

CHALLENGES OF IMPLEMENTING ARBITRATION AGREEMENTS IN TANZANIA: A COMPREHENSIVE REVIEW

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ABSTRACT

The application of arbitration agreements has increased with the growth of commercial interactions worldwide. There are debates on its application. One side allows the application of arbitration agreement because it reduces the burden to the court of law to resolve the disputes. The other side restricts its application to protect the weaker parties in society. An arbitration agreement is the creature of the law. the law regulates its application. Several ways are in place to enforce it such as the stay of the legal proceeding, respecting it, separability and others. Numerous challenges on enforcing arbitration agreements are no-issuance of specific performance and discretionary leave of the court. All in all, the arbitration agreement is a statutory creature with strengths and weaknesses in its enforcement in Tanzania.

Keywords: Arbitration, Arbitration Agreement, Enforcement of Arbitration Agreement

INTRODUCTION

An arbitration agreement is an agreement or a clause in the contract between parties that obliges the parties to settle the disputes arising from their transaction to be resolved through the arbitration process.ⁱ It is the provision that indicates that parties have chosen the arbitration as the means of the dispute settlement. Thus, it is a forum selection clause or agreement. It creates an obligation to arbitrate and it limits the use of court prior arbitration process as agreed.ⁱⁱ

An arbitration agreement binds the parties to a type of resolution outside the courts.ⁱⁱⁱ German law excludes disputes over the rental of living space from any form of arbitration^{iv}, while arbitration agreements with consumers are only considered valid if they are signed, and if the signed document does not bear any other content than the arbitration agreement and if the signed document does not bear any other content than the arbitration agreement.^v

Arbitration agreement takes different forms. There is no single formality of arbitration agreement. Different formalities are depending on the legal system where the arbitration takes place or originate. However, an example of an arbitration agreement comes from the case of *Richardson International v Zao RPK*^{vi}. To quote as it is –

“Any dispute which might arise from or concerning this contract, if not settled by negotiations, shall be settled by arbitration following UNCITRAL arbitration rules presently in force.”

In this paper, we are going to examine the enforcement of arbitration agreements and their challenges in Tanzania. In doing so, the paper contains several parts. The first part is about the introduction to arbitration agreement. The second part embroils matters of definition of key words such as arbitration and arbitration agreement. The third part implicates categories of arbitration. The fourth part includes formation of arbitration agreements. The fifth part embraces the legal enforcement of the arbitration agreement in Tanzania. The sixth part involves conclusion on enforcement of the arbitration agreement. The seventh part shares references.

CONCEPTUAL ISSUES

The title of the paper has two key words. These are arbitration and arbitration agreements. These key words are worthy of exploration of what they mean. The exploration of what they are all about is important in building understanding of what is the subject matter of the paper.

Arbitration

Arbitration is a process by which parties submit a dispute to the decisions of neutral person(s).^{vii} The parties to the dispute have power to appoint a single arbitrator or a body of arbitrators to decide on the matter.^{viii} There are two ways of appointing the arbitrator(s). One is appointment by mutual consent of the parties to the dispute. Two is appointment in accordance with the provisions of the arbitration laws.^{ix}

Categories of Arbitration

Classification of arbitration can be based on either where it takes place or who does the arbitration.^x Hence, according to place of arbitration there are international and domestic or national arbitration.^{xi} According to who does arbitration there are institutional and ad hoc arbitration.^{xii} Each type is accounted hereunder –

- **International Arbitration**

It is an arbitration whose parties belong to different state jurisdiction or countries. Several circumstances define what amounts to international arbitration.^{xiii} First, if the place of abode of parties to arbitration agreement is different countries, their arbitration becomes international.^{xiv} Second, if the place of incorporation of body corporate as parties to arbitration agreement their arbitration becomes international.^{xv} Third, if the parties to arbitration agreement is body of person whose management is in different countries.^{xvi}

- **Domestic Arbitration**

The arbitration becomes domestic when parties to the arbitration belong to the same state jurisdiction or countries.^{xvii} When both parties have place of abode in the same country, their arbitration is domestic one.^{xviii} In addition, when parties are corporate bodies and their place of

incorporation or management is the same country, their arbitration becomes domestic.^{xix} Moreover, if the parties are one is individual person and another is body corporate whose place of abode and incorporation or management is the same country, their arbitration becomes domestic.^{xx} Furthermore, parties decide to conduct their arbitration within the same country as the place of obligation or subject matter, their arbitration becomes domestic.^{xxi}

- **Institutional Arbitration**

It is an arbitration undertaken by the arbitral institution.^{xxii} The parties may freely choose the institution to arbitrate the dispute submitted.^{xxiii} Besides, the law may require the parties to submit the dispute for arbitration in a particular institution vested with power to do so.^{xxiv}

There are international and national institution with mandate to undertake arbitration. In Tanzania, for instance, commission for mediation and arbitration has jurisdiction to conduct arbitration on the labour dispute after failure of mediation.^{xxv} Besides, National Construction Council undertakes arbitration in construction industry.^{xxvi}

Internationally, there are many institutions specialized in conducting arbitration for parties who have consented to submit the dispute to them.^{xxvii} International Chamber of Commerce, International Centre for Settlement of Investment Disputes and the American Arbitration Associations are among of the international arbitration institutions.

