised and incorporated in a number of legal instruments, both at the international and municipal levels. Some of the legal instruments recognising arbitration include,

- The Treaty for the Establishment of the East African Community;
- The Surface and Marine Transport Regulatory Authority Act (2003)⁴¹³;
- The Public Procurement Act (2004)⁴¹⁴;
- The Energy and Water Utilities Regulatory Authority Act (2004)⁴¹⁵;
- The Employment and Labour Relations Act (2004)⁴¹⁶; and
- The Labour Institutions Act (2004)⁴¹⁷.

Notably, the Labour Institutions Act has specifically established the Commission for Mediation and Arbitration (CMA), which is empowered to appoint arbitrators to hear and determine disputes with reference to that Act. Its sister statute, the Employment and Labour Relations Act (2004)⁴¹⁸ has established a mechanism for resolution of disputes through mediation, arbitration and adjudication. Section 92 of that Act ousts the application of the Arbitration Act⁴¹⁹ on arbitration under the CMA in which resolution of disputes by arbitration is mandatory. However, section 93 of that Act permits voluntary arbitration, in which case the provisions of the Arbitration Act may be applied.

413 Act No. 12 of 2003

414 Act No. 21 of 2004.

415 Act No 11 of 2004.

416 Act No. 6 of 2004.

417 Act No. 7 of 2004.

418 Act No. 6 of 2004.

419 Cap 15, R.E. 2002.

9.2 TANZANIA'S COMPLIANCE WITH INTERNATIONAL ARBITRATION LAW

9.2.1 The Arbitration Act Predates Modern International Arbitration Laws

As we have already seen, the Arbitration Act was enacted in 1931 during British colonial rule. Then there were only two international instruments on arbitration that were in place: the 1923 Geneva Protocol on Arbitration and the 1927 Geneva Convention on the Execution of Foreign Awards. So, the Arbitration Act predates some of the modern principal international arbitration instruments: i.e., the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards and the 1985 UNCITRAL Model Law on International Arbitration. As such, the Arbitration Act “formally” incorporates two of the international arbitration instruments, which are thus made part of the schedules to the Act.⁴²⁰

Although Tanzania has not amended the Arbitration Act to accommodate the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards and the 1985 UNCITRAL Model Law on International Arbitration, it is a party to the New York Convention, which entered into force in Tanzania on 12th January 1965. Tanzania is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) of 1965⁴²¹ and the Multilateral Investment Guarantee Agency of 1985⁴²².

9.2.2 The Influence of International Arbitration Law on the Developments Made to the Tanzania Arbitration Act

So, the Tanzania Arbitration Act has not been affected or influenced by the UNCITRAL Model Law⁴²³, but some of its basic principles have been adopted by the National Construction Council (NCC)'s arbitration rules⁴²⁴. In order to make the 1958 New York Convention and the 1985 UNCITRAL Model Law applicable at the domestic level in Tanzania, the Tanganyika Law Society has prepared and submitted to

420 The Protocol on Arbitration Clauses (1923) forms part of the Third Schedule to the Arbitration Act vide section 27 of this law; and the Convention on the Execution of Foreign Arbitral Awards (1927) forms part of the Fourth Schedule to the Arbitration Act vide section 28 of this law.

421 Tanzania has been party to this convention since 17th June 1992.

422 Tanzania has been party to this convention since 19th June 1992.

423 Kapinga, W., et al, “Tanzania.” *Global Arbitration Review*, 2008. P. 236.

424 www.nortonrose.com (accessed on 28 June 2011).

the Attorney-General a proposed new Arbitration Bill⁴²⁵. However, the A-G has not provided its response to this Bill.

Kapinga et al provide the following major differences between the Tanzania Arbitration Act and the UNCITRAL Model Law:

- under the UNCITRAL Model Law, three arbitrators are the established requirement, whereas schedule 1 of the Arbitration Act provides that only a single arbitrator is necessary;
- the Arbitration Act requires arbitrators to proceed in an impartial manner
- whereas the Model Law prescribes the additional requirement of independence of arbitrators and
- unlike the Model Law, the tribunals' determination of its own jurisdiction under domestic law is not a necessary prerequisite to a party's desire to appeal to court⁴²⁶.

All in all, Tanzania fully complies with all international arbitration instruments in force to-date, either through law or practice.

9.3 THE ARBITRATION AGREEMENT AND ARBITRATORS IN TANZANIA

9.3.1 The Arbitration Agreement

(a) Submission to Arbitration

As we noted in Chapter Seven, the arbitration clause or agreement is the basis of almost all extra-judicial arbitral proceedings. As we also noted, the arbitration clause is contained either within the main contract or as a separate written agreement 'by which the parties to a contract agree that disputes between them which have arisen or may arise in the course of the execution of the contract between them shall be referred to arbitration and that the arbitrator's decision (referred to as "award") arising from such reference shall be final and binding upon the parties.'⁴²⁷ The Court of Appeal of Tanzania has also described an arbitration clause in a contract as 'distinct from the other clauses and that its breach can be specifically enforced by the machinery of the Arbitration Act'⁴²⁸.

425 Ibid..

426 Kapinga et al. Op. cit.

427 Global Justice Solutions. Op. cit.

428 *Tanzania Motor Services Ltd and Others v Mehar Singh T/A Thaker Singh*, Court of Appeal of Tanzania at Dodoma, Civil Appeal No. 115 of 2005) [2006] TZCA 5 (Judgement dated 21 July 2006).

In addition, such a clause usually sets out the number of arbitrators to be appointed, the manner of appointing them, the powers of the arbitrators, their qualifications, the place and language of the arbitration, the applicable law, and so on. The Tanzania Arbitration Act does not expressly make reference to an arbitration agreement; but it is implied through the requirement to have a submission clause to refer disputes arising in the event of execution of a contract to arbitration. The expression “submission” is defined in section 2 of the Arbitration Act as: “a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not”.⁴²⁹

(b) The Doctrine of Irrevocability of Submission to Arbitration

Section 4 of the Arbitration Act provides for a doctrine of irrevocability of the clause relating to submission to arbitration. It expressly provides that,

4. Provisions implied in submission

*Unless a different intention is expressed therein a submission shall be irrevocable, except by leave of the court, and shall be deemed to include the provisions set forth in the First Schedule hereto, in so far as they are applicable to the reference under submission.*⁴³⁰

This means that where a contract contains an arbitration clause – or a submission to arbitration clause – the clause cannot be revoked, unless the High Court gives leave to revoke it. And this has to be done in accordance with the provisions of the First Schedule to the Arbitration Act, which requires the provisions to be implied in submissions to be executed as follows,

1. *If no other mode of reference is provided, the reference shall be to a single arbitrator.*
2. *If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.*
3. *The arbitrators shall make their award in writing within three 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, in writing signed by them may, from time to time, extend the time for making the award.*

⁴²⁹ This definition was given some judicial consideration in *Ashak Kabani & Another v Ayisi Makariani & 7 Others*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No 265 of 2001 (Unreported); and *Azania Bancorp Ltd. & Another v The Treasury Registrar – Hatibu M. Co. Ltd.*, High Court of Tanzania

⁴³⁰ *Azania Bancorp Ltd. & Another v The Treasury Registrar – Hatibu M. Co. Ltd.* Ibid.

4. *If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.*
5. *The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, in writing signed by him may, from time to time, extend the time for making his award.*
6. *Subject to any legal objection, the parties to the reference and all persons claiming through them respectively shall, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or [be] called for and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.*
7. *The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on (sic?) [under] oath.*
8. *The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.*
9. *The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between advocate and client.*⁴³¹

Judiciously, the principle of irrevocability of a submission to arbitration or arbitration clause under the Arbitration Act was given due consideration by the High Court (Commercial Court Division) in *Azania Bancorp Ltd. & Another v The Treasury Registrar – Hatibu M. Co. Ltd.*⁴³² In this petition the petitioners sought the revoking of the requirement for submission to arbitration as provided for in the main contract because, they alleged, the contract was procured by fraud and misrepresentation. The High Court rejected this contention, dismissed the petition and ordered the matter to be referred to

431 First Schedule to the Arbitration Act.

432 Ibid.

arbitration as per the founding contract. In reaching this finding, the High Court was fortified by the reasoning of Hoffman, L.J., in *Harbour Assurance Co. (UK) v Kansa General International Assurance Co. Ltd*⁴³³, who stated that,

*... it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. These are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one issue resolved by the court and then, contingently on the outcome of that decision, further issues to be decided by the arbitrator.*⁴³⁴

Refusing to revoke the requirement for submission to arbitration in *Azania Bancorp Ltd. & Another v The Treasury Registrar – Hatibu M. Co. Ltd.*, the High Court authoritatively held that,

As a matter of general principle, it has been stated that where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the court would direct that the parties should go before the specified tribunal and should not resort to the courts. The parties herein very clearly chose arbitration to be the modality of setting their disputes but the petitioners want to [run away] from what was previously agreed upon on the pretext that there was fraud and misrepresentation. These allegations of fraud and misrepresentation have been levelled against the first; third; fourth and fifth respondents, who are not interested so far to clear reputation in an open court of law. They have instead chosen to honour the sanctity of the arbitration agreement should need arise. One would have expected that the respondents whose character has been impeached would be the ones to rush to court to clear their names! One would also have expected that the petition would contain allegations that complicated questions of law are involved in which case it would not be prudent to leave such issues to the arbitrators, but there is nothing of that sort.

So, from this judicial reasoning it can be gathered that the courts would only in few cases revoke the requirement to submit to arbitration disputes arising from a contract that contains a submission to arbitration clause. Otherwise, the court would require parties to refer their dispute(s) to arbitration whenever there is a submission to arbitration clause.

433 (1993) 3 All ER 897.

434 Ibid, p. 915.

9.3.2 Mandatory Requirement to Refer a Dispute to Arbitration where there is an Arbitration Clause

As is the case with universal arbitration law and practice, in Tanzania it is mandatory to refer a dispute to arbitration where there is an arbitration clause in a contract. This rule was buttressed by the Court of Appeal of Tanzania in *Tanzania Motor Services Ltd and Others v Mehar Singh T/A Thaker Singh*.⁴³⁵ In this case, the first appellant entered into a contract with the respondent, under which the first appellant was to build a house on Plot No. 6, Central Business Park, in the Dodoma Municipality. The contract contained an arbitration clause whereby the parties agreed to refer any dispute arising between them to arbitration and final decision of an arbitrator chosen according to agreed procedure. A dispute having arisen between the parties, the respondent instituted in the High Court Civil Case No. 20 of 2002 seeking to recover from the appellants and outstanding some amount of money under the contract.

