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International Arbitration 2022

Tanzania: Law & Practice and Trends & Developments

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TANZANIA

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

In recent years, efforts have been made to enhance alternative means of dispute resolution such as arbitration, mediation and negotiation. Many commercial contracts in Tanzania contain dispute resolution clauses which in most cases require some form of alternative dispute resolution before parties resort to litigating disputes in courts.

The enactment of the Arbitration Act [CAP 15 RE 2020] (Arbitration Act) repealed the Arbitration Act, 1931, which was inherited from the British colonial rule.

For a long time, the National Construction Council (NCC) and the Tanzania Institute of Arbitrators (TIArb) have been the principal arbitral bodies in Tanzania. However, in 2021, the Tanzania International Arbitration Centre (TIAC) was established to provide a forum to facilitate international commercial arbitration.

Additionally, the Arbitration Act provides for establishment of the Tanzania Arbitration Centre (the Centre) as the statutory regulatory body for domestic and international arbitration. The Centre is yet to be operationalised, but recent developments indicate that it will commence operations soon.

The most common arbitration in Tanzania is domestic arbitration; it is very rare to have international arbitration proceedings seated in Tanzania.

1.2 Impact of COVID-19

The COVID-19 pandemic necessitated some Tanzanian courts, particularly the High Court of Tanzania and to some extent the criminal sessions of the Court Appeal, to adopt electronic hearings and case management. The digitalisation of court processes has been quite valuable, although a lot of improvement is needed before the systems can be fully adopted and rolled out to all courts.

It is likely that arbitration proceedings will adapt to the technology solutions quicker than the courts have demonstrated; hence, we expect some arbitral proceedings to be conducted through online teleconferencing platforms.

1.3 Key Industries

Key industries which have historically seen significant activity in international arbitration in Tanzania include construction, telecommunications, finance, mining and other government/investor contracts.

Given the lack of published statistics in Tanzania, it is difficult to ascertain arbitral trends and the impact of COVID-19 on arbitration activities.

1.4 Arbitral Institutions

Tanzania currently has three arbitral institutions, namely the NCC, the TIArb and the recently established TIAC.

Additionally, the Arbitration Act provides for establishment of the Tanzania Arbitration Centre (the Centre), which is likely to commence operations soon.

1.5 National Courts

Tanzanian courts are, at present, only vested with supervisory authority over arbitral proceedings and the ability to enforce arbitral awards.

2. GOVERNING LEGISLATION

2.1 Governing Law

In Tanzania, arbitration proceedings are governed by the Arbitration Act, 2020 and the Arbi-

tration (Rules of Procedure) Regulations, 2021 (the Rules of Procedure Regulations).

The Arbitration Act, 2020 is based on the UK Arbitration Act, 1996 and not on the UNCITRAL Model Law.

2.2 Changes to National Law

There have been no changes to Tanzanian arbitration laws in 2021/2022. We are not aware of any pending legislation that may change laws governing arbitration in Tanzania.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

According to the Arbitration Act, for an arbitration agreement to be enforceable, it must be in writing. An agreement shall be deemed to be in writing where:

- the agreement is in writing, whether or not it is signed by the parties;
- the agreement is made by exchange of communications in writing; or
- the agreement is evidenced in writing.

3.2 Arbitrability

Arbitration stems from what has been agreed by parties under an arbitration agreement. Under the Arbitration Act, an arbitration agreement has been defined as an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Recent case law in Tanzania has been explicit that it is only the High Court that has the authority to hear winding-up proceedings regardless of whether the winding-up petition arises from a contract that provided for an arbitration clause. Therefore, any matter in which the relief sought requires an order that only a court can make will not be arbitrable.

3.3 National Courts' Approach

The Arbitration Act provides explicitly that an arbitral award shall be final and binding upon the parties claiming through it. As such, the national courts have been reluctant to interfere with the enforcement of an arbitral award provided it is in accordance with the Arbitration Act.

The grounds upon which enforcement of an arbitral award shall be rejected are as follows.