- **Ad hoc Arbitration**

It is an arbitration whose parties agree among themselves and arrange for arbitration.^{xxviii} No institution undertakes this arbitration.^{xxix} This arbitration is not conducted according to the rules of an arbitral institution.^{xxx} Since, parties do not have an obligation to submit their arbitration to the rules of an arbitral institution; they are free to state their own rules of procedure.^{xxxi}

In ad hoc arbitration, the parties and the arbitrators independently determine the procedure, without the involvement of an arbitral institution.^{xxxii} It offers parties the opportunity to conduct the arbitration how they wish, allowing more flexibility and freedom, but less support.^{xxxiii}

Arbitration Agreement

An arbitration agreement is an agreement or a clause in the contract between parties that obliges the parties to settle the disputes arising from their transaction to be resolved through the arbitration process.^{xxxiv} It is the provision that indicates that parties have chosen the arbitration as the means of the dispute settlement. Thus, it is a forum selection clause or agreement. It creates an obligation to arbitrate and it limits the use of court prior arbitration process as agreed.^{xxxv}

Arbitration agreement is an agreement by the parties to submit to arbitration dispute arising from defined legal relationship.^{xxxvi} The parties define scope of dispute to be submitted to arbitration. They may commit all disputes or part of the dispute to submit to arbitration. The arbitration agreement specifies the dispute arising from the particular legal relationship between parties. The legal relationship may come from the contractual arrangement or not.^{xxxvii}

FORMATION OF ARBITRATION AGREEMENTS

The arbitration agreement is agreement sui generis. Since arbitration agreement is like any other agreement, its formation requires certain essentials to be met. The essentials are capacity to enter contract, legality and free consent.

Starting with capacity, the parties who want to form an arbitration agreement must have competence to contract.^{xxxviii} The competence to contract is determined by three factors. The first factor is the age of majority. The second factor is the soundness of the mind.^{xxxix} The third factor is the legal qualification.^{xl} If the parties are individual persons, they must be of 18 or above years of age to become competent to contract.^{xli} Additionally, the individual persons must have sound mind at the time of formation of an agreement. If the parties are body corporate must be registered to have capacity to enter contract.^{xlii} If the parties are incompetent to contract, the agreement made becomes void.^{xliii}

Moreover, free consent is necessary to form arbitration agreement.^{xliv} The parties purposed to make arbitration agreement must exercise their free will upon forming the arbitration

agreement.^{xlv} The parties must agree on the same thing in the same sense.^{xlvi} Hence, there must be a consensus ad idem between parties when making the arbitration agreement. The consent of the parties becomes free when there is no coercion, duress, misrepresentation, fraud, undue influence and mistake.^{xlvii} Failure to exercise free will, the arbitration agreement may be treated as voidable at the option of the party whose consent was so induced.^{xlviii} Nevertheless, when both parties were at mistake the agreement becomes void.^{xlix}

Furthermore, when the parties enter arbitration must conform with the laws of the land.¹ This means that the purpose or object of the making arbitration agreement should be in consonance with the laws of the country.^{li} Whenever such purpose contradicts with the law or defeats provisions of the law, intends to injure a person, property and is considered immoral or against public policy, there is no legality.^{lii} Hence it becomes void ab initio.^{liii}

On the other hand, the arbitration agreement is quite different from the ordinary agreement. The differences between them rest on the imposition of obligations and enforcement.^{liv} Hence, there are special formalities to be complied with when making arbitration agreements.

The essential requirement of arbitration agreement is that it has to be in writing to be enforceable. The arbitration agreement must be in writing for it to be enforced. Section 8(1) of the Arbitration Act^{lv} states that the arbitration shall apply only to the written arbitration agreement. The arbitration agreements which are not written shall not be effective as per the arbitration.

The arbitration agreement shall be deemed to be in writing under several circumstances. One, the arbitration agreement is in writing with signature or without signature of the parties.^{lvi} Two, the arbitration agreement is made by way of exchange of communication by way of writing.^{lvii} Three, the arbitration agreement is evidenced in writing.^{lviii}

ENFORCEMENT OF ARBITRATION AGREEMENTS

The enforcement of legal concept is important to make sure the spirit of it becomes alive. Hence, enforcement makes arbitration agreement meaningful. Arbitration agreements are

enforceable like other agreements. The enforcement of arbitration agreement centres on four main issues. One is principles governing enforcement of arbitration agreement. Two is legal framework governing enforcement of arbitration agreement. Three is judicial perspectives toward enforcement of arbitration agreement. Four is practical issues related to enforcement of arbitration agreement.

