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Chapter Nine

Arbitration Law and Practice in Tanzania

9.0 INTRODUCTION

Although the Arbitration Act[403] 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the English Arbitration Act of 1889[407], which has been repealed and replaced by a number of arbitration laws, the most recent being the 1996 Arbitration Act.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

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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 Act[419] 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 1965[421] and the Multilateral Investment Guarantee Agency of 1985 [422].

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 Law[423], but some of its basic principles have been adopted by the National Construction Council (NCC)'s arbitration rules[424]. In order to make the 1985 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 Bill[425]. 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 court.[426]

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.*

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429 This definition was given some judicial consideration in A*shak 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 Act[436], 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 suit[437].

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

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'.

out of the arbitration agreement to which both parties had agreed. For 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.'

438 Op. cit.

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,

> *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).

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

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,

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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 partiers 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 Council[452] and the Tanzania Institute of Arbitrators[453] 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 or 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 Act[455] and section 95 of the Civil Procedure Code[456]).'[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 tribunal[458].

(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 awards[459], and hearing petitions challenging arbitral awards[460].

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 proceedings[461];
- Power to appoint arbitrators, umpire or third arbitrators in certain cases[462];
- Power to extend time for making an arbitral award[463];
- Power to remit an arbitral award for reconsideration[464]; and
- Power to remove an arbitrator or umpire[465].

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 subsequent date. Parties to the arbitral proceedings usually bring their

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.

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 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-examination[466].

(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 she will start calling his or her witnesses who are examined in the same way as those for the claimant, *mutatis mutandis*.

466 Chipeta, B.D., *Civil Procedure in Tanzania: A Student's Manual.* Dar es Salaam: Dar es Salaam University Press, 2002, pp. 192-9.

(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 law[467], 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 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 rule[470]. 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 discretion[472] 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.

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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" test[496] 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's*[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]

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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 is 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.

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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,

> *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]

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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.

517 Ibid.

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 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

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.

522 Ibid, p. 37.

523 Ibid.

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-consideration[524]; 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.

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.