The appellants, instead of filing a written statement of defence, applied by way of petition for a stay of the proceedings in terms of section 6 of the Arbitration Act⁴³⁶, rule 5 of the Arbitration Rules (1957) and Rule 18 of the Second Schedule to the Civil Procedure Code (1966). The learned judge dismissed the petition, hence the appellants appealed to the Court of Appeal of Tanzania. In the course of the hearing of the this appeal, the respondent filed a preliminary objection challenging the competence of the appeal by reason of Section 5(2)(d) of the Appellate Jurisdiction Act (1979), as amended by Act No. 25 of 2002, on the ground that the decision in question was interlocutory, that is, it did not finally determine Civil Case No. 20 of 2002; and, therefore, it was not appealable. In fact, Act No. 25 of 2002 bars appeals against preliminary or interlocutory decision or order; unless such decision or order has the effect of finally determining the suit⁴³⁷.

Resisting this preliminary objection, the appellants' counsel argued that the petition for stay of proceedings under the Arbitration Act was a suit in its own right; because the appellants were asserting a right arising out of the arbitration agreement to which both parties had agreed. For

435 Op. cit.

436 Cap. 15 R.E. 2002.

437 Section 5(2)(d) provides that: '(2) Notwithstanding the provision of Subsection (1)–(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit.'

that matter, the parties had agreed to refer disputes arising out of the contract to arbitration as prescribed in the arbitration clause under the contract. Therefore, it was the appellants' contention that the decision of the learned judge implying that the parties did not need to go to arbitration was not an interlocutory one. It finally determined the rights of the parties by circumventing the recourse to arbitration.

The sole issue before the Court of Appeal was, thus: what was the effect of the decision of the learned judge by refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration? *Inter alia*, the Court of Appeal quashed this preliminary objection, agreeing with the appellants that the petition for staying Civil Case No. 20 of 2002 pending a reference to arbitration was a suit within the meaning of section 5(2)(d) of the Appellate Jurisdiction Act (1979). Therefore, the Court of Appeal authoritatively held that,

In the present case, the decision of the learned judge refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in contracts for arbitration meaningless. They are meant to serve a purpose.

The implication of this decision is that where a dispute arises in relation to the execution of a contract which has an arbitration agreement, the dispute must first be referred to arbitration.

This requirement was given due weight in *Ashak Kabani & Another v Ayisi Makariani & 7 Others*⁴³⁸, where the High Court (Commercial Division) held that a party to proceedings before the court who wants to have a matter referred to arbitration must do so at the earliest stage possible 'and at any rate, before the filing of the Written Statement of Defence'. The court further held that, as it has been held in several cases, 'once a party files the Written Statement of Defence then that party already discloses its defence hence, entering into a contest with the adverse party and by so doing, invites the court to adjudicate.'

This judicial authority was derived from the view of Desai, J. in the Supreme Court of India's case of *Food Corp. of India v Yadov Engineer Contractors*⁴³⁹ where it was held that,

438 Op. cit.

439 (1982) AIR (SC) 1302 at 1307.

The legislature by making it mandatory on the party seeking [the] benefit of the arbitration agreement to apply for stay of the proceedings before filing the written statement or before taking any steps in the proceedings unmistakably pointed out that the filing of the written statement discloses such conduct on the part of the party as would unquestionably show that the party has abandoned its rights under the arbitration agreement and has disclosed an unequivocal intention to accept the forum of the court for the resolution of the dispute by waiving its right to get the dispute resolved by a forum contemplated by the arbitration agreement. When a party files written statement to the suit it discloses its defence, enters into a contest and invites the court to adjudicate upon the dispute, there is no question of then enforcing an arbitration agreement by forcing the parties to resort to the forum of their choice as set out in the arbitration agreement ...

In *Ashak Kabani & Another v Ayisi Makariani & 7 Others* the High Court held that section 6 of the Arbitration Act,

... requires a party to take appropriate steps for the recourse to arbitration before he files his Written Statement of Defence. There are several pre-requisites that should be complied with and or considered. The first such pre-requisite is the presence of a submission to arbitration inter-partes.

The High Court also held that under the Arbitration Act, such an application should be made by way of petition as provided for under Rule 5 of the Arbitration Rules (1957) which states, 'Save as is otherwise provided, all applications made under the Ordinance shall be made by way of petition.' The Court, thus, ordered a stay of all proceedings therein and operations of all orders made therein pending a reference to arbitration pursuant to clause 8 of the Joint Venture Agreement (JVA); clause 13 of the Lease Agreement (LA) and clause 13 of the Employment Agreement (EA).

9.3.3 Appointment of Arbitrators and Reference to an Arbitrator

As a universal rule, arbitrators are appointed in accordance with the provisions of the arbitration clause. As we have seen above, the Arbitration Act uses the expression submission to arbitration instead of arbitration clause. So, the appointment of an arbitrator under the Arbitration Act is provided for in section 5, which explicitly stipulates that,

5. Reference to arbitrator to be appointed by third person

The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein and an arbitrator may be designated either by name or as the holder for the time being of any office or appointment.

It should be noted, though, that as a rule of practice 'a sitting judge may not be appointed as an arbitrator'.⁴⁴⁰

Appointment under this law confers jurisdiction on the arbitrators, subject to other conditions in the Arbitration Clause, to enter upon the reference. If the Arbitration Agreement does not spell out the number of arbitrators, the arbitrator(s) will be appointed in accordance with the provisions of the Act. This is done through section 4, which contains provisions stating what matters may be implied in an Arbitration Agreement if the Agreement itself is silent on those matters. There may also be provided in an arbitration agreement the qualifications for persons to be appointed as arbitrators and the manner of their removal for any reason. The Act is silent on this point although it states that the Court may remove an arbitrator for misconduct, without defining what amounts to misconduct.

9.3.4 Powers and Roles of Arbitrators

The appointment of an arbitrator confers upon such arbitrator power to hear and determine the matter that has been referred to him or her. The Arbitrator is required to determine matters faithfully: i.e. *fairly, impartially and without fear or favour*. In respect of *faithfulness*, it can be stated that,

... sometimes Parties are under a mistaken belief that because the Arbitration Clause gives them power to appoint an arbitrator, that means that he is their Arbitrator in the Reference and so will act in

440 Kapinga, et al. Op. cit, p. 237.

*their interest. That is totally wrong. A party appoints an Arbitrator under the Arbitration Agreement because he believes that the Arbitrator so appointed has the requisite qualifications, such as education, training in a given field, experience as an arbitrator and unquestionable integrity.*⁴⁴¹

Once appointed, an Arbitrator belongs to the Arbitral Tribunal and not to any of the parties, and his or her duty is to determine the dispute fairly, justly, and without fear or favour. It should be noted that under the Tanzanian arbitration law and practice, a Party has the power to appoint an arbitrator; but he has no power to remove him or revoke his appointment.

Under the provisions of the Act, arbitrators have the powers:

- to appoint an umpire;
- to extend time for making an award;
- to examine witnesses under oath or affirmation;
- to require witnesses to produce books or documents, or anything in the party's possession;
- to order provision for costs of the arbitration and award; and
- to make an arbitral award.

Besides, they have power to *state a special case* to the High Court on any point of law, and power to *correct* in an award any clerical error or mistake arising from any slip of the pen or omission.

9.4 JURISDICTION OF AN ARBITRAL TRIBUNAL AND INITIATION OF ARBITRAL PROCEEDINGS

9.4.1 Jurisdiction of the Arbitral Tribunal

Once arbitrators have been duly constituted they will constitute an Arbitral Tribunal. Before it assumes its duties, functions and powers vested in it, the Arbitral Tribunal must have jurisdiction so to act. Accordingly, the jurisdiction of an arbitral tribunal 'may be defined as the extent to which, or the limits within which, such tribunal may exercise its powers, and what powers.'⁴⁴² The jurisdiction of an Arbitral Tribunal is conferred upon it by its appointment on the basis of the Arbitration

⁴⁴¹ Global Justice Solutions. Op. cit.

⁴⁴² See Chapter 11 of the ADR Manual set out in Global Justice Solutions. Ibid.

Agreement by the parties. In *Mvita Construction Co. v Tanzania Harbours Authority*⁴⁴³, the Court of Appeal of Tanzania held that,

Under the law of Tanzania, an arbitrator's authority, power and jurisdiction are founded on the agreement of the parties to a contract to submit present or future differences to arbitration.

Unless the parties' agreement provides otherwise, the arbitral tribunal has power to rule on its own substantive jurisdiction regarding,

- (a) *the existence or validity of the submission to arbitration clause or an arbitration agreement. In Tanzania Motor Services*⁴⁴⁴ *and in Mandani v Suchale*⁴⁴⁵ *it was held that where there is an arbitration clause in a contract, parties to that contract must first refer any dispute arising from its performance to arbitration;*
- (b) *whether or not the arbitral tribunal is properly constituted; and*
- (c) *arbitrability of the matter, that is, whether it is in accordance with the arbitration agreement.*

Similarly, the arbitral tribunal has jurisdiction to determine or rule whether or not it has exceeded its scope of authority. The tribunal also should determine the place of arbitration and the language of arbitral proceedings if these matters are not set out in the Arbitration Agreement. In Tanzania, the language of arbitration is normally English,⁴⁴⁶ although in some cases the oral proceedings may be conducted in Kiswahili and the records may be in English.

If a party wishes to raise an objection to the effect that the arbitral tribunal has no substantive jurisdiction, he must raise such objection within reasonable time. An objection that the tribunal is exceeding its authority must be made as soon as the matter alleged to be beyond the scope of the tribunal arises during the arbitral proceedings, though the arbitral tribunal may accept such a plea at a later stage if it considers, and must be satisfied, that the delay was justified.

In addition, under section 6 of the Arbitration Act, where a party to an arbitration agreement or a person claiming under him, commences legal proceedings against any other party to the arbitration agreement or any person claiming under him in respect of any matter agreed to be referred to arbitration, such party to the legal proceedings may,

443 Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 94 of 2001 (Unreported).

444 Op. cit.

445 (1971) HCD no. 10.