- At the request of the party against which it is invoked, that party furnishes to court proof that:
  - (a) parties to the arbitration agreement, pursuant to the law applicable, lacked capacity to enter into the agreement or were not properly represented;
  - (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;
  - (c) the party against which the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
  - (d) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that, if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;
  - (e) the composition of the arbitral tribunal or

the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

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

- The making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.
- The court finds that:
  (a) the subject matter of the dispute is not capable of settlement by arbitration under any written laws; or
  (b) the recognition or enforcement of the arbitral award would be contrary to any written laws or norms.

3.4 Validity

An arbitration agreement is treated as a distinct agreement separate from the main agreement. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement, regardless of whether it is in writing or not, shall not be regarded as invalid or non-existent because the rest of the agreement is invalid or has become ineffective.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

The parties to an arbitration agreement are at liberty to agree on the number of arbitrators to form the arbitral tribunal and on the necessity of having a chairperson or umpire.

Additionally, the parties may agree on the procedure for appointing the arbitrator or arbitrators and the procedure for appointing any chairperson or umpire.

4.2 Default Procedures

The Arbitration Act provides for a default procedure in the event that the parties fail to appoint an arbitrator. In an instance where the parties have agreed that the matter will be presided over by two arbitrators, and one of the parties has appointed an arbitrator of its choice while the second party has defaulted, the first party may give notice in writing to the other party for the appointed arbitrator to act as a sole arbitrator whose award will be binding on the parties.

Where the parties fail to appoint an arbitrator, either party may apply to the Centre, which will direct on the appointment procedure or make an appointment on behalf of the parties.

With regard to the designation of an arbitrator in a multi-party arbitration, the parties acting as claimants shall be considered as a single-party claimant and the parties claimed against shall be considered as a single-party respondent. Both the parties acting as a single-party claimant and the parties acting as a single-party respondent are at liberty to select an arbitrator or arbitrators. If the multiple parties cannot agree on selecting an arbitrator, the Centre shall select the arbitrator on behalf of the multiple parties.

4.3 Court Intervention

The courts have no authority in the appointment of arbitrators. It is only the parties vested with the mandate and, in the event they fail, the Centre will have the mandate to appoint an arbitrator.

4.4 Challenge and Removal of Arbitrators

According to the Arbitration Act and the Rules of Procedure Regulations, an arbitrator may be challenged where there are justifiable doubts as to the impartiality or independence of the

arbitrator. A party that intends to challenge an arbitrator is required to notify the Centre within 14 days from the time of being advised of the identity of the arbitrator, attaching documentation establishing the basis for such challenge. An arbitrator may be removed due to any of the following grounds:

- that there are circumstances which give rise to justifiable doubts as to his or her impartiality;
- that the arbitrator does not possess the qualifications required by the arbitration agreement;
- that he or she is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his or she capacity to do so; or
- that he or she has failed or refused to:
  (a) properly conduct proceedings;
  (b) use all reasonable dispatch in conducting the proceedings; or
  (c) make an award, and substantial injustice has been or will be caused to the applicant.

It should be noted that the arbitrator will only be removed after being heard by the Centre.

4.5 Arbitrator Requirements

An arbitrator appointed to preside over an arbitration proceeding is required to possess the following qualifications:

- be an arbitrator who is accredited or registered in terms of the Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021 (the Practitioners Accreditation Regulations);
- not have a family relationship based on descent and marriage down to the third generation, with any of the parties in dispute;
- not possess a financial interest or any other interest whatsoever in the result of the arbitration;
- be named in the arbitration agreement by the parties; and
- be a person of high moral character and recognised competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgement.

As per the Arbitration Act and its Regulations, an arbitrator is obliged to disclose all facts and circumstances which may raise concerns as to his or her impartiality and independence.

5. JURISDICTION

5.1 Matters Excluded From Arbitration

Please refer to our response in **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

An arbitral tribunal is vested with the power to rule on its own substantive jurisdiction, on whether there exists a valid arbitration agreement, on whether the arbitral tribunal is properly constituted and on matters that shall be submitted to arbitration in accordance with the arbitration agreement.