Principles of Arbitration Agreement

Several principles are in place to govern the functioning and regulation of arbitration agreements.^{lix} They establish legality and legal regulation of the arbitration agreement. In this part of the paper, we are going to discuss the principles which regulate the nature of arbitration agreements.

- **Separability of Arbitration Agreement**

It is a principle of law that states that an arbitration agreement is a separate legal agreement from the underlying contract in which it is part.^{lx} Although an arbitration agreement is part of the contract of the parties, the law considers it separate from the contract. The underlying essence of the principle is that the nature and enforcement of the arbitration agreement are quite different from the contract even though it is a contractual provision therein.

The principle purpose of the principle of separability is that it aims at safeguarding an arbitral tribunal's jurisdiction of the arbitral authority.^{lxi} It is so by enforcing and implementing the parties' agreement to arbitrate and not to see the arbitration agreement distinct from the main agreement generally. It protects the independence of the arbitration agreement and arbitral authority.^{lxii}

The principle has a philosophical foundation. Philosophically, it implies that invalidity of the contract cannot make arbitration agreement invalid therein.^{lxiii} This is because they are two separate agreements with different legal nature and validity.

Hence, its applicability is that if the underlying agreement or contract is deemed void, the arbitration agreement therein remains well-grounded. Hence the arbitration clause is exclusive of the validity of the contract in question.^{lxiv}

- **Freedom to Agreement**

Arbitration is an agreement *sui generis*. It has all essentials to an ordinary contract. However, it has specific requirements. The general essentials make it an ordinary contract. Hence, it has to comply with the principles of the ordinary contract. Among of foundational principles of the ordinary contract is the freedom of parties to enter the agreement.

Freedom to Agreement applies to the making of the arbitration agreement. Parties are free to adapt the agreements to their particular circumstances under their free will. The will becomes free when there is no coercion, undue influence, fraud, mistake, and or misrepresentation.^{lxv}

For instance, parties to an arbitration agreement may wish to stipulate the number of terms and conditions on which the arbitration agreement is based on. Parties may stipulate the nature, jurisdiction, number and functioning of the arbitration tribunal and disputes to resolve through the arbitration process. Also, it may be desirable for them to stipulate the place and language of the arbitration and the law applicable to the merits.

- **Sanctity of Arbitration Agreement**

Like ordinary contracts, the arbitration agreement is a sacred instrument. The parties to the arbitration agreement must respect and perform it in good faith. Respecting and performing the arbitration agreement operates under the principle of sanctity of arbitration agreement.

The principle of sanctity of agreement states that parties to the freely agreed contract must honour their agreement and perform in good faith. Failure to do so, the law may mandate the enforcement of the arbitration agreement through the court of law. The principle operates in international law through *pactasuntservanda*.^{lxvi}

The court rightly observed in the case of Mohamed Idrissa Mohammed v Hashim Ayoub Jaku^{lxvii} that where a party to the contract has no good reason not to fulfil an agreement, he must be forced to perform his part, for an agreement must be adhered to and fulfilled. The court showed the importance of the fulfilment of the agreement. This applies to the arbitration agreement as well.

- **Survival of arbitration agreement**

The law establishes another principle that regulates the arbitration agreement. This principle is the survival of the arbitration agreement upon the death of the party to the arbitration agreement. It shows that the death of a party to an arbitration agreement cannot extinguish the arbitration agreement.

Section 11 of the Arbitration Act^{lxviii} provides for the principle of survival of the arbitration agreement upon the death of the party to it. It states that an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representative of that party.

The above-mentioned legal provision indicates several issues. First, the death of the party to the arbitration agreement cannot discharge the agreement. Second, when the party to the arbitration agreement passes away, the court may enforce such arbitration agreement by or against the personal representative of the deceased party. Third, parties may agree otherwise on the operation of the principle of the survival of arbitration agreement upon the death of the party.

Laws Governing Enforcement of Arbitration Agreements

Legal setup is a key component in the proper functioning of the concept or aspect in the country.^{lxix} It establishes legality by recognising the concept. It provides a mechanism for its enforcement if persons do contrary to what the law provides. The effectiveness of the regulation of the aspect depends on the effectiveness of the legal setup. On the above basis, several pieces of legislation are in place to govern the arbitration agreement in Tanzania.