446 Kapinga, et al. Op. cit, p. 238.

at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings.⁴⁴⁷

If the court is 'satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.'⁴⁴⁸

9.4.2 Commencement/Initiation of Arbitral Proceedings

Both the Arbitration Act and the 1957 Arbitration Rules do not contain detailed guidelines on procedural matters such as how to commence arbitral proceedings, how to adduce evidence, how to conduct cross-examination of witnesses, or disclosure of documents or powers of the Arbitral Tribunal.⁴⁴⁹ So, the commencement of arbitral proceedings depends on the provisions of the Arbitration Clause or the rules (if any) applicable to the reference. Usually the arbitral proceedings are presumed to start when one of the parties notifies the other party that a dispute which has arisen between them should be referred to arbitration or if the party moves the appointing authority. Otherwise, Kapinga et al provide specific procedures on the commencement of arbitral proceedings:

- where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a [*sic*] notice in writing requiring him or them to submit that matter to the person so named or designated;
- where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter; and
- where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.⁴⁵⁰

447 See, for example, *Tanzania Motor Services*. Op. cit.

448 Kapinga, et al. Op. cit.

449 www.nortonrose.com. Op. cit.

450 Kapinga, et al. Op. cit.

9.4.3 Preliminary Meeting or Meeting of Directors

(a) Power to Convene a Preliminary Meeting or Meeting of Directors

Again, the procedure for the preliminary meeting is not set out in the Arbitration Act and the Arbitration Rules; but in the ADR Manual. According to the Manual, as soon as an arbitrator has been appointed and has duly accepted the appointment, she or he will call for a meeting: called a *Preliminary Meeting* or a *Meeting of Directions*. Present at that meeting will be the arbitrator, the parties and their representatives or advocates. The purpose of that meeting is to define and agree on:

- (i) procedures to be used in the Arbitration proceedings;
- (ii) timetable for various events;
- (iii) the venue;
- (iv) sitting times;
- (v) the manner of recording the evidence; and
- (vi) arbitrator's interim costs, and other incidental matters.

After that meeting, the arbitrator will issue what is called an *Order of Directions* to the parties. The Order of Directions to the parties sets out: (i) what was agreed at the meeting; and (ii) requires the Parties to abide by what was so agreed, including a timetable for presentation of pleadings, venue for the sittings of the Arbitral Tribunal, whether there is to be a "Scott's Schedule"⁴⁵¹ or not, whether the arbitration will be conducted by way or oral hearing or presentation of documents only. This is a direction as to the functional descriptions of activities or tasks which should be carried out or accomplished by the parties in the arbitration prior to the hearing (if there will be a hearing) in the arbitration.

(b) Agenda for the Preliminary Meeting

The ADR Manual contains details on the agenda for the Preliminary Meeting. Before the Preliminary Meeting, the arbitrator must prepare an Agenda for the Meeting, which should preferably be sent out to the Parties before the date of the meeting and may contain:

- (i) Ascertainment of the parties and their representation;
- (ii) Perusal of the original arbitration agreement;

451 The ADR Manual describes a Scott's Schedule as a process that takes place: 'Where a claim consists of large numbers of items each of which has a separate basis, it is convenient for the Arbitrator to have the pleadings summarized in the form of a schedule in which each item is taken separately and includes the contentions of both parties in relation to that item. Such a schedule is called The Scott Schedule.'

- (iii) Identification of Items in dispute (Issues);
- (iv) Whether or not parties want a reasoned award;
- (v) Timetable for presentation of pleadings;
- (vi) When discovery should take place;
- (vii) Whether there shall be an oral hearing or written presentations;
- (viii) Venue (or place of hearing) and procedure;
- (ix) Expert witnesses;
- (x) Communications with the arbitrator;
- (xi) Figures, plans, photographs and correspondence;
- (xii) Common bundle;
- (xiii) Transcript of hearing;
- (xiv) Arbitrator's interim costs;
- (xv) Scott Schedule;
- (xvi) Oath and Affirmation;
- (xvii) Textbooks and Law Reports or Periodicals.
- (xviii) Final speeches.
- (xix) Any other business (A.O.B.); and/or
- (xx) Close of meeting.

9.5 ETHICAL RULES FOR AN ARBITRATOR

Both the Arbitration Act and the Arbitration Rules do not set out rules of ethical conduct of arbitrators; rather they are detailed in the ADR Manual, which requires an arbitrator to refrain from sitting with one of the parties in the absence of the other party. So, when they come for a meeting, both parties must come in together. In the course of the meeting, such matters as whether or there should be a reasoned award, oral hearing or documents only, time within which to file pleadings, etc., should preferably be dealt with by consent of all parties.

According to the Manual, the arbitrator must also tell the parties that all correspondences to him by a party must be copied to the other party. As a matter of practice, telephone calls to the arbitrator should not be made by the parties unless it is unavoidable to do so. If the arbitrator has or has had any relationship or close relationship with any of the parties, their representatives, advisers, expert witnesses or close relations, this should be disclosed to the parties. If there is and any of the parties or the arbitrator himself feels distinctly uncomfortable about such relationship, then the arbitrator may have to withdraw from the arbitration.

The arbitrator must not accept any hospitality from either party even in the presence of the other party. This is so because, like justice in a court of law, arbitration must be rooted in confidence. As in court trials,

an arbitrator may visit the *locus in quo*; in consultation with parties and preferably before hearing commences. He may also ask the parties to suggest the date for hearing.

9.6 PLEADINGS

9.6.1 Applicable Law

As stated earlier, the Arbitration Act does not contain provisions regarding procedural and evidential matters for arbitration proceedings. For instance, there are no provisions regarding form and content of the statement of claim or the statement of defence, amendment of pleadings, representation, interlocutory orders, etc. Some arbitration institutions, such as the National Construction Council⁴⁵² and the Tanzania Institute of Arbitrators⁴⁵³ have their own house rules governing arbitral proceedings instituted under their umbrella. So, arbitral proceedings in Tanzania are conducted by using the provisions regulating civil cases under the CPC to a very large extent, *mutatis mutandis*.

9.6.2 Statement of Claim and Statement of Defence

As in judicial civil proceedings, the Statement of Claim or Points of Claim, Points of Defence, and Counter-claim are a means of informing each party what the case of the other party is, and are also a means of defining questions of fact or law to be determined by the Arbitral Tribunal. The form and contents of the Statement of Claim and Statement of Defence are set out herein below.

(a) Statement of Claim

The Statement of Claim should commence with a brief introduction of the Parties, and then should state the contract from which the dispute arises, its purpose and an outline of the respective responsibilities and rights of the parties.

It may then go on to summarize the particular clauses of the Contract relevant to the dispute and how they were breached, the

452 The National Construction Council is established under section 3 of the National Construction Council Act, Cap. 162 R.E. 2002. The NCC sponsors and facilitates arbitration in settling dispute within the construction industry.

453 The Tanzania Institute of Arbitrators is a non-governmental organisation (NGO) registered under the Societies Act, Cap. 337 R.E. 2002, inter alia, to generally facilitate arbitration in Tanzania. In conjunction with the NCC, TIA arranges short professional courses and examinations for arbitrators. They also have a compilation of practising arbitrators in Tanzania.

nature of damage suffered by the claimant as a result of the breach, and the relief sought by the claimant. In the case of a claim for special damages, like in ordinary civil pleadings, these must be expressly and specifically pleaded and the particulars thereof given.

(b) Statement of Defence

The Points of Defence should be framed more or less as an ordinary Written Statement of Defence in judicial proceedings. Care must be taken to specifically deny what is not admitted; otherwise it may be taken to have been admitted. The Statement of Claim must answer each and every allegation in the Statement of Claim. What is admitted should be clearly stated as this saves time. Evasive denials may be taken to be admissions. If it is desired to make fresh allegations, these may be included in the Points of Defence.

As a cover in case some points in the Statement of Claim have not been covered in the Points of Defence, many points of Defence, as in ordinary judicial pleadings, use a “blanket cover” of denial. It is, therefore, common to see such statements as,

*Save for matters expressly admitted herein, each and every allegation of facts contained in the Points of Claim are hereby denied as if the same were set out and traversed seriatim.*⁴⁵⁴

It is also open, as in judicial proceedings, to ask for further and better particulars if the Points of Claim do not sufficiently disclose basis of the claim. Besides, applications for amendment of pleadings are permitted and may be granted if sufficient reasons are given and the particular application should be made within reasonable time.

9.7 PROCEDURE IN ARBITRAL PROCEEDINGS AND COURT INTERVENTION

As already stated, the both the Arbitration Act and the Arbitration Rules do not provide for procedures in arbitral proceedings. But the ADR Manual details the procedures for arbitral proceedings as discussed herein below.

9.7.1 Party Autonomy

It is a principle of arbitration that arbitral proceedings must stay as far away from the courts as possible. After all, that is the universal basis of all ADR mechanisms. In arbitration, there is what is called “party autonomy”, which should be safeguarded as far as possible. So, the parties are at liberty

454 See the ADR Manual.

to choose the arbitrators as well as the rules of procedures, language, law applicable and location for the conduct of the arbitral proceedings.

9.7.2 Court Intervention

Although the general arbitration rule is that the parties have autonomy on how to conduct the arbitral proceedings, supportive court interventions sometimes become necessary. In principle, the intervention, 'supervisory powers and jurisdiction of the Tanzanian courts over ... arbitration proceedings are specifically provided by the statute (i.e. the Arbitration Act⁴⁵⁵ and section 95 of the Civil Procedure Code⁴⁵⁶).⁴⁵⁷ In certain cases, court intervention is allowed in arbitral proceedings: for instance, in summoning witnesses; and in citing and punishing for court contempt as set out below.

(a) Court's Power to Issue Summons to Witness in Arbitral Proceedings

Being an *ad hoc* body, an arbitral tribunal usually does not have power to issue summonses to witnesses. That power belongs to the court under both civil and criminal procedural laws. So, where an arbitral tribunal wants to summon an unwilling witness, the court has power to summon witnesses on behalf of an arbitral tribunal. To this end, section 13(1) of the Arbitration Act provides that,

(1) The court shall issue the same processes to the parties and any witness whom the arbitrator or umpire desires to examine as the court may issue in suits tried before it.

In case a witness is unwilling to testify in an Arbitral Tribunal, the tribunal may request the court to intervene whereby a summons would be issued to such witness. When such witness fails to appear in the tribunal as ordered by the court, the witness may be held liable for disobeying the court's summons.

(b) Court's Power to Cite and Punish for Contempt of an Arbitral Tribunal

The arbitral tribunal has no power to cite and punish for contempt – even if the contempt was committed before the tribunal with reference

455 Cap. 15 R.E. 2002.

456 Cap. 33 R.E. 2002.

457 *per* Mushi, J. in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

to it or its member(s). So, where a party to an arbitral tribunal or its witness has committed the offence of contempt of court (tribunal), the arbitral tribunal will refer the matter to a court of law to cite and punish the contempt or for his contempt of the arbitral tribunal⁴⁵⁸.