This is further reiterated by Regulation 28 of the Rules of Procedure Regulations, which provides that an arbitral tribunal has the power to hear and determine objections to its own jurisdiction, including any objections with respect to the form, existence, validity or scope of the arbitration agreement.

5.3 Circumstances for Court Intervention

The Arbitration Act vests a party to the proceedings with the power to challenge any award made by the tribunal ruling on its substantive jurisdiction provided the party challenging the

said award provides notice to the other parties and to the arbitral tribunal.

The Arbitration Act further provides that a party subject to arbitral proceedings may apply to the court to rule on any question as to the substantive jurisdiction of the arbitral tribunal. Such an application to the court will not be considered unless the following requirements are met:

- the application is made with the agreement in writing of all the other parties to the proceedings; or
- the application is made with the permission of the arbitral tribunal and the court is satisfied that:
  - (a) the determination of the question is likely to produce substantial savings in costs;
  - (b) the application was made without delay; and
  - (c) there is good reason why the matter should be decided by the court.

Unless the parties agree otherwise, the tribunal may proceed with the conduct of the proceedings and make an award pending determination of an application.

5.4 Timing of Challenge

A party may raise an objection on the ground that the arbitral tribunal lacks substantive jurisdiction not later than the time the party takes the first step in the proceedings to contest the merits of any matter in relation to which the party is challenging the arbitral tribunal's jurisdiction. As per Section 36 of the Arbitration Act, a party may make an application to court, as soon as possible, to determine any questions as to the substantive jurisdiction of the arbitral tribunal.

A party may challenge an award of the tribunal ruling on its substantive jurisdiction within 28 days of the award being made.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of admissibility and jurisdiction is not stipulated in our arbitration laws, nor has it been tested in case law; however, borrowing from decisions in the UK, any party challenging an award based on substantial jurisdiction is entitled to a complete rehearing of the jurisdictional matters, rather than just a review of the tribunal's decision on the issue.

5.6 Breach of Arbitration Agreement

The courts have emphasised in various decisions that the parties are bound by their agreements; therefore, where parties have agreed to determine their disputes by way of arbitration, any legal proceedings brought before the court will be stayed on application to pave way for arbitration.

5.7 Jurisdiction Over Third Parties

The Arbitration Act defines the term "party" to mean a party to an arbitration agreement. The tribunals will only assume jurisdiction over individuals or entities that are party to an arbitration agreement or signatories to the contract containing the arbitration agreement. The Arbitration Act does not give room to allow the arbitral tribunal to assume jurisdiction over third parties.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

The parties may agree on the powers to be conferred to the arbitral tribunal in respect of granting interim reliefs. In the absence of such agreement, the Arbitration Act grants the tribunal default powers of granting interim reliefs related to security for costs, preservation of evidence and preservation of property.

An interim relief awarded by the tribunal is binding on the parties; however, it would require enforcement to make it effective. Given the expected delays in enforcing such award and the urgency surrounding the granting of an interim order, parties may seek to apply to the courts directly for some interim orders.

6.2 Role of Courts

Unless otherwise agreed by the parties, the Arbitration Act bestows wide powers upon the court in relation to the preservation of evidence and property for arbitration. The court's authority under this section is the same as those exercisable in legal proceedings.

The court may make an order based on the following orders:

- the taking of the evidence of witnesses;
- the preservation of evidence;
- making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings: (a) for the inspection, photographing, preservation, custody or detention of the property; or (b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property; and for that purpose, the court may authorise any person to enter any premises in the possession or control of a party to the arbitration;
- the sale of any goods which are the subject of the proceedings; or
- the granting of an interim injunction or the appointment of a receiver.

The Rules of Procedure Regulations also make provision for the procedure in appointment of emergency arbitrators in an instance where urgent interim relief is required prior to the formation of the tribunal. The party seeking such interim relief may apply to the Centre, which will subsequently appoint an arbitrator to preside over the hearing seeking relief. Any order by the emergency arbitrator will be a binding on the parties.

The law does not cater for court intervention after an emergency arbitrator has been appointed. Given the strict set of circumstances under which a court may intervene in arbitral proceedings, it is unlikely that a court will be able to intervene once an emergency arbitrator has been appointed.

