THE ROLE OF NATIONAL COURTS IN ARBITRATION: AN EXAMINATION OF THE ATTITUDE OF UGANDAN COURTS

دور المحاكم الوطنية في التحكيم
تفحص موقف المحاكم الأوغندية

by

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Abstract

This study examined the attitude of Ugandan courts towards arbitration in order to facilitate efficient resolution of construction disputes which are better resolved by arbitration. The investigation was done through a case-study research design involving a desk review of existing literature, legislation and the cases decided by the courts in Uganda in order to establish how the Ugandan judiciary has facilitated the growth of the process. The study notes that the courts in Uganda are generally supportive of the arbitration process as exemplified by their tendency to recognize a valid arbitration agreement and unwillingness to examine evidence that is before an arbitral tribunal among others. It however notes some challenges that need to be addressed including: ambiguity in some parts of the substantive law on arbitration, knowledge gaps among lawyers on how the arbitration process operates, as well as a shut down on arbitration due to an abeyance in the powers of Centre for Arbitration and Dispute Resolution (CADER) to appoint arbitrators following a High Court ruling against the Executive Director's exercise of the said powers without a constituted Council. Needless to say, CADER has also been operating with significantly low levels of funding.

ملخص منقح

قامت هذه الدراسة بمراجعة موقف المحاكم الأوغندية من التحكيم من أجل تقديم حل فعال لنزاعات البناء التي يتم حلها بشكل أفضل عن طريق التحكيم. تم إجراء التحقيق من خلال تصميم بحث لدراسة الحالة يتضمن مراجعة مكتبية لما هو موجود

الأدبيات والتشريعات والقضايا التي تم بت الحكم فيها من قبل المحاكم في أوغندا من أجل تحديد كيفية

تبسيط القضاء الأوغندي نمو العملية. تشير الدراسة إلى أن المحاكم في أوغندا تدعم بشكل عام عملية التحكيم كما يتجلى في ميلها إلى ذلك الاعتراف باتفاق تحكيم صالح وعدم الرغبة في فحص الأدلة الموجودة أمام هيئة التحكيم مع بعضهم البعض . ومع ذلك ، فإن الدراسة تشير إلى بعض التحديات التي تحتاج إلى معالجة بما في ذلك: الغموض في بعض أجزاء القانون الموضوعي بشأن التحكيم ، والفجوات المعرفية فيما بين المحامين حول كيفية عمل عملية التحكيم ، بالإضافة إلى إغلاق التحكيم في تعيين المحكمين عقب حكم (ك.أ.د.ي.ر) بسبب عدم صلاحيات مركز التحكيم وحل النزاعات المحكمة العليا ضد ممارسة المدير التنفيذي السلطات دون تشكيل مجلس. وغني عن القول ، أن مركز يعمل أيضًا بمستويات منخفضة بشكل ملحوظ من (ك.أ.د.ي.ر)" مركز التحكيم وحل النزاعات" التمويل

ری.

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LIST OF ABBREVIATIONS

ACA	Arbitration and Conciliation Act
ADR	Alternative Dispute Resolution
CADER	Centre for Arbitration and Dispute Resolution
CBRC	Case Backlog Reduction Committee
CETA	Comprehensive economic Trade Agreement
CPA	Civil Procedure Act
FDI	Foreign Direct Investment
ICAMEK	International Centre for Arbitration and Mediation in Kampala
NSSF	National Social Security Fund
UBA	Uganda Bankers' Association
ULS	Uganda Law Society
UNCITRAL	United Nations Commission on International Trade Law

CHAPTER I – INTRODUCTION

1.1 Introductory notes

The attitude of national courts towards arbitration in any one jurisdiction has a huge bearing on the efficiency of the process and therefore its ability to facilitate timely resolution of commercial disputes which are increasingly preferred to be resolved through arbitration. It is on this basis that this dissertation set out to assess the attitude of Ugandan courts towards arbitration with a view to identifying the opportunities and challenges for effective resolution of construction disputes.

The investigation is done through a case-study research design involving a review of the major decisions in which the courts in Uganda have pronounced themselves on issues presented to them at the different stages of the arbitration process. In this regard, the conclusions on the attitude of Ugandan courts towards arbitration are informed by an analysis of the selected cases in terms of their effect on the arbitration process. Additionally, the dissertation makes recommendations of what needs to be done in order to ensure that Ugandan courts perform a supportive ─as opposed to disruptive─ role in the arbitration process.