(c) Other Ancillary Court Interventions

The court has other occasions for intervening in the arbitral proceedings. For instance, unless an arbitration agreement provides otherwise, a court of law may issue interlocutory orders such as temporary injunctions, sale of goods which are the subject of arbitral proceedings, dealing with case stated, and execution of awards⁴⁵⁹, and hearing petitions challenging arbitral awards⁴⁶⁰.

In addition, the High Court has power under the Arbitration Act to intervene in arbitral proceedings as follows:

- Power to extend time for commencing arbitration proceedings⁴⁶¹;
- Power to appoint arbitrators, umpire or third arbitrators in certain cases⁴⁶²;
- Power to extend time for making an arbitral award⁴⁶³;
- Power to remit an arbitral award for reconsideration⁴⁶⁴; and
- Power to remove an arbitrator or umpire⁴⁶⁵.

9.7.3 Preliminaries to Hearing in Arbitral Proceedings

The Arbitration Act is silent as to the procedure to be followed in arbitration hearings and the applicable law on evidential matters. Neither Parliament nor the Court has made any rules for the same. It would appear that the idea was that those parties creating an arbitration agreement will provide for such a procedure. So, as in the case of pleadings, reliance is made on the provisions of the Civil Procedure Code.

(a) Attendance of parties and witnesses

Usually the arbitrator will inform the parties of the date(s) and place of hearing the matter either at the Preliminary Meeting or some

458 See section 13(2) of the Arbitration Act.

459 Ibid. Section 17.

460 Ibid. Section 16.

461 Ibid. Section 7.

462 Ibid. Section 8.

463 Ibid. Section 14.

464 Ibid. Section 15.

465 Ibid. Section 18.

subsequent date. Parties to the arbitral proceedings usually bring their own witnesses without requiring summons to attend. But if a Party does so desire, the court may issue a court summons for and on behalf of the Arbitral Tribunal.

(b) Privacy and Confidentiality

Essentially, arbitration is a private matter; and, thus, proceedings in arbitral tribunals are conducted in privacy or *in camera*. Although the arbitration law and its rules do not expressly provide for the principles of privacy and confidentiality, arbitration practice in Tanzania requires that only parties, their witnesses and advisers or representatives, and the arbitrator should participate in the arbitral proceedings. Other people may only participate in the arbitral proceedings with the consent of both parties and the arbitral tribunal itself.

(c) Sitting Arrangement and Addressing the Arbitral Tribunal

The place of arbitration or venue should be sufficient to accommodate all those involved in the process as well as for documents and drawings where applicable. The parties sit opposite to each other on long parallel tables while the arbitrator sits at a table at the other end facing the two tables. If they have advocates, whom they are allowed to have, they should sit with their advocates. At the opposite end will sit the witness testifying at a particular time. Accommodation is arranged by agreement between the parties, but an arbitrator must decline to use it if they are premises of one of the parties unless the other party has agreed.

9.7.4 Hearing in Arbitral Proceedings

The hearing procedure in arbitral proceedings is conducted in two ways: first, it may be conducted by filing documents only, in which case the parties or their advocates may present all relevant documents on which they rely and may further be asked to file submissions to elaborate them. Or, second, it may be by way of oral evidence; that is, where the parties will call witnesses who will be examined in the same way as in an ordinary court of law.

(a) Getting Started

Usually the arbitrator will start by briefly giving an outline of events leading to his appointment and acceptance, the arbitration agreement and the occurrence of the dispute. Thereafter, the claimant or his advocate will make an opening speech in which he introduces himself

and those on his side; and then gives a short background and nature of the dispute and the relief being claimed.

Thereafter, he starts to call his witnesses one after another. Each of these witnesses will *take the oath or affirm* to tell the truth and nothing but the truth. It should be noted that Christians must take oath, and others must affirm – just as in conventional courts of law.

(b) Examination of Witnesses: Claimant's Case

The examination of witnesses in arbitral tribunals is not different from examination of witnesses in a court of law. After taking the oath or affirming to tell the truth, a witness is examined first by the claimant or his advocate: i.e. the person for whom the witness is called to testify (i.e. examination-in-chief). Thereafter, the witness is cross-examined by the opposite party. At the end, the witness may be re-examined by the party calling the witness. After that process, the arbitrator too may ask questions if he or she so wishes. When the claimant has called all his witnesses, he or she will rest his case – i.e. he or she will inform the arbitral tribunal that his or her case has come to an end.

As in courts of law, the object of examination of witnesses in arbitral tribunals serves a purpose. That is, for examination-in-chief the object is to let the witness adduce material facts which he or she knows and which the case of the party calling him wholly depends. Thus, the party calling the witness must extract as much of the material facts in his or her favour as the witness knows or remembers. For cross-examination, the purpose is to test the accuracy and truthfulness of the witness, to destroy or weaken his or her evidence or show that the witness is unreliable, or to extract evidence that favours the cross-examining party. For re-examination, the object is to repair the damage done by cross-examination. This is the last opportunity a witness has to clarify on vague statements or apparent contradictions revealed in cross-examination⁴⁶⁶.

(c) Examination of Witnesses: The Respondent's Case

After the claimant's case is closed, the respondent or his/her advocate will open his or her case, in the same way as the claimant did, by making a short speech introducing himself or herself and those on his or her side, and then give a substance of the respondent's case. Thereafter, he or

466 Chipeta, B.D., *Civil Procedure in Tanzania: A Student's Manual*. Dar es Salaam: Dar es Salaam University Press, 2002, pp. 192-9.

she will start calling his or her witnesses who are examined in the same way as those for the claimant, *mutatis mutandis*.

(d) Taking Evidence

As there is no procedure for taking evidence of witnesses in the Arbitration Act and the Arbitration Rules, evidence of witnesses present in the arbitral tribunal must be taken on oath and orally in the presence and under personal direction of the presiding arbitrator(s). Like in courts of law⁴⁶⁷, evidence in an arbitral tribunal may be in narrative form, not necessarily in question-and-answer format, unless it is necessary to so record.

(e) Closing Speeches or Final Submissions

At the close of the respondent's case, that is, after all witnesses for the defence have been examined, the respondent or his or her advocate will make a closing speech in which he or she will highlight strong points in his or her favour and plays down the claimant's strong points while highlighting its weak points. Then the claimant or his advocate will make his or final speech also in which he or she will do the opposite of his or her opponent: he or she will highlight strong points in favour of the claimant and will play down the claimant's weak points while highlighting the respondent's weak points.

At the end of those final speeches or submissions, the arbitrator may either fix a date when the award will be made or published; or he or she may give some indication as to when it will be published.

9.8 THE ARBITRAL AWARD

9.8.1 Meaning of an Arbitral Award

An arbitral award simply means the final decision of the arbitrator or umpire in arbitral proceedings. It is in the nature of a judgment in a court of law, but it is usually in numbered paragraphs according to the issues considered and decided. Although there is no particular form of formulating an arbitral award, it must 'contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. The award shall further state the seat of the arbitration and the date when the award is made'⁴⁶⁸.

467 See particularly Order XVIII, rules 6 and 7 of the Civil Procedure Code, Cap. 33 R.E. 2002.

468 Kapinga, et al. Op. cit. P. 239.

9.8.2 Requisites of an Arbitral Award

The law and practice relating to arbitration in Tanzania requires that an arbitral award must:

- (i) resolve all issues;
- (ii) not contain extraneous issues which go beyond the jurisdiction of the arbitral tribunal or matters which were not referred to it;
- (iii) be final and unconditional;
- (iv) be certain and capable of performance by the parties and
- (v) be capable of enforcement by the parties.

Failure to meet any one of the foregoing criteria would amount to misconduct on the part of the arbitrator or umpire. That could be grounds for challenging the arbitral award. The award must be duly signed by the arbitrator(s) or umpire and the parties should be duly informed. Unless the parties had agreed otherwise, in Tanzania an arbitral award is final and binding upon the parties.⁴⁶⁹

9.8.3 Costs of Award and Interests

(a) Costs

In any judicial or quasi-judicial proceedings, there are considerable costs to be incurred by the parties and the presiding judicial officer. These kinds of costs would have not been incurred were the proceedings not initiated. As such, it is a cardinal rule of procedure that a successful party should be entitled to be awarded costs. So, in arbitral proceedings, the award usually contains an order for costs. As in court proceedings, costs generally follow the event; that is, that the successful party should be awarded costs, unless there is a compelling reason for departing from this general rule⁴⁷⁰. However, there is strict adherence to this cardinal rule in arbitral proceedings, as there is no rule obliging the arbitrator or umpire to condemn the loser to pay the costs alone or the splitting of the costs in any proportion.⁴⁷¹

As in court proceedings, the power to award costs in arbitral proceedings is the discretion⁴⁷² of the arbitrator(s) or umpire, 'who may

469 *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

470 See particularly *Reid Hewitt & Corp. v Joseph* (1981) A.C. 717.

471 Kapinga, et al. Op. cit. P. 239

472 In *Kiska Ltd. v de Angelis* (1969) E.A. 6, the court held that such discretion must be exercised judicially.

direct how and by whom those costs or any part thereof will be paid. In addition, he may tax or settle the amount of costs to be paid and may award costs to be paid between advocate and client.⁴⁷³

In the Tanzanian arbitration practice, costs in arbitration may be divided into two categories: costs of the reference and costs of the award. Costs of the reference are those expenses incurred in negotiation and settlement of the terms of the submission between the parties, especially expenses incurred by the parties or arbitrator, say in hiring an expert by an arbitral tribunal or hiring the venue of the arbitration, and costs of advocates. As stated earlier, costs in arbitration *follow the event*.

Costs of award are sums due to the arbitrator in respect of his remuneration and expenses. If these are not paid, the *arbitrator may decline* to deliver the award. They include the fees and expenses of the arbitrator and administrative costs. Assessment of costs in arbitration is usually done in the discretion of the arbitrator.