6.3 Security for Costs

The Arbitration Act vests the court and the tribunal with the power to order security for costs unless the parties agree otherwise.

7. PROCEDURE

7.1 Governing Rules

Arbitration proceedings are governed by the Arbitration Act and the Rules of Procedure Regulations and the Civil Procedure Code [CAP. 33 R.E. 2019].

The procedure for registration and accreditation of arbitrators is governed by the Practitioners Accreditation Regulations.

The conduct of arbitrators is governed by the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021 (the Code of Conduct).

7.2 Procedural Steps

Arbitral proceedings in respect of a particular dispute shall commence on the date on which the request for the dispute to be referred to arbitration is received by the other party. The procedural rules shall be as agreed by the parties or directed by the arbitrator or arbitral tribunal.

7.3 Powers and Duties of Arbitrators

A tribunal is given a wide array of powers under the law; however, the use of such power is contingent on the parties' agreement. Arbitrators are obligated to act fairly and impartially, giving each party a reasonable opportunity of putting its case and to adopt procedures suitable to the circumstances of that particular case while avoiding unnecessary delay or expense in order to provide a fair means to resolve the dispute.

7.4 Legal Representatives

The parties may be represented by an advocate, or any other person chosen by them. The law does not regulate the qualification of the legal representative as such. Given the general application, legal representatives appearing before a tribunal can have qualifications other than domestic qualifications.

8. EVIDENCE

8.1 Collection and Submission of Evidence

The arbitral tribunal has the discretion to decide on all the procedural and evidential matters, subject to the agreement of the parties. No specific rules have been set out guiding such procedure; it is entirely at the discretion of the tribunal.

8.2 Rules of Evidence

Evidential matters in arbitration proceedings are decided by the arbitral tribunal. Such matters include:

- when and where the proceedings shall be held;
- the language or languages to be used in proceedings and whether translations of any relevant documents are to be supplied;
- whether, and if so, what form of written statements of claim and defence are to be used, when they are to be supplied and the extent to which they can be amended;
- which documents shall be produced by the parties and at what stage;
- what questions are to be asked and answered by the respective parties and when and in what form it shall be done;
- whether to apply strict rules of evidence or any other rules as to admissibility, relevance or weight of any material be it oral, written or other evidence sought to be tendered on any matter of fact or opinion, and the time, manner and form in which such material shall be exchanged and presented;
- whether and to what extent the arbitral tribunal shall itself take the initiative in ascertaining the facts and the law; and
- whether and to what extent there shall be oral evidence, written evidence or submissions.

8.3 Powers of Compulsion

A witness within Tanzania who is unwilling to attend arbitral proceedings in order to provide oral testimony or to produce documents or other material evidence may be compelled to attend the proceedings via an application to the court. A party to the proceedings, with the permission of the arbitral tribunal or by agreement with the other party, may apply to the court for the issuance of a witness summons.

With regard to the production of documents, the law sets a limitation by providing that a witness is not compelled to produce in arbitration any document or material evidence that the witness would not be compelled to produce in proceedings in court. This provision is intended to protect the witness's right in respect of evidence that is privileged from production and to prevent disclosure of documents by way of a "fishing expedition".

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Arbitral proceedings are usually conducted privately and in camera. Both the parties and the arbitral tribunal are under an obligation to keep the entirety of the arbitral proceedings confidential. The law permits very limited circumstances where disclosure of confidential information may be permitted, which include attaching the award where the court is being moved to exercise its supervisory powers or where the award is being executed.

10. THE AWARD

10.1 Legal Requirements

An arbitral award is required to be made in writing stating the reasons upon which the award is based unless the parties agreed that no reasons are to be given. An award granted by an arbitral tribunal shall be passed based on the legal stipulations or based on justice and propriety.

Unless the parties agree otherwise, arbitration proceedings shall be completed within a period of not later than 180 days from the date of composition of the arbitral tribunal. Where the dispute is complex, the tribunal may extend the deadline upon notice to the parties. An award is to be delivered within 30 days of conclusion of the hearing.