- **Constitution of the United Republic of Tanzania^{lxx}**

A constitution is the body of legal and political rules through which the state is governed. The rules concern the government of a country. A constitution in the narrow sense is a document or set of documents intentionally drafted to form the fundamental law of a country.^{lxxi} Constitutions may be classified as written or unwritten, flexible or rigid, monarchical or republican, federal or unitary, supreme or subordinate to the legislature, or based on the separation of powers.^{lxxii}

The constitution is often regarded as the mother law. It is regarded so because it is the supreme law of the land. This implies there is no other law that is above the constitution of the country. Moreover, the other laws derive their legitimacy from the constitution. This denotes that the other laws of the land that go against the constitutional provisions are declared to be null and void.^{lxxiii} Hence, even the arbitration law has to derive its legality from the mother law unless it will be declared to be null and void.^{lxxiv}

Article 15(1) of the Constitution of the United Republic of Tanzania^{lxxv} provides for the principle of freedom of persons which is the basic principle applies in contractual relations. It provides that every person has the right to freedom and to live as a free person. This means the person is free even to enter the contractual transactions as a free person. Hence, the doctrine of freedom of the parties to an agreement as the fundamental principle has its roots in the constitutional provision of the right to live as a free person which includes the right to engage in contractual relations as a free person. The constitutional provision entitled the requirement of free consent in the arbitration agreement.

- **Arbitration Act^{lxxvi}**

It is an Act of the Parliament. To create an enabling environment for domestic and international arbitration, Tanzania has repealed the Arbitration Act [Cap 15 R.E 2002] and replaced it with a new Arbitration Act in 2020.

The purpose of the Act is to provide for conduct relating to domestic arbitration, international arbitration and enforcement of foreign arbitral awards, repeal of the Arbitration Act and to provide for matters relating to or incidental thereto.^{lxxvii}

The Act has thirteen parts. Part I deals with preliminary provisions such as the short title, citation, application and interpretation section. Part II entails general provisions such as principles, the seat of arbitration, court, the scope of application, and agreement. Part III encompasses the arbitration agreement. Part IV centres on the commencement of arbitral proceedings. Part V focuses on the arbitral tribunal. Part VI involves the jurisdiction of the arbitral tribunal. Part VII implicates arbitral proceedings. Part VIII contains the cost of arbitration. Part IX consists of the power of the court concerning awards. Part X embroils arbitration centre. Part XI includes recognition and enforcement of foreign awards. Part XII

catches miscellaneous provisions. Part XIII middles the consequential amendments of other laws.

Section 4 of the Arbitration Act^{lxxviii} construes arbitration agreements. It shows what amounts to the arbitration agreement. It states that the reference in an agreement to a written form of the arbitration clause or a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the arbitration agreement.

Section 8 of the Arbitration Act^{lxxix} deals with the formalities of the arbitration agreement. It requires an arbitration agreement to comply with several formalities. One, the arbitration agreement must be in writing. Two, both parties to the arbitration agreement must sign it. Three, an exchange of written submissions between the parties.

Section 10 of the Arbitration Act^{lxxx} provides for the separability of the arbitration agreement. It states that an arbitration agreement that forms or was intended to form part of another agreement, whether or not in writing, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose, be treated as a distinct agreement.

Section 11 of the Arbitration Act^{lxxxii} provides for the principle of survival of the arbitration agreement upon the death of the party to it. It states that an arbitration agreement is not discharged by the death of a party and may be enforced by or against the personal representative of that party.

Section 13 of the Arbitration Act^{lxxxiii} ensures the stay of legal proceedings. It states that a party to an arbitration agreement against whom legal proceedings are brought, whether by way of claim or counterclaim in respect of a matter which under the agreement is to be referred to arbitration may, upon notice to the other party to the proceedings, apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

- **The Civil Procedure Code**^{lxxxiii}

It is a general law concerning the civil procedure in Tanzania. It contains both principal and subsidiary legislation as one instrument. Sections of the Act constitute principal legislation.

Orders constitute subsidiary legislation. The parliament makes and unmakes sections of the Act. The Chief Justice makes and unmakes the orders. Besides, it is an Act providing for the procedure and related matters in civil proceedings.^{lxxxiv}

For civil litigation gurus and practitioners in Tanzania, the Civil Procedure Code is equal to a Bible to a faithful Christian. All court proceedings in the High Court and Subordinate Courts must follow the code. This is in addition to the Magistrates Courts' Act, in the case of the latter, Subordinate Courts in the styles of District Courts and Resident Courts.^{lxxxv}

Rule 1 of the Second Schedule to the Civil Procedure Code^{lxxxvi} creates a need for the reference to commence the arbitration upon arbitration agreement. It states that wherein 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. Every such application shall be in writing and shall state the matter sought to be referred.