(b) Interest

Apart from awarding costs, an arbitral tribunal may also award interest, including compound interest; and generally speaking, an arbitral tribunal has power to direct by whom, to whom, and in what manner the costs should be paid. In addition the tribunal has discretionary power to order dates and rates of the interest to be paid, unless otherwise agreed by the parties.⁴⁷⁴ As such,

*The interest can be on the whole or part of any amount awarded by the tribunal and in respect of any period up to the date of the award. The tribunal may also award simple or compound interest on the outstanding amount of any award from the date of the award (or any later date) until payment, at such rates and with such interest as it considers appropriate. The normal interest is the commercial rate, or around 25 per cent of the value of the subject matter.*⁴⁷⁵

9.8.4 Correction of an Award

The arbitration practice in Tanzania allows an arbitral tribunal to correct any clerical mistake or error arising from accidental slip or omission in an arbitral award. This can be done on the arbitrator's own motion or on application by a party. This power can also be agreed upon by the parties during the preliminary agreements before arbitral

473 Kapinga, et al. Op. cit.

474 Ibid.

475 Ibid.

proceedings commence. In this respect, any 'correction of an award forms part of the award.'⁴⁷⁶ For instance, in *Dowans Holdings SA & Dowans Tanzania Ltd. v Tanzania Electric Supply CO. Ltd.*⁴⁷⁷ the International Court of Arbitration of the International Chamber of Commerce (ICC) on 13th December 2010 made an addendum to its award first issued on 15th November 2010.

9.8.5 Enforcement of Arbitral Awards

(a) Enforcement of Domestic Arbitral Awards

Ordinarily, a party against whom an arbitral award has been made should obey it without further ado. This is so because that is the purpose of an arbitral agreement. But, in many cases, unsuccessful parties do not do so; hence the need arises for the successful party to execute the award. Under the provisions of section 16 of the Arbitration Act, an arbitral award may be executed by a court of law; i.e. the High Court, as if it were *a decree of the court*. In *Mandani v Suchale*⁴⁷⁸ the court held that an arbitral award is a decree capable of being enforced in a court of law. In *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*,⁴⁷⁹ Mushi, J., held that: 'It is hereby ordered that in terms of sect. 17 of the Arbitration Act (Cap. 15, R.E. 2002), the ICC's Final Award filed in this court, be formally registered and should be a decree of this court and enforceable as such.' [Emphasis in the original text].

So, the successful party who is desirous of executing the award is required to request the arbitral tribunal to file the award or cause it to be filed in court under the Arbitration Rules of 1957. After paying the requisite fees and any other expenses of the arbitral tribunal, the tribunal will file the award or cause it to be filed in the court which will then execute it as an ordinary decree of the court – *if there is no petition challenging the validity of the award on any ground of misconduct by the arbitrator*.

(b) Enforcement of Foreign Arbitral Awards

In Tanzania, foreign arbitral awards can be enforced if there is a reciprocal enforcement of judgment or awards arrangements with the

476 Ibid.

477 International Court of Arbitration of the International Chamber of Commerce (ICC), at Dar es Salaam, Arbitration Case No. 15947 (Unreported).

478 (1971) HCD no. 10.

479 Op. cit. at pp. 88–9 of the typed judgment.

country in which it was awarded.⁴⁸⁰ According to section 29(2) of the Arbitration Act,

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings; and any reference in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

According to the Protocol on Arbitration Clauses of 1923 (Third Schedule to the Arbitration Act), contracting states, including Tanzania, are bound to recognize the validity of arbitration clauses agreed between parties across national borders. In the same vein, Tanzania is also bound by the 1927 Convention on the Execution of Foreign Arbitral Awards (Fourth Schedule to the Arbitration Act), which provides that:

*... an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.*⁴⁸¹

The 1927 Convention on the Execution of Foreign Arbitral Awards provides that in order to obtain such recognition or enforcement, it shall, further, be necessary,

- (a) *that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;*
- (b) *that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;*
- (c) *that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;*

⁴⁸⁰ www.nortonrose.com. Op. cit.

⁴⁸¹ Article I of the 1927 Convention on the Execution of Foreign Arbitral Awards (Fourth Schedule to the Arbitration Act).

- (d) *that the award has become final in the country in which it has been made in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;*
- (e) *that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.*⁴⁸²

In terms of Article 2 of the 1923 Convention on the Execution of Foreign Arbitral Awards, even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied,

- (a) *that the award has been annulled in the country in which it was made;*
- (b) *that the party against whom the award was made was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;*
- (c) *that the award does no deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.*

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Enforcement of foreign arbitral awards in Tanzania is also governed by the New York Convention. In the view of Justice Burton in *Dowans Holding SA & Dowans Tanzania Ltd. v Tanzania Electric Supply Co. Ltd*⁴⁸³,

*It is common ground that the intention of the New York Convention was to make enforcement of a Convention award more straightforward, and in particular to remove the previous necessity for a double exequatur*⁴⁸⁴ – i.e. the need, before a Convention award could be enforced in any

482 Ibid.

483 Op. cit.

484 *Exequatur* means leave for the enforcement.

other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration (as for example in the Indian Supreme Court decision of Oil & Natural Gas Commission v Western Company of Northern America AIR 1987 SC 674 ...) the arbitration had its seat in London was governed by Indian law.

In principle, the Geneva Convention insisted that a party seeking enforcement of an award had to prove that the award had become “final” in the country in which it was made. This meant that the said party had to make another application for leave to enforce an award in the country in which he sought enforcement, which yielded the system of “double *exequatur*” in the enforcement of international arbitral awards. This system was highly criticised at the New York Conference that adopted the New York Convention in 1958. At this conference two sets of criticism against the *double exequatur* system were raised. First, the acquisition of leave for enforcement in a country where the award was made was an unnecessary time-consuming hurdle, ‘especially since no enforcement was sought in that country.’⁴⁸⁵ Second, this requirement could result in delaying tactics ‘on the part of the respondent who could forestall the award becoming final by instituting setting aside procedures in the country in which the award was made.’⁴⁸⁶

Therefore, the New York Convention eliminated the “double *exequatur*” in two ways: first, by replacing the word “final” with the word “binding” in order to remove the need for acquiring leave for enforcement in the country of origin.⁴⁸⁷ And, second, by stating ‘it is no longer the party seeking enforcement of the award who has to prove that the award has become binding in the country in which the award is made; rather, the party against whom the enforcement is sought has to prove that the award has not become binding.’⁴⁸⁸ Under the New York Convention, a foreign arbitral award is binding if it is no longer open to an appeal in the country where it was made; and can, thus, be enforced in any country.

The execution or enforcement of a foreign arbitral award follows similar procedure as for domestic arbitral awards in the High Court.

485 Jan van den Berg, A., *The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation*. Kluwer Law International, 1981, p. 266.

486 Ibid.

487 See Article V(1)(e) of the New York Convention.

488 Jan van den Berg, Op. Cit. See also *Jose Muller A.G. v Sigval Bergesen*, Kluwer Arbitration ATF 108 lb 85 (JdT 1982 I 367).

9.8.6 Challenging an Arbitral Award

(a) Grounds for Challenging an Arbitral Award

Under the provisions of sections 15 and 16 of the Arbitration Act the court can interfere with the conduct of the arbitral proceedings and the ensuing award if it is satisfied that (i) there has been misconduct on the part of the arbitral tribunal; or (ii) that the award has been improperly procured by the respondents. Section 16 provides that,

‘Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award’ [Emphasis supplied].

As Mushi, J. held in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁴⁸⁹, the intervention by the court ‘is automatic, regardless of any clause in the arbitration agreement, which purports to oust or waive the jurisdiction of courts.’⁴⁹⁰ It should be noted, however, that such court intervention does not amount to an appeal against the decision of the arbitral tribunal because the law relating to arbitration in Tanzania does not provide for the right of appeal to the losing party.⁴⁹¹ It simply amounts to overturning of the arbitration outcome.

(i) The Test of Whether there is “Error on the Face of the Award”

The terms “misconduct” of the arbitrator and “improperly procured” award are not defined in the Arbitration Act and ‘worse still, the term is not defined elsewhere in Tanzanian statutes. In the circumstances, therefore, courts in Tanzania have quite often relied upon and have been influenced by views of other courts in the common law jurisdictions, which have had the opportunity of interpreting words, terms, phrases, or sections of law *in pari material* and in similar factual situations.’⁴⁹² One of the cases that has defined these terms is *D.B. Shapriya & Co Ltd v Bish International BV*⁴⁹³ where

489 High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported).

490 See also the English case of *Zarmikow v Roth Schmidt & Co.* (1922) 2 KB 478.

491 *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*. Op. cit.

492 *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*. Op. cit.

493 (No 2) [2003] 2 East Africa Law Rep 404 (HCT).

Msumi, J. (as he then was) held that since the Tanzanian Arbitration Act is based on the English Arbitration Act of 1889, English authorities as to the true meaning of these terms are highly relevant to the construction of these terms in Tanzania. As such, in the English case of *Taylor & Son Ltd. v Barnett Trading Co.*⁴⁹⁴ it was held that,

... an arbitrator is guilty of "misconduct" if he knows or recognises that a contract is illegal and thereafter proceeds to make an award upon a dispute arising under the contract. [Emphasis supplied].

Based on this definition, Mushi, J. in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁴⁹⁵ held that,

... a misconduct is an irregularity in the course of conducting an arbitration and if it is capable of affecting the results of the proceedings, then [court] intervention is not only justified but also necessary.

In Tanzania, therefore, circumstances enumerating these grounds usually include the following,

- (i) *failure to deal with all issues in the reference;*
- (ii) *failure to conduct the arbitral proceedings in accordance with the procedure agreed upon by the parties;*
- (iii) *taking into account extraneous matters;*
- (iv) *bribery or corruption;*
- (v) *ambiguity or uncertainty of the award;*
- (vi) *negligent conduct of the proceedings by the arbitrator; and*
- (vii) *failure to comply with rules of natural justice, such as hearing one party on a substantive matter in the absence of the other party.*

These grounds of challenging an arbitral awards are premised in an "old" test⁴⁹⁶ with regard to whether there is "error on the face of the award", by reference to the provisions of section 16 of the Arbitration Act. Referring to the decision of the English

494 (1953) 1 WLR. 563.

495 Op. cit.

496 This test is discussed at length in *Dowans Holding SA & Dowans Tanzania Ltd. v Tanzania Electric Supply Co. Ltd.* [2011] EWHC 1957 (Comm) and *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*. Op. cit.

Court of Appeal in *Moran v Lloyd*⁴⁹⁷, Mushi, J. held in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁴⁹⁸ that,

*... an arbitrator does not misconduct himself or the proceedings merely because he makes an error of fact or of law, unless it appears "on the face of the award", or where the question of law was raised by special case stated for the opinion of the court, which is the only occasion an error of law could be used to justify the intervention of the court with the proceedings of an arbitrator.*⁴⁹⁹ [Emphasis in the original text]

Upjohn, J. held in *Terson Limited v Stevenage Development Corporation*⁵⁰⁰ that if there is no misconduct then there will be no error of law on the face of the award, 'or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed, in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law as long as any mistake of law does not appear on the face of the award.' The test of "error of law on the face of award" was described in *Champsey Bhara & Co. v Kuvraj Ballow SPG & WVG Co. Ltd.*⁵⁰¹ as an 'erroneous legal proposition stated in the award and which forms its basis.' In that case, the court further held that,

*... an error of law on the face of the award means, in their Lordships' view, that you can find it in the award or a document actually incorporated thereto, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can say it is erroneous.*⁵⁰²

497 [1983] 2 All ER 200.