The argument made by the dissertation is that a positive attitude of Ugandan courts towards arbitration is extremely important for construction investors, financiers, contractors and law practitioners especially considering the complexities around the nature of relationships, disputes that emerge in that field as well as the level of capital investment involved. Contrasted with the traditional litigation in court which is associated with several challenges, an effective arbitration environment will facilitate better, affordable and timely resolution of construction disputes. However this is not achievable if the attitude of national courts is negative.

The enquiry made by the dissertation is presented in five chapters structured as follows: this introductory chapter (Chapter I) presents the background to the study, problem statement, study objectives, research questions, significance of the study as well as the methodology through which the objectives are achieved. This is followed by Chapter II which presents the findings from a review of the relevant literature on national courts' involvement in the arbitration process. On its part, Chapter III highlights the legal framework on arbitration in Uganda followed by a presentation and discussion of the major cases mirroring the attitude of Ugandan courts towards arbitration which is done in Chapter IV. Finally, Chapter V presents the major conclusions of the study as well as the recommendations on how to facilitate an efficient arbitration environment in Uganda.

1.2 Background

1.2.1 Preference for non-litigious dispute resolution

Trade and business is growing very rapidly across the different sectors and borders just as the actors involved and the rules by which it is governed. Accompanying this growth is a related trend in the nature and dynamics of disputes arising in business relations, as well as the mechanisms for their resolution. Increasingly, parties to business disputes are making recourse to alternative dispute resolution (ADR) mechanisms which are deemed to be more efficient compared to the taking of disputes to national courts which are associated with anti-business elements such as delays and risks.[1] One such mechanism that is increasingly being preferred by businesses in resolving transnational commercial engagements is arbitration.[2]

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[1] See a Keynote Address 'Is International Arbitration truly international? The role of Diversity' made by Funke Adekoya SAN at the 3rd Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa on 6th March, 2018. Accessed at the Arbitration in Africa website: https://docs.wixstatic.com/ugd/54e92e_28ab07d307084b42a414cd3969436da1.pdf.

[2] See "Corporate choices in International Arbitration: Industry" (2013) at: http://www.arbitration.qmul.ac.uk/docs/123282.pdf/

1.2.2 Why Arbitrate?

Capper defines arbitration as a "consensual, private process for the submission of a dispute for a decision of a tribunal, comprising one or more independent third persons."[3] A key feature in this definition is the element of consent of the parties. This means that there has to be an agreement between the parties to resort to arbitration for all or part of the disputes arising out of their legal relationship.[4]

A combination of factors makes the arbitration process "an effective way of obtaining a final and binding decision on a dispute"[5]. On the one hand, perhaps most importantly, are the advantages said to be inherent in arbitration. For example, the process is said to guarantee order and predictability in international transactions. This it does by providing an environment that is free from the complications associated with the variances in the "substantive and procedural norms" which may apply to litigation in different court systems[6]. The process is also said to be cost friendly and time efficient[7]; it allows for convenience by leaving the parties with the discretion to determine their arbitrators[8], where and when to arbitrate as well as the law under which to do so[9]; it allows for the conduct of proceedings in a private environment which guarantees confidentiality[10]; its decisions are final with limited

[3]P. Capper, International Arbitration: A Handbook (2004), at 2.

[4]See Art. II (1) of the New York Convention, 1958 and Article 7(1) of the UNCITRAL Model Law on International Commercial Arbitration.

[5] Nigel Blackaby & Constantine Partasides, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (6th ed, OXFORD 2015) 2.

[6]Park, in 36 Vand. J. Transnat'l L. (2003) 1257; Carbonneau, in 36 Vand. J. Transnat'l (2003)1189.

[7]Edna Sussman, Why arbitrate? October 2009 | NYSBA Journal, P. 20, & 7(1) TDM (2010).

[8] This being based on issues such as the relevant technical expertise relating to the dispute in question.

[9]Sussman *supra*.

[10]Ibid.

room prescribed for judicial review and are capable of being enforced in most of the jurisdictions that are party to the New York Convention.[11]

On the other hand, the preference for arbitration is informed by the challenges of the traditional means of resolving dispute by way of litigation in court including: high levels of backlog which leads to delays in resolution of disputes and the related losses to business men whose undertakings involve huge sums of money; the high costs of litigation process in terms of legal fees to the lawyers; limitations in the expertise of judicial officers in highly specialised fields, just to mention but a few.

1.2.3 National courts' role in commercial arbitration

It is noteworthy that recourse to arbitration for whatever reason does not completely divorce national courts from participating in commercial disputes. In fact, Arbitration needs to be supported by national courts in order for it to function effectively.[12] Indeed, there exists a host of instances (before, during or even after conclusion of the arbitration process) where recourse may be made to courts of law.[13] It is not new, for example, to see parties to an arbitration resort to national courts to enforce an award.[14] This way, national courts serve as a fulcrum that facilitates the efficiency of the arbitration process.