Rule 3 of the Second Schedule to the Civil Procedure Code^{lxxxvii} provides for an order of reference from the court to conduct arbitration as per the arbitration agreement. It states that the court shall, by order, refer to the arbitrator the matter indifference 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.

Rule 17 of the Second Schedule to the Civil Procedure Code^{lxxxviii} deals with the application to file in the court the arbitration agreement. It implicates that 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 is filed in court.

JUDICIAL PERSPECTIVES ON ENFORCEMENT OF ARBITRATION AGREEMENT

Several case laws are established on enforcement of the arbitration agreements. The case laws speak of distinct aspects, which are important in the enforcement of the arbitration agreements

in Tanzania. The following mechanisms established in case laws in enforcing the arbitration agreements.

Respect of Arbitration Agreement

In *Maunga Seed Company (T) Ltd v Secretary to the Treasury, Ministry of Finance and National Planning: Government of the Republic of Zambia & Another*^{lxxxix}, the court commented on the need of respecting the arbitration agreement in the discharge of the parties commitment and good faith. The court had this opinion, as the agreement gives room for arbitration, it was (is) unnecessary for the parties to the arbitration agreement to resort to court action.

The court commented further such an unnecessary step is first embarrassing to both parties. Second, it is likely to interfere with the noble commitment by both governments (parties) to improve food security in their respective countries as expressed in the preamble to the agreement signed by both of them.

Stay of Proceedings

In *Construction Engineers And Builders Ltd v Sugar Development Corporation*^{xc}, the court observed the stay of proceeding as a way of enforcing the arbitration agreement. The court observed that the party to a contract containing an arbitration clause may apply for a stay of proceedings. In addition, the other party does so according to the arbitration clause.

Besides, the court has to consider certain aspects before awarding the stay of the proceeding. First, the court has decided on the precise nature of the dispute. Second, the court has to decide on whether the dispute falls within the terms of the arbitration clause.

Mandatory submission of the dispute to arbitration

In *Construction Engineers and Builders Ltd v Sugar Development Corporation*^{xcⁱ}, the court opined on the legal obligation of the submission of the matter to arbitration in presence of a valid arbitration agreement between the parties. The court enunciated the general and exceptional rule as to that legal obligation of submission of the dispute to the arbitration forum.

As a general rule, the court stated that where it is clear that the parties to a contract have agreed to submit all their disputes or differences arising under the contract containing a submission agreement to an arbitrator, the dispute must go to arbitration.

Under exceptional circumstances, the court may override the requirement of submitting the dispute to the arbitration forum in presence of the arbitration agreement. The court stated that unless there is good reason to justify the court to override the agreement of the parties, the parties will not have the obligation of referring the matter to the arbitration.

Appeal-ability of Decision of Stay of Proceeding

Since an arbitration clause in a contract is distinct from the other clauses and that its breach can be specifically enforced by the machinery of the Arbitration Act, the stay of proceeding concerning the arbitration agreement amounts to suit and its decision is appealable.

In *Tanzania Motor Services Ltd & Others v Mehar Singh t/a Thaker Singh*^{xcii}, the court of Appeal of Tanzania observed that the decision of the court refusing to stay the proceedings 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

PRACTICAL CHALLENGES OF ENFORCEMENT OF ARBITRATION AGREEMENTS

Enforcement of the arbitration agreement faces several challenges from the legal frameworks governing it. Among of the challenges observed in the paper are hereby accounted for –

The court cannot issue specific performance on arbitration clause if it is not a conditional precedent.

In *Transgem Trust v Tanzania Zoisite Corp. Ltd*^{xciii}, the court recognised the enforcement of the arbitration agreement through specific performance orders. However, the court exposes the

non-enforcement of the arbitration agreement if at all it was not a condition precedent to submit the matter to the arbitration forum.

On one hand, the court had this to say plaintiffs' action is based in part on the theory that the contract contained an arbitration clause which the defendant did not respect in terminating the contract unilaterally, and that the court should therefore enter an order of specific performance requiring defendants to submit their complaints to arbitration.

On the other hand, the court observed that the contract did not make an arbitration award as a condition precedent to a cause of action, and it is well settled that an arbitration clause of this type will not be enforced by specific performance.

Failure to protest court's jurisdiction on the ground of arbitration agreement waives its enforcement

In *Mvita Construction Company v Tanzania Harbours Authority*^{xciv}, the court commented on non-enforcement of the arbitration agreement when the party does not protest the jurisdiction of the court on the ground that the other party has not honoured the provisions of the submission agreement. The holding implies the challenge to enforcement of the arbitration agreement upon failure to protest jurisdiction.

The court stated that since Tanzania Harbour Authority did not register any protest to jurisdiction following Mvita's failure to comply with the procedural preconditions under clause 67 (arbitration agreement) of the contract to submit to arbitration but took part in the arbitration it waived, by conduct, the right to object to jurisdiction.