498 Op. cit.

499 In the English case of *Terson Limited v Stevenage Development Corporation* [1963] 3 All ER 863, the Court of Appeal of England outlined the circumstances in which a court may interfere with the misconduct of an arbitral tribunal, which include (a) if an arbitrator is guilty of misconduct; (b) if the award contains "an error of law on its face"; and (c) if a special case stated on a question of law, where the court will determine the question of law within the framework of the particular special case.

500 Ibid.

501 (1923) AC 480.

502 See also *CEQB Ltd. v SDC* [1983] TLR 13.

(ii) Exception to the “Error on the Face of the Award” Test

The general rule that courts can set aside an award if it contains an “error of law on the face of the award” does not apply if the point of law in question has been specifically referred to the arbitral tribunal for determination. This exception was developed by the House of Lords in *F.R. Absalom Ltd. v Great Western (London) Garden Village Society*⁵⁰³ and applied in the Indian Supreme Court in *Alopi Parshad & Sons Ltd. v Union of India*⁵⁰⁴. It has also been canvassed by the recent Tanzanian cases of *D.B. Shapriya & Co. Ltd. v Bish International BV*⁵⁰⁵ and *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁵⁰⁶ as well as the recent English decision in *Dowans Holding SA & Dowans Tanzania Ltd. v Tanzania Electric Supply Co. Ltd.*⁵⁰⁷ This exception is to the effect that where specific questions concerning error on the face of the award are submitted to the arbitrator for his decision, his decision on the issues could not be interfered with merely on the ground of its being wrong.⁵⁰⁸

The “old” test of entitlement to challenge an arbitral award by reference to error on the face of the award has been subjected to a “modern” approach adopted internationally in the context of the New York Convention. In modern international arbitration law, and in the context of the Tanzanian High Court decision in *Shapriya*, Tanzanian courts should have ‘full regard to the international approach to the undesirability of interfering with the careful decisions by arbitrators on issues which, by virtue of an arbitration agreement such as in this case, have been referred to those arbitrators in order for them to make a final and binding decision.’⁵⁰⁹ In the phraseology of Mushi, J. in *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*⁵¹⁰,

503 [1933] AC 592.

504 AIR 1960 SC 588.

505 (No 2) [2003] 2 East Africa Law Rep 404 (HCT).

506 Op. cit.

507 Op. cit.

508 See particularly *Government of Kelantan v Duff Development Co.* [1923] AC 396 and *F.R. Absalom Ltd. v Great Western (London) Garden Village Society*. Op. cit.

509 per Justice Burton in *Dowans Holding SA & Dowans Tanzania Ltd. v Tanzania Electric Supply Co. Ltd.* Op. cit, para 42.

510 Op. cit.

The rationale [of this exception] is that, in such circumstances, the parties have agreed between themselves that the tribunal, and not the court, should resolve the relevant question of law, and therefore, the court cannot interfere with the tribunal's conclusion, even if it takes a different view of the law. [Emphasis in the original text].

In addition, this rationale is premised in the well-established principle of law underlying both the Tanzania Civil Procedure Code and the Arbitration Act to the effect that it is public policy that litigation (including arbitration) should come to finality by avoiding unnecessary delays and re-opening or re-arguing of issues already resolved by a tribunal or court of law.⁵¹¹ This principle is clearly elaborated in the following regards,

... just as an award prevents a party from raising a second time a claim on which he has succeeded, so also the award prevents him from disputing a second time an issue he has failed. The losing party cannot be permitted to try again, just because he believes that on the second occasion he may have a more sympathetic tribunal, more convincing witnesses, or a better advocate. There must be an end to disputes.⁵¹²

In *Shapriya* one of the issues that the arbitrator had been asked to determine was relating to construction of a statute thus: 'whether the assumption of a position of an architect under the contract by the Respondent which is not registered as an architect under the Architects, Quantity Surveyors and Building Contractors Regulation Act, Number 35 of 1972, was irregular and/or unlawful.' In the High Court, the petitioners sought to challenge the arbitrator's conclusion in relation to this issue. Msumi, J. (as he then was) held that they were not entitled to do so on the basis of the principle that it is not open to an unsuccessful party to challenge the arbitrator's conclusion on a point of law that had been specifically referred to him for decision. It was his Lordship's view that, rather than submitting it to the arbitrator, the issue ought to have been referred to the High Court for its opinion by way of special stated case.

511 *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*. Op. cit. See also *Christ for All Nations v Apollo Insurance* (2002) E.A. 366.

512 Mustill, M.J. and S.C. Boyd, *Commercial Arbitration*. London. 2nd edn. Butterworths, 1989, p. 413.

The principle that the court will not interfere with the finding of the arbitral tribunal on question of law that was referred to it for decision applies even where the court is of the opinion that the decision of the arbitral tribunal on that matter was wrong.⁵¹³

(b) Procedure in Challenging an Arbitral Award

The procedure for challenging an arbitral award is set out in section 8 of the Arbitration Rules (1957).⁵¹⁴ Under this rule, the challenge against any arbitral award must be initiated by a petition accompanied, as an annexure, by the submission to arbitration clause or the arbitration agreement contained in the contract from which a dispute arose. The arbitral award also must be annexed to the petition. The rule categorically provides that,

8. Every Petition shall have annexed to it the submission, the award or the special case, to which the Petition relates, or a copy of it certified by the Petitioner or his advocate to be a true copy.

The wording of this rule indicates that non-compliance with the requirements of the rule is fatal. This was also the view of the court in *Legal and Human Rights Centre* and in *Dev. Bank v Blue Line Enterprises Ltd.*⁵¹⁵ In *Legal and Human Rights Centre*, the court held that: 'It is enough to state that the compliance with the provisions of Rule 8 is mandatory.'⁵¹⁶ Failure to comply with this requirement renders the petition fatally defective. In *Legal and Human Rights Centre*, for instance, the High Court dismissed the Petition for, *inter alia*, failing to attach thereto the submission and the award made by the arbitral tribunal. In this case, the High Court held that,

513 See particularly *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*, op. cit; and *W.J. Tame Ltd. v Zagarits Estate Ltd.* (1960) E.A. 370.

514 Cap. 15, Subsidiary Legislation, R.E. 2002.

515 Misc. Civil Cause No. 32 of 2003. Quoted in *Legal and Human Rights Centre & 3 Others v Dowans Tanzania Ltd. & 2 Others*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8 of 2011 (Unreported) [Ruling dated 6th September 2011]. p. 43.

516 Ibid.

*The purpose of [annexing to the petition] the submission and the award is to enable the court to ascertain that the Petition is within the scope of the Arbitration Agreement or the arbitration itself, or matters [at] issue between the parties, or whether the award interferes with the rights of strangers, such as the Petitioners in this matter.*⁵¹⁷

As the High Court opined in *Legal and Human Rights Centre*,

*'the display of the submission or the award to the Petition is important and essential to show that the court has jurisdiction to do what it is asked to do.'*⁵¹⁸

For any person to challenge an arbitral award on any of the listed grounds, such person must indicate that he or she has *locus standi*⁵¹⁹ to do so. In *Legal and Human Rights Centre*⁵²⁰, the High Court held that the Arbitration Act 'contemplates that only the parties to an arbitration agreement and the subsequent award may approach the court for relief arising out of any given arbitration ...'⁵²¹ This implies that the arbitration law in Tanzania does not anticipate or allow any third party or a stranger to any arbitral proceedings to intervene for the purpose of obtaining any relief arising from such proceedings.

For the doctrine of *locus standi* to be successfully established, the plaintiff must plead facts indicating the interest or rights he or she asserts to have been infringed by the would-be defendant or respondent. In the view of the *Lujuna Ballonzi* and *Legal and Human Rights Centre's* decisions, 'it is clear that, whether or not a right or interest is one of

517 Ibid.

518 Ibid.

519 The definition and application of the doctrine of *locus standi* in Tanzania was eloquently expounded by Samatta, JK (as he then was) in *Lujuna Shubi Ballonzi (Senior) v Registered Trustee of Chama cha Mapinduzi* [1996] TLR 203. In the phraseology of Justice Samatta, 'in order to maintain proceedings successfully, a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court. ... Courts do not have power to determine issues of general interest. ... They can only accord protection to interests which are regarded as being entitled to legal recognition. ... To maintain an action before it a litigant must assert interference with or deprivation of, or threat of interference or deprivation of, a right or interest which the law takes cognizance of'. Before this decision was made, the Court of Appeal of Tanzania had defined *locus standi* in *John Byombalirwa v Agency Maritime International (Tanzania) Ltd.* [1993] TLR 1, to mean the essential facts which it is necessary for the plaintiff to prove before he succeed[s] in the suit. See also *Legal and Human Rights Centre & 3 Others v Dowans Tanzania Ltd. & 2 Others*. Ibid.

520 Ibid.

521 Ibid, p. 20 of the typed Ruling.

public in nature or otherwise, it must be clearly pleaded, and it is not a matter to be perceived impliedly.⁵²² Viewed in this context, therefore, 'the issue is not about one having personal or public interest, but rather, it is about disclosure in the petition of material facts that give the petitioners a right or interest in the matter which the law takes cognizance.'⁵²³ In *Legal and Human Rights Centre*, for example, the High Court dismissed the Petition for, *inter alia*, failing to clearly plead facts indicating the petitioners' rights or interests to be affected by the execution of the award made by the arbitral tribunal.

(c) Remedies Available in Challenging an Arbitral Award

Remedies which are available in challenging an award are usually in the following forms:

- (i) setting aside the award under section 16 of the Arbitration Act;
- (ii) remitting the award to the arbitrator under section 15 of the Arbitration Act for re-consideration⁵²⁴; or
- (iii) declaring the award to be of no effect either in whole or in part.⁵²⁵

Declaring an award to be of no effect or setting it aside has the effect, in fact, of allowing the petition with the result that the winner in the Arbitral Tribunal loses completely. Remitting an award happens where the court remits the award to the arbitrator for reconsideration by him.