10.2 Types of Remedies

In addition to having the mandate to award final awards, an arbitral tribunal has the power to grant interim, interlocutory or partial awards depending upon the circumstances of the case.

10.3 Recovering Interest and Legal Costs

The Arbitration Act provides that costs shall follow the event, as is the norm in court proceedings in Tanzania, which is built upon the adversarial system. In contrast, the Rules of Procedure Regulations provide that each party shall bear its own cost for legal representation and will not be assessed against the other party. However, Section 36(1) of the Interpretation of Laws Act [CAP 1 RE 2019] provides that subsidiary legislation shall not be inconsistent with the provisions of the written law under which it is made. Therefore, in this case, costs will follow suit.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

An arbitral award is deemed to be final, from which no appeal lies unless the parties agree otherwise. However, an arbitral award may be challenged on the following grounds:

- the arbitral tribunal exceeded its substantive jurisdiction;
- the tribunal failed to deal with all the issues before it;
- the award was obtained by fraud or procured in a manner that is contrary to public policy; or
- there was irregularity in the conduct of the proceeding or in the award.

Where the court determines that there is a serious irregularity affecting the tribunal, it may:

- remit the award to the arbitral tribunal, in whole or in part, for reconsideration;
- set aside the award in whole or in part; or
- declare the award to be of no effect, in whole or in part.

The court shall not exercise powers to set aside or nullify an arbitral award, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot exclude the scope of a challenge on substantive jurisdiction or serious irregularity; however, it may exclude the scope of the parties to approach the court on a question of law.

11.3 Standard of Judicial Review

The merits of a case cannot be reviewed or determined by a court; however, a party may challenge an award on substantive jurisdiction, serious irregularity or a question of law. A party challenging an award on the above grounds will be entitled to a complete re-hearing as opposed to a review of the tribunal's decision. However, in the event that it is successful, the court may only confirm the award, vary the award, remit the award back to the tribunal, set aside the award in whole or in part, or declare the award to be of no effect.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Tanzania has signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). However, the treaty has not been domesticated into Tanzania law.

Tanzania is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (the Geneva Convention), the Geneva Protocol on Arbitration Clauses (the Geneva Protocol), the ICSID Convention 1965, the Multilateral Investment Treaties Guaranteed Agency Convention 1958 (the MIGA Convention) and several Bilateral Investment Treaties with other countries.

Foreign arbitral awards are recognised and can be enforced by the High Court subject to compliance with the Arbitration Act. According to the provisions of Section 78(1) of the Arbitration Act, upon application in writing to the High Court, a domestic arbitral award or foreign arbitral award shall be recognised as binding and enforceable.

12.2 Enforcement Procedure

Standard

In order for an award to be enforceable, it must:

- have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- have been made by the arbitral tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- have been made in conformity with the law governing the arbitration procedure;
- have become final in the country in which it was made;
- have been in respect of a matter which may lawfully be referred to arbitration under the laws of Tanzania, and its enforcement shall not be contrary to the public policy or the laws of Tanzania; and
- not contradict conditions for enforcement of foreign awards as provided under Section 83(2) and (4) of the Arbitration Act.

Procedure

Regulation 63 of the Rules of Procedure Regulations provides for the format in which the application for enforcement of the arbitral award must be made to the court, namely that it shall:

- be made by way of petition and be titled "In the matter of the arbitration and in the matter of the Act", and reference shall be made in the application to the relevant section of the Arbitration Act;
- contain a brief statement, in summary form, of the material facts, shall be divided into

paragraphs numbered consecutively and shall state the nature of the relief sought or the questions of law for the determination of the court, as the case may be;
- annexed to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to which the petition relates, or a copy of it certified by the petitioner or his advocate to be a true copy;
- have annexed to it the submission, the minutes or proceedings of the arbitral tribunal award or the ruling to which the petition relates, or a copy of it certified by the petitioner or his or her advocate to be a true copy; and
- specify the persons affected by it and upon whom notice is required to be given as provided in those Regulations and shall state the address, in detail, of each of them.