The need for leave to revoke arbitration agreement

In *Eco-Tec (Zanzibar) Ltd v Principal Secretary, Ministry of Finance And Economic Affairs*^{xcv}, the court observed the important issue as far as enforcement of the arbitration agreement is concerned. It states that the court has no power to revoke the arbitration agreement unless the parties have sought the leave to do so. this may compromise the enforcement of the arbitration agreement because of the discretionary powers of the court in awarding the leave to revoke the arbitration agreement.

At first, the court said that since the submission clauses were agreed upon by the parties in terms of section 3 of the Arbitration Decree, a party to such an agreement can apply to the Court for leave to revoke the submission. Importantly, the Court has no power to revoke a submission under section 3, it can only grant leave to a party to revoke the submission.

Then, the court observed that where the arbitration process has already been set in motion and an Interim Final Award made the appellant must make a strong case to persuade the Court to grant leave to revoke the submission to arbitration.

Finally, the court established that there being a binding submission to arbitration between the parties, and although under section 3 of the Arbitration Decree, the Court may, in a proper case, give leave to a party to revoke a submission to arbitration, in this case, the appellant has not shown a good cause because it was fully aware of the financial implications of submitting to a foreign forum for arbitration.

CONCLUSION

The arbitration agreement is an agreement by the parties to submit their dispute to arbitration. The agreement may specify either all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship. The agreement may stipulate whether contractual or not. It may be in the form of an arbitration clause in a contract or the form of a separate agreement. Regardless of its form, legally speaking is a distinct agreement from the underlying contract.

They have laws that govern the application of the arbitration agreement. These laws may either restrict or broaden the applicability of the arbitration based on different reasons. Some of the reasons are reduction of the burden of the court in settlement of the disputes and protection of the weaker members of the society.

Tanzania has the Arbitration Act^{xcvi} and the Civil Procedure Code Act^{xcvii} to govern the arbitration agreement. Several principles are in place governing the arbitration agreement.

Some of them are the separability of the arbitration agreement, freedom of agreement, the sanctity of the agreement and survival of the arbitration agreement.

In Tanzania, one may enforce arbitration agreement through several statutory mechanisms such as order of reference, stay of a legal proceeding, respecting the arbitration agreement, application to file the arbitration agreement, mandatory submission of the dispute to arbitration, and appealability of decision on stay of legal proceeding.

Nevertheless, the enforcement of the arbitration agreement in a country faces several challenges. These are the need for leave to revoke arbitration agreement, failure to protest court's jurisdiction on the ground of arbitration agreement waives its enforcement and the court cannot issue specific performance on arbitration clause if it is not a conditional precedent.

Therefore, amendment of the law is a must to enable the court to order specific performance on arbitration clause if it is not a condition precedent even if it is not a conditional precedent. Moreover, the absence of the protest court's jurisdiction on the ground of arbitration agreement should not waive its enforcement. Furthermore, no need for leave to revoke the arbitration agreement.

REFERENCES

- Aksen, G.: (1991). Ad Hoc versus Institutional Arbitration. The ICC International Court of Arbitration Bulletin 2(1),
- Arkin, H.L., 1987. International ad hoc Arbitration: A practical Alternative. Int'l Bus. Law., 15,
- All Answers Ltd, 'Scott v Avery - Arbitration' (Lawteacher.net, December 2021) <<https://www.lawteacher.net/cases/scott-v-avery.php?vref=1>> accessed 30 December 2021
- American Arbitration Association (2013). "Drafting Dispute Resolution Clauses: A Practical Guide".
- Blanke, G., 2008, July. Institutional versus Ad Hoc Arbitration: A European Perspective. In ERA Forum (Vol. 9, No. 2, pp. 275-282). Springer-Verlag.
- Breakthrough Attorneys, Litigation Law Update: What Litigants Should Know Regarding the Recent Amendments to The Tanzania Civil Procedure Code, Cap. 33 R.E. 2002; Volume I, June 29, 2019
- Jennings, R., 2002. The Differences between Conducting a Case in the ICJ and in an ad hoc Arbitration Tribunal—An Inside View. In Liber Amicorum Judge Shigeru Oda (2 vols) (pp. 893-909). Brill Nijhoff.
- McLaren, R.H., 2001. Introducing the Court of Arbitration for Sport: The ad hoc division at the Olympic Games. Marq. Sports L. Rev., 12
- Onyango J. O. and Nassali, M. Zanzibar: Constitutionalism and Political Stability – Muafaka and the Search for a New Vision, A Report of the Fact-Finding Mission Organised under the Auspices of Kituo Cha Katiba, 2003.
- Redfern, A., Hunter, M.: (2004). Law and Practice of International Commercial Arbitration, Sweet & Maxwell, 4th edition