522 Ibid, p. 37.

523 Ibid.

524 See particularly *King v Thomas McKenna Ltd* (1991) 1 All ER 653 and *CRDB Bank Ltd. v The Government of the United Republic of Tanzania*, High Court of Tanzania at Dar es Salaam, Misc. Cause No. 34 of 2007 (Unreported). In these cases it was held that an arbitral award can be remitted to the arbitrator for reconsideration where it is established that: (i) due to some clear error in calculation, mishap or misunderstanding, some aspects of the dispute have not been considered and adjudicated upon as fully as or in the manner that the parties were entitled to expect; and, (ii) it would be inequitable to allow an award to take effect without some further consideration by the arbitrators.

525 *Tanzania Electric Supply Co. Ltd. v Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)*. Op. cit.

Appendix 1

Geneva Protocol, 1923

PROTOCOL ON ARBITRATION CLAUSES

(Signed at a Meeting of the Assembly of the League of Nations held on the Twenty-Fourth Day of September, Nineteen Hundred and Twenty-three)

.....
The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:—

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.
4. The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

1. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.
2. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.
3. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date of which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.
4. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the under-mentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

Appendix 2

Geneva Convention, 1927

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS

(Signed at Geneva on the Twenty-Sixth Day of September, Nineteen Hundred
And Twenty-Seven)

ARTICLE 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:—

- (a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:—

- (a) That the award has been annulled in the country in which it was made;
- (b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;
- (c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular:—

- (1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;
- (2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made;
- (3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2(a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923.

ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect in the case of each High Contracting Party, three months after the deposit of the ratifications on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9

The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

ARTICLE 10

The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

Appendix 3

United Nations Convention on The Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)

ARTICLE I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

ARTICLE II

1. Each Contracting State shall recognize 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.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

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

ARTICLE III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied

upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

ARTICLE IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

ARTICLE V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference 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 decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

ARTICLE VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

ARTICLE VII

- 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.
- 2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

ARTICLE VIII

- 1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.
- 2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

ARTICLE IX

- 1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

ARTICLE X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.
2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.
3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

ARTICLE XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

ARTICLE XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

ARTICLE XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition and enforcement proceedings have been instituted before the denunciation takes effect.

ARTICLE XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

ARTICLE XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

ARTICLE XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix 4

THE ARBITRATION ACT (Cap. 15 R.E. 2002)

ARRANGEMENT OF SECTIONS

PART I

Preliminary Provisions

1. Short title.
2. Interpretation.

PART II

General Provisions Relating to Arbitration by consent out of Court

3. Application of Part II.
4. Provisions implied in submission.
5. Reference to arbitrator to be appointed by third person.
6. Power to stay proceedings where there is a submission.
7. Powers of court to extend time for commencing arbitration proceedings.
8. Power of the court in certain cases to appoint an arbitrator, umpire or third arbitrator.
9. Power of parties in certain cases to fill vacancy.
10. Power as to appointment of arbitrators where submission provides for three arbitrators.
11. Power of arbitrator or umpire.
12. Award to be signed and filed.
13. Process to summon witnesses.
14. Power of court to extend time for making award.
15. Power to remit award.
16. Power to set aside award.
17. Award when filed to be enforceable as a decree.
18. Power to remove arbitrator or umpire.
19. Costs.
20. Forms.
21. Power of High Court to make rules.
22. Application of Part II to Government.
- 23.–24. [Omitted.]
25. Application to statutory arbitration.
26. [Transitional provisions.]

PART III

Provisions Relating to The Protocol Set Forth
in the Third Schedule

27. Staying of court proceedings in respect of matters to be referred to arbitration under agreements relating to submission to arbitration.

PART IV

Provisions Relating to the Convention Set Forth
in the Fourth Schedule

28. Application of Part IV.
29. Effect of foreign awards.
30. Conditions for enforcement of foreign awards.
31. Evidence.
32. Meaning of "final award".
33. [Transitional provisions.]

SCHEDULES

CHAPTER 15

THE ARBITRATION ACT

An Act to provide for arbitration of disputes.

[22nd May, 1931]

(Ords. Nos. 26 of 1931; 32 of 1932; Act No. 10 of 1971)

PART I

Preliminary Provisions (ss 1–2)

1. Short title

This Act may be cited as the Arbitration Act.

2. Interpretation

In this Act, unless the context otherwise requires—

"the court" means the High Court;

"submission" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.

PART II

General Provisions Relating to Arbitration
by Consent out of Court (ss 3–26)

3. Application of Part II

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

Provided that in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the President may, with the concurrence of the Chief Justice, confer the powers vested in the court by this

Part either upon all subordinate courts or any particular subordinate court or class of court.

4. Provisions implied in submission

Unless a different intention is expressed therein a submission shall be irrevocable, except by leave of the court, and shall be deemed to include the provisions set forth in the First Schedule hereto, in so far as they are applicable to the reference under submission.

5. Reference to arbitrator to be appointed by third person

The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein and an arbitrator may be designated either by name or as the holder for the time being of any office or appointment.

6. Power to stay proceedings where there is a submission

Where a party to a submission to which this Part applies, or a person claiming under him, commences legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings.

7. Powers of court to extend time for commencing arbitration proceedings*

(1) Where the terms of an agreement to refer future disputes to arbitration provide that any claim to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step is taken within the time fixed by the agreement and a dispute arises to which the agreement applies, the court, if it is of the opinion that the circumstances of the case hardship would otherwise be caused and notwithstanding that the time so fixed has expired may, on such terms, if any, as it may consider just, extend the time for the period as it thinks proper.

(2) The provisions of subsection (1) shall be without prejudice to any written law limiting the time for the commencement of arbitration proceedings.

8. Power of the court in certain cases to appoint an arbitrator, umpire or third arbitrator

(1) In any of the following cases—

- (a) where a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

- (b) if an appointed arbitrator neglects or refuses to act or is incapable of acting the vacancy should not be filled and the parties do not fill the vacancy;
 - (c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him;
 - (d) where an appointed umpire or third arbitrator refuses to act or is incapable of acting or dies or is removed and the submission does not show that it was intended that the vacancy should not be filled, and the parties or arbitrators do not fill the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.
- (2) If the appointment is not made within seven clear days after the service of the notice, the court may, on application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator who shall have the like powers to act in the reference and to make an award as if he had been appointed by consent of all parties.

9. Power of parties in certain cases to fill vacancy

Where a submission provides that the reference shall be to two arbitrators, one to be appointed by each party, unless a different intention is expressed therein—

- (a) if either of the appointed arbitrators refuses to act or is incapable of acting or dies or is removed, the party who appointed him may appoint a new arbitrator in his place;
- (b) if, on such a reference, one party fails to appoint an arbitrator either originally or by way of substitution for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference and his award shall be binding on both parties as if he had been appointed by consent:
- (c) Provided that the court may set aside any appointment made under this paragraph.

10. Power as to appointment of arbitrators where submission provides for three arbitrators

(1) Where a submission provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, unless the submission expresses a contrary intention—

- (a) if one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the

reference and the award of the arbitrator so appointed shall be binding on both parties as if he had been appointed by consent.

- (b) if after each party has appointed an arbitrator the two arbitrators appointed fail to appoint a third arbitrator within seven clear days after the service by either party of a notice upon them to make the appointment, the court may, on an application by the party who gave the notice, exercise in the place of the two arbitrators the power of appointing the third arbitrator;
 - (c) if an arbitrator appointed either by one of the parties or by the arbitrators or by the court refuses to act or is incapable of acting or dies, a new arbitrator may be appointed in his place by the party, arbitrators or court, as the case may be.
- (2) The court may set aside any appointment of a person to act as sole arbitrator made under this section.

11. Power of arbitrator or umpire

The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein, have power—

- (a) to administer oaths to the parties and witnesses appearing;
- (b) to state a special case for the opinion of the court on any question of law involved; and
- (c) to correct in an award any clerical mistake or error arising from any accidental slip or omission.

12. Award to be signed and filed

(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, to be filed in the court; and notice of the filing shall be given to the parties by the arbitrators or umpire.

(3) Where the arbitrators or umpire state a special case under paragraph (b) of section 10, the court shall deliver its opinion thereon and the opinion shall be added to, and shall form part of, the award.

13. Process to summon witnesses

(1) The court shall issue the same processes to the parties and any witness whom the arbitrator or umpire desires to examine as the court may issue in suits tried before it.

(2) Persons not attending in accordance with such process or making any other default or refusing to give their evidence or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred shall be subject to the like disadvantages, penalties and punishments by order of the court on the

representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the court.

14. Power of court to extend time for making award

The time for making an award may, from time to time, be extended by order of the court whether the time for making the award has expired or not.

15. Power to remit award

(1) The court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award.

16. Power to set aside award

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

17. Award when filed to be enforceable as a decree

(1) An award on a submission on being filed in the court in accordance with this Act shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside, be enforceable as if it were a decree of the court.

(2) An award may be conditional or in the alternative.

18. Power to remove arbitrator or umpire

Where an arbitrator or umpire commits any misconduct, the court may remove him.

19. Costs

Any order made by the court may be made on such terms as to costs or otherwise as the court thinks fit.

20. Forms

The Minister responsible for legal affairs may make Regulations for the purposes of this Act and may amend the Second Schedule.

21. Power of High Court to make rules

The High Court may make rules as to—

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

22. Application of Part II to Government

This Part shall apply to a submission of or an arbitration to which the Government of the United Republic is a party.

[Ss 23 to 24. Omitted]

25. Application to statutory arbitration

This Part shall apply to arbitrations under any law in force before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Part is inconsistent with that law in relation to its provisions regulating arbitration or with any rules or procedure authorised or recognised by that law.

26. Transitional provisions

[Transitional provisions.]

PART III

Provisions Relating to the Protocol Set Forth
in the Third Schedule

27. Staying of court proceedings in respect of matters to be referred to arbitration under agreements relating to submission to arbitration
Notwithstanding anything in Part II, if any party to a submission made in pursuance of an agreement to which the Protocol on Arbitration Clauses of 1923 which is set forth in the Third Schedule hereto applies or any person commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to these legal proceedings may, at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings apply to that court to stay the proceedings and that court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

PART IV

Provisions Relating to the Convention Set Forth
in the Fourth Schedule (ss 28–33)

28. Application of Part IV

- (1) The provisions of this Part apply to any award made after 28th July, 1924—
- (a) in pursuance of an agreement for arbitration to which the Protocol set out in the Third Schedule applies; and
 - (b) between persons who are subject to the jurisdiction of any State which is a party to the Convention on the Execution of Foreign Arbitral Awards which Convention is set out in the Fourth Schedule to this Act; and an award to which the provisions of this Part apply, is in this Part referred to as “a foreign award”.