Not less than seven days before the date for the hearing of a petition or such lesser time as a magistrate or, as the case may be, a judge may allow, written notice must be given by the court to all persons specified in the petition and to such other persons as appear to likely be affected by the proceedings, requiring them to show cause, within the time specified in the notice, why the relief sought should not be granted, and if no sufficient cause be shown, a judge may make such order as the circumstances of the case may appear to him or her to so require.

Status of an Award That has Been Set Aside by the Courts in the Seat of Arbitration or is Subject to an Ongoing Set-aside Proceeding

As per the above, an award that has been set aside or is subject to an ongoing set-aside proceeding in the seat of arbitration will not be enforceable in Tanzania.

Defence of Sovereign Immunity

Tanzania currently has no law in place regulating state immunity, nor is there judicial precedent discussing the inclination of the judiciary in Tanzania either towards absolute or restrictive immunity. The defence of sovereign immunity will not be available where the state has consented to arbitration contained in a bilateral investment treaty or where it has been expressly waived in the agreement between the parties.

Moreover, a party will not be able to attach the properties of the Tanzanian government during the enforcement of an award against Tanzania through the Tanzanian courts. The Government Proceeding Act [CAP 5 RE 2019] explicitly prohibits attachment of government assets; instead, the decree holder shall approach the Permanent Secretary of the Treasury, who will then pay the amount lawfully due.

12.3 Approach of the Courts

Tanzanian courts generally recognise and enforce arbitral awards. This is reflected in the Arbitration Act, which sets strict parameters on the grounds on which the court can reject enforcement of an arbitral award.

Among the grounds preventing enforcement of an arbitral award is when the award is contrary to the public policy of Mainland Tanzania. It is therefore clear that Tanzania interprets public policy grounds to mean domestic public policy.

In the case of Catic International Engineering (T) Limited v University of Dar es Salaam, Miscellaneous Commercial Cause No. 1 of 2020, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), the arbitral tribunal ruled in favour of the Petitioner against the Respondent, a public institution, on the grounds of public policy.

The court cited with approval the Kenyan case of Tanzania National Roads Agency v Kundan Singh, Miscellaneous Civil Application No. 171 of 2012 (unreported), where it was held that an

award could be set aside on the grounds of public policy if it was shown that the award was:

- inconsistent with the constitution or other laws of the country;
- inimical to national interests; or
- contrary to justice or morality.

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration

The law does not cater for class-action or group arbitration, especially since arbitration is typically a bilateral affair binding only upon the parties to the arbitration agreement.

13.2 Ethical Codes

Arbitrators are governed by the Code of Conduct, which lays out principles which arbitrators are required to adhere to when handling disputes such as acting impartially, fairly, confidentially, acting in the interest of justice and fairness, and avoiding any conflict of interest.

A general code of conduct for counsels representing the parties in arbitration proceedings has not yet been enacted. While each profession at present is guided by its respective code of conduct, questions can be asked regarding the applicability of the said codes of conduct in arbitral proceedings and the disciplinary mechanisms that follow suit. For example, would the Medical Council of Tanganyika be able to exercise its disciplinary authority when a doctor has acted against the interests of a party while representing them as counsel? Can a doctor be held liable for acts conducted outside the medical field? It may be argued that perhaps the only profession which would provide adequate redress for a party is where the counsel representing the party is an advocate. Advocates are governed by the Advocates Act [CAP 341 RE 2019], which provides that advocates have a duty to act confidentially, competently, honestly and in the best interest of their client. Disciplinary redress can be sought through the Advocates Committee.

Given that the law does not limit the parties from selecting a counsel of their choice, it may be prudent to enact a law governing the counsel's code of conduct, especially given that there is a possibility that the counsel selected may not necessarily be a professional.

13.3 Third-Party Funding

There are no rules or restrictions on third-party funders.

13.4 Consolidation

Arbitral proceedings may be consolidated, or concurrent hearings may be held, only where the parties agree to do so based on terms agreed upon by the parties.

Unless the parties agree to do so, an arbitral tribunal does not have the power to order consolidation of proceedings or concurrent hearings.