Schultz, T.: (2006). *Information Technology and Arbitration: A Practitioner's Guide*, Kluwer Law International

Shonk, K., What is an Arbitration Agreement? The ins and outs of contractual agreements to engage in arbitration. SEPTEMBER 20TH, 2021
<https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement/>

Tweeddale, A., and Tweeddale, K., *Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees*, (2011) 77 *Arbitration* 423-427

UK Parliament, The contents of Magna Carta, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/>

UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)

Walton, A. and Vitoria, M., *Russell on the Law of Arbitration* (London: Stevens & Sons, 1982), page 199-200.

Wilson, J. O., (2008). *A Book for Judges*. quoted in Duhaime, 2013

ENDNOTES

ⁱ Andrew Tweeddale and Keren Tweeddale, *Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees*, (2011) 77 *Arbitration* 423-427

ⁱⁱ UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)

ⁱⁱⁱ Shonk, K., What is an Arbitration Agreement? The ins and outs of contractual agreements to engage in arbitration. SEPTEMBER 20TH, 2021 <https://www.pon.harvard.edu/daily/conflict-resolution/what-is-an-arbitration-agreement/>

^{iv} Section 1030 subsection 2 *Zivilprozessordnung*

^v Section 1031 subsection 5 of the *Zivilprozessordnung*.

^{vi} 2002 FCA 97

^{vii} The Arbitration Act, s 3

^{viii} *Ibid*

^{ix} The Arbitration Act, s 3

^x Paulsson, J., 2013. *The idea of arbitration*. OUP Oxford.

- ^{xi}Sayre, P.L., 1928. Development of Commercial Arbitration Law. *The Yale Law Journal*, 37(5), pp.595-617.
- ^{xii}Mentschikoff, S., 1961. Commercial arbitration. *Columbia Law Review*, 61(5), pp.846-869.
- ^{xiii}The Arbitration Act, s 3
- ^{xiv}The Arbitration Act, s 3(a)
- ^{xv}The Arbitration Act, s 3(b)
- ^{xvi}The Arbitration Act, s 3(c)
- ^{xvii}The Arbitration Act, s 3A
- ^{xviii}The Arbitration Act, s 3A (a)
- ^{xix}The Arbitration Act, s 3A (b)
- ^{xx}The Arbitration Act, s 3A (c)
- ^{xxi}The Arbitration Act, s 3A (d)
- ^{xxii}Horton, D., 2018. Arbitration About Arbitration. *Stan. L. Rev.*, 70, p.3
- ^{xxiii}Lew, J.D., Mistelis, L.A., Kröll, S.M. and Kröll, S., 2003. Comparative international commercial arbitration. Kluwer Law International BV.
- ^{xxiv}Ginsburg, T., 2003. The culture of arbitration. *Vand. J. Transnat'l L.*, 36, p.1335.
- ^{xxv} The Employment and Labour Relations Act, s 88(2)
- ^{xxvi}Kepler, K., Procedural Laws of Commercial Arbitration in Tanzania: An Analysis.
- ^{xxvii} Paris Arbitration, Arbitral Institution, available at <http://parisarbitration.com/en/glossaire/arbitral-institution/#:~:text=Arbitral%20institution.%20Organisation%20that%20manages%20arbitral%20procedures%2C%20generally,HKIAAC%2C%20DFIAC%2C%20LCIA%2C%20SIAC%2C%20SCC%2C%20and%20Swiss%20Chambers>
- ^{xxviii}Arkin, H.L., 1987. International ad hoc Arbitration: A practical Alternative. *Int'l Bus. Law.*, 15, p.5.
- ^{xxix}Jennings, R., 2002. The Differences between Conducting a Case in the ICJ and in an ad hoc Arbitration Tribunal—An Inside View. In *Liber Amicorum Judge Shigeru Oda* (2 vols) (pp. 893-909). Brill Nijhoff.
- ^{xxx}Blanke, G., 2008, July. Institutional versus Ad Hoc Arbitration: A European Perspective. In *ERA Forum* (Vol. 9, No. 2, pp. 275-282). Springer-Verlag.
- ^{xxxi}McLaren, R.H., 2001. Introducing the Court of Arbitration for Sport: The ad hoc division at the Olympic Games. *Marq. Sports L. Rev.*, 12, p.515.
- ^{xxxii}Zhang, T., 2013. Enforceability of Ad Hoc Arbitration Agreements in China: China's Incomplete Ad Hoc Arbitration System. *Cornell Int'l LJ*, 46, p.361.
- ^{xxxiii}Lu, L. and Qi, Q., 2019. Determining the Validity of Ad Hoc Arbitration Agreements in China: Past, Present, and Future. *Frontiers of Law in China*, 14(1), pp.115-140.
- ^{xxxiv} Andrew Tweeddale and Keren Tweeddale, *Scott v Avery Clauses: O'er Judges' Fingers, Who Straight Dream on Fees*, (2011) 77 *Arbitration* 423-427
- ^{xxxv} UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985)
- ^{xxxvi}The Arbitration Act, s 3
- ^{xxxvii}The Arbitration Act, s 3
- ^{xxxviii} The Law of Contract Act, ss 10 and 11(1)
- ^{xxxix} Ibid, ss 11(1) and 12
- ^{xl} Ibid, s 11(1)
- ^{xli} The Law of the Child Act, s 4(1)
- ^{xlii} The Law of Contract Act, s 11(1)
- ^{xliiii} Ibid, s 11(2)
- ^{xliv}Carbonneau, T.E., 2003. The Exercise of Contract Freedom in the Making of Arbitration Agreement. *Vand. J. Transnat'l L.*, 36, p.1189.
- ^{xlv}The Law of Contract Act, s 10
- ^{xlvi} Ibid, s 13
- ^{xlvii} Ibid, s 14
- ^{xlviii} Ibid, s 19
- ^{xlix} Ibid, s 20
- ^lEgle, A.V., 2003. Back to *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement. *Wash. L. Rev.*, 78, p.199.
- ^{li}Brand, R.A. and Flechtner, H.M., 1992. Arbitration and Contract Formation in International Trade: First Interpretations of the UN Sales Convention. *JL & Com.*, 12, p.239.
- ^{lii} The Law of Contract Act, s 23(1)