However, the role that national courts play in the process should not be allowed to exceed its supportive limits since doing so would instead disrupt the arbitration process in which case the process will not grow. Since arbitration is undeniably the preference of

[11] See, also, Richard A. Homing, Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46, 9 AM. REV. INT'L ARB. 155, 156-57 (1998).

[12] Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arb Int 121, 127.

[13] In this regard, see, generally, Emilia Onyema, "Power shift in international commercial arbitration proceedings", (2004) Vol 14 (Nos 1 & 2) Caribbean Law Review, 62-77.

[14]Cremades, Bernardo M. &Plehn, Steven L, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" (1984) 2 Boston University International Law Journal, 317, 329.

businesses, the courts' attitude will also most likely affect the levels of Foreign Direct Investment (FDI) in Uganda yet the country is predominantly an FDI based economy. According to the 2019 World Bank Doing Business report, Uganda still ranks poorly in the ease of doing business rankings. Out of the total of 190 countries, Uganda is ranked 127 compared to other regional players such as Rwanda and Kenya who are in positions 29 and 61 respectively. This ranking was based on a number of indicators including the ease of enforcing business contracts for example in terms of the time and cost.

Furthermore, since much of the FDI is in the form of contracts with government of Uganda, an efficient arbitration environment increases investors' confidence that any emergent disputes will be resolved impartially. However, this may not be so if the attitude of national courts is anti-arbitration.

1.3 Contextualising ADR in Uganda: A magical wand?

Alternative Dispute Resolution (ADR) strategies are increasingly being adopted in dispute settlement in Uganda both in addition to, and at times in the place of "conventional law suits."[15] Examples in this regard include mediation, negotiation, conciliation, court annexed ADR, mini-trial/early neutral evaluation, arbitration[16] and adjudication.

This is becauseADR mechanisms are perceived to be a magic wand to fix the complex puzzle that is dealing with the high level of backlog characterising the formal court system in Uganda. In December 2015, for example, the Judiciary of Uganda conducted a National Court Case Census with the objective of establishing the state of backlog at the different

[15]Anthony C. Kakooza, Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects (June 18, 2010). Uganda Living Law Journal, Vol. 7 No. 2 December 2009, pp. 268-294. ISSN 1729-4672. Published by the Uganda Law Reform Commission. Available at SSRN: https://ssrn.com/abstract=1715664

[16]Id. (citing Hon. Justice G. W. M. Kiryabwire: Alternative Dispute Resolution – A catalyst in Commercial Development: A case study from Uganda; in Uganda Living Law Journal, Vol. 3: No. 2 December 2005, at p. 145).

courts.[17]This report coming out of that exercise revealed that over 114,809[18] cases pending in the judicial system from all courts in Uganda with 1 in every 4 of these having spent as many as 10 years in the system. The census attributed this backlog to a number of factors including: inadequate staffing in some courts; poor case management; existence of non-operational courts; general lack of skills in use of ICTs; lack of idealism and commitment to the institution among staff to a point where every effort has to be remunerated in monetary terms; absence of service delivery standards to guide uniform approach in handling cases; as well as absence of timelines within which the cases should be removed.[19] As a way forward, it recommended encouraging ADR as an innovation to reduce on the incidence of backlog.

Of specific mention, the census found that the highest number of backlog among the courts of record was at the High Court of Uganda with a whole 36,313 (31.63%) pending cases. The distribution of backlog among the different divisions of the High court was as follows:

Division	**Level of Backlog**
Commercial Division	2,604
Criminal Division	8,518
Civil Division	10,723
Anti-corruption Division	257
International Crimes Division	15

[17] See Report of the Judiciary National Court Case Census, 2016. Accessed at http://www.judiciary.go.ug/files/downloads/Census%20Report%202015.pdf.

[18] According to a later report of the Case Backlog Reduction Committee (CBRC) constituted following this census report, the total number of pending cases as of 31st January 2017 was 155,400. See a 27th March 2017 post on the Judiciary's website titled 'Backlog Committee Releases Report.' Accessed at http://www.judiciary.go.ug/data/news/311/5714/Backlog%20Committee%20Releases%20Report.html.

[19]Id.

Family Division	4512
Land Division	5976

This number is considerably high compared to the numbers at the Court of Appeal and Supreme Court which had 5,836 (5.08%) and 96 (0.08%) respectively. Notably, the High Court is seized with unlimited original jurisdiction in all civil and criminal matters meaning that any delays in its processes has a substantive effect on the realisation of justice by businesses.[20]The sum total of this is that businesses have their capital locked up while waiting for the next available opportunity when the court will find time to adjudicate on their matter.