13.5 Binding of Third Parties

Generally, an arbitration agreement only binds the parties that signed the agreement. It will not be binding upon a third party. The exception to this general principle is when an agent signs on behalf of a principal, in which instance the arbitration agreement will be binding upon the principal too.

Bowmans operates across Africa through its offices in South Africa, Kenya, Tanzania, Uganda, Mauritius and Zambia. Bowmans works closely with its alliance firms Aman Assefa & Associates Law Office in Ethiopia and Udo Udoma & Belo-Osagie in Nigeria, and its best friends in Mozambique (Taciana Peão Lopes & Advogados Associados) and Malawi (PFI Partnerships). Bowmans also has strong relationships with other leading law firms across the rest of Africa. Bowmans Tanzania has over 20 professional and business services staff based in the Dar es Salaam office. We are also able to draw on the experience and expertise of over 800 colleagues in other Bowmans offices. Bowmans Tanzania has established itself as a leading dispute resolution practice in Tanzania, with extensive experience in Tanzania commercial litigation, cross-border disputes (including international arbitration) and disputes with and before government bodies and regulators.

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Trends and Developments

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Bowmans see p.20

Trends and Developments in International Arbitration in Tanzania

Arbitration proceedings in Tanzania have in recent years experienced some interesting developments.

A new Arbitration Act [CAP 15 RE 2020] (Arbitration Act) was enacted in 2020 to replace the Arbitration Act, 1931. The Arbitration Act establishes a more robust mechanism for regulation of arbitral proceedings and accreditation of arbitral practitioners. Significantly, the Arbitration Act also establishes the Tanzania Arbitration Centre, a government-funded centre through which domestic and international disputes may be heard. It is expected that the Arbitration Act will enhance investor confidence in dispute resolution and provide for an accessible alternative dispute resolution mechanism for disputes, thus reducing the backlog of cases in the national courts.

With the continued rise in the use of arbitration in commercial disputes, we highlight some recent developments expounding on the Tanzanian court's approach towards arbitration.

Arbitration cannot be bypassed through liquidation proceedings

In the case of North Mara Gold Mine Limited v Diamond Motors Limited, Civil Appeal No. 29 of 2017, Court of Appeal of Tanzania, at Dar es Salaam (unreported), the Court of Appeal held that the High Court erred in dismissing a petition to stay winding-up proceedings so as to pave the way to arbitrate the underlying dispute between the parties. The Court of Appeal held that the prayer to have the underlying dispute referred to arbitration before proceeding with the winding-up petition did not oust the jurisdiction of the High Court as the sole authority to determine winding-up proceedings. As such, the High Court erred in failing to grant the prayer.

The above decision is in line with the decision in Queensway Tanzania (EPZ) Limited v Tanzania Tooku Garments Co. Ltd, Misc. Commercial Cause No. 43 of 2020, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), in which the court struck out a petition to wind up the Respondent in order to pave way for arbitration.

The High Court judge relied on the English case of Salford Estates (No. 2) Limited v Altomart Limited [2015] Ch. 289 [2014] EWCA Civ. 1575 and stated:

"Courts should not encourage parties to use 'the draconian threat of liquidation' as a method for bypassing an arbitration agreement. To allow that to happen, it was said, 'would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue."

The High Court subsequently relied on the decision in Parmalat Capital Finance Ltd v Food Holdings Ltd (in liq) [2009] 1 BCLC, where the court held:

"A party to a dispute should not be allowed to use the threat of a winding-up petition as a means of forcing the company to pay a bona fide disputed debt."

Having stated the above positions, the judge highlighted the simple fact that if an award was to be properly issued through arbitration, any

failure to satisfy the award *"would entitle the successful party to seek recourse to the Court for redress, which may as well include filing for winding up proceedings. In so doing, the arbitration policy of upholding parties' autonomy would be upheld while, at the same time, maintaining the right of a creditor to file for winding up proceedings."*

In light of the above and in line with the court's approach of encouraging arbitration, the parties were directed to arbitrate their dispute as the underlying dispute between the parties from which the petition arose.