- liii Landau, T., Donovan, D.F. and van Haersolte-van Hof, J., 2002. The requirement of a written form for an arbitration agreement. Albert Jan van.
- liv American Arbitration Association (2013). "Drafting Dispute Resolution Clauses: A Practical Guide". p. 10.
- lv Act No. 2 of 2020
- lvi The Arbitration Act, s 8(3)(a)
- lvii Ibid, s 8(3)(b)
- lviii Ibid, s 8(3)(c)
- lix Walton, A. and Vitoria, M., Russell on the Law of Arbitration (London: Stevens & Sons, 1982), page 199-200.
- lx Article 23 (1) UNCITRAL Rules
- lxi Amec E&C Services Ltd. v Nova Chemicals Ltd. 35 BLR (3d) 100 (Ontario, 2003)
- lxii Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)
- lxiii Babcock v Wilcox Canada Ltd 2003 ABQB 1004
- lxiv Heyman v Darwins Ltd [1942] 1 All ER 337 and also at 1942 AC 356
- lxv The Law of Contract Act, s 14
- lxvi The Vienna Convention on Law of Treaties, art 26
- lxvii 1993 TLR 280 (CA)
- lxviii Act No. 2 of 2020
- lxix Collins English Dictionary
- lxx 1977 as amended from time to time.
- lxxi J. O. Onyango and M. Nassali, Zanzibar: Constitutionalism and Political Stability – Muafaka and the Search for a New Vision, A Report of the Fact-Finding Mission Organised under the Auspices of Kituo Cha Katiba, 2003.
- lxxii UK Parliament, The contents of Magna Carta, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/magnacarta/magnacartaclauses/>
- lxxiii The Constitution of the United Republic of Tanzania, art 64(5)
- lxxiv Wilson, John Owen (2008). A Book For Judges. quoted in Duham, 2013
- lxxv Ibid
- lxxvi Act No. 2 of 2020
- lxxvii The Arbitration Act, long title
- lxxviii Act No. 2 of 2020
- lxxix Act No. 2 of 2020
- lxxx Ibid
- lxxxi Act No. 2 of 2020
- lxxxii Ibid
- lxxxiii Cap 33 R.E 2019
- lxxxiv The Civil Procedure Code Act, long title
- lxxxv Breakthrough Attorneys, Litigation Law Update: What Litigants Should Know Regarding The Recent Amendments To The Tanzania Civil Procedure Code, Cap. 33 R.E. 2002; Volume I, June 29, 2019
- lxxxvi Cap 33 R.E 2019
- lxxxvii Cap 33 R.E 2019
- lxxxviii Ibid
- lxxxix (Civil Case 99 of 2003) [2004] TZHC 13 (13 October 2004)
- xc 1983 TLR 13 (CA)
- xci Ibid
- xcii (Civil Appeal 115 of 2005) [2006] TZCA 5 (21 July 2006)
- xciii (1968) HCD no. 501
- xciv [2006] TLR 22
- xcv [2006] TLR 443
- xcvi Act No. 2 of 2020
- xcvii Cap 33 R.E. 2019