(2) This Part shall not apply to any award made on an arbitration agreement governed by the law of Tanzania.

29. Effect of foreign awards

(1) A foreign award shall, subject to the provisions of this Part, be enforceable in the High Court either by action or under the provisions of section 16 of this Act.

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings; and any reference in this Part to enforcing a foreign award shall be construed as including references to relying on an award.

30. Conditions for enforcement of foreign awards

(1) In order that a foreign award may be enforceable under this Part, it must—

- (a) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) have been made by the tribunal provided for in the agreement or constituted in a manner agreed upon by the parties;
- (c) have been made in conformity with the law governing the arbitration procedure;
- (d) have become final in the country in which it was made; and
- (e) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania, and its enforcement must not be contrary to the public policy or the law of Tanzania.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part if the court is satisfied that—

- (a) the award has been annulled in the country in which it was made; or
- (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented; or
- (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration;
- (d) Provided that if the award does not deal with all the questions referred the court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b) and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section entitling him to contest the validity of the award the court may, if it thinks fit, either

refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

31. Evidence

(1) The party seeking to enforce a foreign award must produce—

- (a) the original award or its copy duly authenticated in the manner required by the law of the country in which it was made;
- (b) evidence proving that the award has become final; and
- (c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of subsection (1) of section 29 are satisfied.

(2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of Tanzania.

(3) Subject to the provisions of this section the court may make rules with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part.

32. Meaning of “final award”

For the purposes of this Part an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

33. Transitional provisions

[Transitional provisions.]

FIRST SCHEDULE

Provisions to be Implied in Submissions

(Section 4)

1. If no other mode of reference is provided, the reference shall be to a single arbitrator.
2. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.
3. The arbitrators shall make their award in writing within three 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, in writing signed by them may, from time to time, extend the time for making the award.
4. If the arbitrators have allowed their time or extended time to expire without making an award or have delivered to any party to the submission or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.
5. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, in writing signed by him may, from time to time, extend the time for making his award.
6. Subject to any legal objection, the parties to the reference and all persons claiming through them respectively shall, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power which may be required or called for and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.
7. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.
8. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.
9. The cost of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to and by whom and in what manner those costs or any part thereof shall be paid and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between advocate and client.

SECOND SCHEDULE

Forms

FORM 1

Submission to Arbitration

THE ARBITRATION ACT

(Section 20)

In the matter of the Arbitration Act

Whereas differences have arisen and are still subsisting between A. B. of
 and C. D. of concerning

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in
 difference to the arbitration of X. Y.

(Signed) A. B.

C. D.

Dated 20...

FORM 2

Appointment of Arbitration
 under Agreement to refer Future Differences to Arbitration

THE ARBITRATION ACT

In the matter of the Arbitration Act

Whereas by an agreement in writing dated the day of,
 and made between A. B. of and C. D. of, it is provided
 that differences between the parties shall be referred to an arbitrator as
 therein mentioned.

And whereas differences within the meaning of the said agreement have arisen
 and are still subsisting between the parties concerning

Now we, the parties, A. B. and C. D., do hereby refer the matters in difference to the
 arbitration award of X. Y.

(Signed) A. B.

C. D.

Dated 20...

FORM 3

Extension of Time by Arbitrator by Endorsement on Submission

THE ARBITRATION ACT

In the matter of the Arbitration Act, and an arbitration between A.B., of
and C. D., of
I hereby extend the time of making my award in respect of the matters in difference
referred to me until the day of 20..
Dated

(Signed) X. Y.
Arbitrator

FORM 4

Case Stated for Opinion of Court

THE ARBITRATION ACT

In the matter of the Arbitration Act and an arbitration between A. B., of
and C. D., of
The following special case is, pursuant to the provisions of paragraph (b) of
section 10 of the Act, stated for the opinion of the High Court (Here state
the facts concisely in numbered paragraphs).
The questions of law for the opinion of the court are:-
First, whether
.....
Secondly, whether
.....

Dated (Signed) X. Y.
Arbitrator

FORM 5

Award

THE ARBITRATION ACT

In the matter of the Arbitration Act and an arbitration between A. B. of,
and C. D., of

Whereas, in pursuance of an agreement in writing dated the day
of 20..., made between A. B. of and C. D. of, A. B.
and C. D. have referred to me, X. Y., the matters in difference between them
concerning
.....
.....

Now I, X. Y., having duly considered the matters submitted to me, do hereby make
an award as follows:—

I award:—

(1) That
.....
.....
.....

(2) That
.....
.....
.....

(Signed) X. Y.
Arbitrator
Dated 20...

THIRD SCHEDULE

Protocol on Arbitration Clauses

(Section 27)

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place. The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The tribunals of the Contracting Parties on being seized of a dispute regarding a contract made between persons to whom article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all signatory States.

6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date on which

it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

* Act No. 10 of 1971 (2nd Schedule).

FOURTH SCHEDULE

Convention on The Execution of Foreign Arbitral Awards

(Section 28)

ARTICLE I

In the territories of any High Contracting party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary—

- (a) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;
- (b) that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;
- (c) that the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;
- (d) that the award has become final in the country in which it has been made in the sense that it will not be considered as such if it is open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;
- (e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

ARTICLE 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied—

- (a) that the award has been annulled in the country in which it was made;
- (b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented;

- (c) that the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

ARTICLE 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a court of law, the court may if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

ARTICLE 4

The party relying upon an award or claiming its enforcement must supply, in particular—

- (a) the original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;
- (b) documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made;
- (c) when necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2(a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article in the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

ARTICLE 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law, or the law or the treaties of the country where such award is sought to be relied upon.

ARTICLE 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923.

ARTICLE 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified. It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified. Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

ARTICLE 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter it shall take effect, in the case of each High Contracting Party three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

ARTICLE 9

The present Convention may be denounced on behalf of any Member of the league or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it. The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations. The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

ARTICLE 10

The present Convention does not apply to the colonies, protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned. The application of this Convention to one or more of such colonies, protectorates or territories to which the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the league of Nations by one of the High Contracting Parties. Such declaration shall take effect three months after the deposit thereof. The High Contracting Parties can at any time denounce the Convention for all or any of the colonies, protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

ARTICLE 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the league of Nations to every Member of the league of Nations and to every non-Member State which signs the same.

Appendix 5

CIVIL PROCEDURE CODE (CAP. 33 R.E. 2002)

THE SECOND SCHEDULE

ARBITRATION

ARBITRATION IN SUITS

1.-(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

3.-(1) The court shall, by order, refer to the arbitrator the matter reference in, difference which he is required to determine, and shall fix such time as it, thinks reasonable for the making of the award, and, shall specify such time in the order.

(2) Where a matter referred to arbitration, the court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

4.-(1) Where the reference is to two or more, arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire; or,
- (b) declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by, empowering-the arbitrators to appoint an umpire, or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the court may determine.

(2) Where an umpire is appointed, the court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

5.-(1) In any of the following cases, namely:-

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
- (b) where an arbitrator or umpire—

- (i) dies, or
 - (ii) (refuses or neglects to act or becomes incapable, of acting, or
 - (iii) leaves Tanzania in circumstances showing that he will probably not return at an early date, or
- (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

6. Every arbitrator or umpire appointed under rule 4 or rule 5 shall have the like powers as if his name had been inserted in the order of reference.

7.-(1) The court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the court may issue in suits tried before it,

(2) Persons not attending in accordance with such process, or making any other default or, refusing to give their evidence, or guilty of any contempt to the -arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishment, by order of the court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the court.

8. Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration and, in such case shall proceed with the suit.

9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators—

- (a) if they have allowed the appointed time to expire without making arbitrators an award, or
- (b) if they have delivered to the court or to the umpire a notice in writing stating that they cannot agree.

10. Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

11. Upon any reference by an order of the court, the arbitrator or umpire may, with the leave of the court, state the award as to, the whole or any part thereof in the form of a special case for the opinion of the court, and the court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

12. The court may, by order, modify or correct an award:-

- (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

13. The court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

14. The court may remit the award or any matter referred to award or arbitration to the reconsideration of the same arbitrator or umpire, matter referred to upon such terms as it thinks fit arbitration:-

- (a) where the award has left undetermined any of the matters referred may be to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;
- (c) where an objection to the legality of the award is apparent upon the face of it.

15.-(1) An award remitted under rule 14 becomes void on failure of the arbitrator or umpire, to reconsider it. But no award shall be set aside except on one of the following grounds; namely:

- (a) corruption or misconduct of the arbitrator or umpire;
- (b) either party having been guilty of fraudulent concealment of any, matter which he ought to have disclosed or of willfully misleading or deceiving the arbitrator or umpire;
- (c) the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed, by the court or being otherwise invalid.

(2) Where an award becomes void or is set aside under sub-rule (1), the court shall make an order superseding the arbitration and in such case shall proceed with the suit.

16.-(1) Where the court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in the manner aforesaid, and no application has been made to set aside the award, or the court has refused such application, the court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

ORDER OF REFERENCE ON AGREEMENTS TO REFER

17.-(1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the other or others of them as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the court, shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the court may appoint an arbitrator.

18. Where any party to any agreement to refer to arbitration, or where there is any person claiming under him, institutes any suit against any other is an agreement to party to the agreement, or any person claiming under him, in respect refer to arbitration of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the court to stay the suit; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

19. The foregoing provisions so far as they are consistent with applicable to any agreement filed under rule 1, shall be applicable to all proceedings Provisions proceedings under the order of reference made by the court under that rule, and to the award and to the decree following thereon under rule 17

ARBITRATION WITHOUT THE INTERVENTION OF A COURT

20.-(1) Where any matter has been referred to arbitration without the intervention of a court, and an award has been made thereon, any person interested in the award may apply to any court having jurisdiction over the subject-matter of the award that the award be filed in referred to arbitration without intervention court of court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

21.-(1) Where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in rule 14 or rule 15 is proved, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

List of Statutes

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Arbitration Rules (1957), Cap. 15 (Subsidiary Legislation) R.E. 2002.
Civil Procedure Code (1966), Cap. 33 R.E. 2002.
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African Union Convention on Combating and Prevention of Corruption (2003).
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New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).
OAS Inter-American Convention Against Corruption (1996).
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Rules of Arbitration of the International Chamber of Commerce, came into force on 1st January 1998.
Rules of Conduct on Bribery in International Business Transactions, adopted in 1977 by the ICC.
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United Nations Convention Against Corruption (2003).
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