An exception to the above rule is where an agreement between the parties provides for arbitration; however, the respondent admits to the debt in dispute. In such an instance, the court will proceed with the winding-up petition, as held in the case of Sinotruk International v TSN Logistics Limited, Miscellaneous Commercial Cause No. 13 of 2021, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported).

An arbitral award will be set aside where it is in breach of local laws on the grounds of public policy

In the case of Catic International Engineering (T) Limited v University of Dar es Salaam, Miscellaneous Commercial Cause No. 1 of 2020, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), the arbitral tribunal ruled in favour of Catic International Engineering (T) Limited (Petitioner) against a public institution, the University of Dar es Salaam (Respondent).

The Respondent sought to challenge the award on the basis that the additional sum agreed upon between the parties for the execution of the contract contravenes the procedures public institutions are to obey as provided for in the Public Procurement Act [CAP 410) (the Act). The Act required any variation exceeding 15% of the contracted sum to be channelled through the Tender Board of the Procurement Entity for approval. The Respondent argued that the variation in the present agreement exceeded 15%; hence, it required approval of the Tender Board.

The court ruled that illegality needs to be apparent on the fact of the award. Unless it is apparent, the court will not interfere with the award. Citing the acclaimed case of State Trading Corporation v Betamax Ltd, 2019 SCJ 154, the court held that when an award infringes public procurement laws or public policy, illegality may be sufficiently relied upon to set aside the arbitral award. One of the underlying purposes behind the Act was to ensure accountability and oversight of all public institutions. A contracting party therefore is not permitted to circumvent the laws of the country.

In the above circumstances, the award was set aside by the High Court for contravening public policy.

Parallel proceedings

In the case of DB Shapriya & Co. Limited v Yara Tanzania Limited, Miscellaneous Commercial Cause No. 3 of 2019, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), DB Shapriya & Co. Limited (Petitioner) instituted a suit in the High Court seeking redress for a commercial dispute between the parties. Upon an application by Yara Tanzania Limited (Respondent), the High Court stayed proceedings and ordered for the matter to be referred to arbitration in accordance with the agreement between the parties. Arbitration proceedings were not opted in a timely manner; therefore, the High Court ordered for the suit to proceed. The Respondent, dissatisfied, approached the Court of Appeal seeking to reverse the order of the High Court and simultaneously initiated arbitration proceedings. The Respondent obtained a favourable arbitral award without the participa-

tion of the Petitioner. Given that the proceedings in the High Court were never stayed, the court proceeded with the determination of the suit and delivered a default judgment in favour of the Petitioner, in contrast to the award by the tribunal.

The Petitioner applied to the High Court seeking to set aside the award of the arbitral tribunal on the basis of public policy.

The court held that the proceedings in the suit before the High Court and the proceedings before the arbitral tribunal emanated from the same contractual dispute involving the same parties. The effect of registering the arbitral award would result in two conflicting decrees originating from the same court, an outcome which would be in contravention with public policy.

The court held that the arbitral award will not have legal force for as long as the decree from the judgment of the High Court is in force.

Failure to abide by the arbitration agreement will render the award illegal

In the case of Kilimanjaro Oil Company v Tanzania Petroleum Development Corporation, Miscellaneous Commercial Cause No. 385 of 2017, High Court of Tanzania (Commercial Division), at Dar es Salaam (unreported), the High Court set aside an arbitral award on the grounds that the adjudicator exceeded the time period agreed upon between the parties to render his decision.

The agreement between the parties provided for an adjudicator to provide his decision in writing within 14 days of receipt of the notification of the dispute. A party then had 14 days from the date of receipt of the decision to refer the matter to an arbitrator if they so wished. The Petitioner contended that the Arbitrator failed to consider the fact that the Adjudicator grossly exceeded his jurisdiction by failing to determine the dispute within the time frame provided, a contention the court agreed with.

The court held that an arbitrator has no power aside from the power vested in him by the parties through the arbitration agreement. If he has acted outside the bounds of the agreement, he has acted without jurisdiction. The Adjudicator's failure to act within the mandates of the agreement rendered his ruling a nullity, which in turn rendered the arbitral proceedings a nullity.

The arbitral award was set aside and the proceedings quashed.

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