1.4 The arbitration environment in Uganda

As already noted, Uganda recognizes arbitration as one of the alternative dispute resolution mechanisms. Just as is the case elsewhere, the mechanism is preferred for resolution of especially disputes that are of a commercial nature.[21] A 2009 World Bank study report on Uganda's legal and judicial sector attributed the increase in the use of ADR mechanisms ─including arbitration─ to the expectation that there would be a significant reduction in the backlog at the Commercial Division of the High Court.[22] This essentially portrays arbitration as a more efficient approach to commercial dispute resolution. This is especially considering that the establishment of the Commercial court itself was based on a the 1995 recommendation by a report of the Commission of Inquiry into the Delays in the Judicial System which had found that there were a number of limitations in the High court at

[20]Constitution of the Republic of Uganda, 1995 (as amended), Article 139.

[21]Kakooza, *supra*, at 2.

[22] World Bank (Legal Vice Presidency), 'Uganda Legal and Judicial Sector Study Report,' July 2009 at 65 (accessed at http://documents.worldbank.org/curated/en/922811468309343817/pdf/497010ESW0P11010Box341968B01PUBLIC1.pdf).

the time.[23] As part of the reforms, the Commercial Division (Mediation Pilot Project) Rules 2003 Statutory Instrument 71 of 2003 were issued with the effect of providing for a mechanism through which disputes at the Commercial court would be forwarded to the Center for Arbitration and Dispute Resolution (CADER) for either arbitration or mediation.[24]

Quite negatively, the above study by the World Bank found that some lawyers are advising their clients to opt out of arbitration and instead have their disputes litigated before the Commercial Court.[25] The report attributes this trend to the huge costs mainly in the form of the "very high" fees charged by senior lawyers.[26]

Nevertheless, arbitration is still very much considered. A resounding piece of evidence for this attitude is reflected in a recent initiative between bankers in Uganda, through their umbrella body known as Uganda Bankers' Association (UBA) and the Uganda Law Society (ULS) which led to the establishment of an independent center for resolution of disputes arising in the banking and financial sector.[27]For example, an estimated UGX 729.6

[23]See Hon. Justice Benjamin J. Odoki, The relevance of Commercial Courts to the Modern Judiciary: A case Study from Uganda. A Paper presented at the Southern African Chief justices Forum Conference held from 13th to 14th August 2010 in Johannesburg, South Africa (available at https://www.venice.coe.int/sacjf/2010_08_RSA_Johannesburg/Uganda.pdf) citing the 1995 Justice Platt Commission of Inquiry Report on Delays in the Judicial System.

[24] Geoffrey Kiryabwire, 'The Development of the Commercial judicial System in Uganda: A Study of the Commercial Court Division, High Court of Uganda', Volume 2 *Journal of Business, Entrepreneurship & the Law* Issue 2 (2009), at 353.

[25] World Bank (Legal Vice Presidency), 'Uganda Legal and Judicial Sector Study Report,' note 22 above at 65.

[26]Id.

[27]See Judiciary of Uganda, 'Lawyers, and Bankers Root for Independent Arbitration Centre' (accessed at https://judiciary.go.ug/data/news/576/1803/Lawyers,%20Bankers%20Root%20for%20Independent%20Arbitration%20Cenre.html posted on August 8, 2018); Badru Kasadah, 'Lawyers, bankers to set up joint dispute resolution center,' *Eagle news,* March 23, 2018 (accessed at https://eagle.co.ug/2018/03/23/lawyers-bankers-to-set-up-joint-dispute-resolution-center.html); and https://www.icamek.org/about-us/.

Billion (approximately USD 194.2 million) is said to be currently tied up in the formal justice system for, among other reasons, a high level of case backlog.[28]

It is such realities that led to the establishment of the International Centre for Arbitration and Mediation in Kampala (ICAMEK) in order to "…complement the current judicial system with a fair, expeditious, efficient, and flexible Alternative Dispute Resolution mechanism."[29] In the view of the Bankers, the centre would help them save their capital from being locked up into the litigation system which is already faced with a number of challenges that are not likely to be resolved in the near future.

1.5 Problem Statement

The coming into force of Uganda's Arbitration and Conciliation Act No. 4 of 2000, which is based on the UNCITRAL model law, is a strong gesture that Uganda is willing to comply with the international standards relating to arbitration. This way, Uganda positions itself as a favourable investment destination since business persons would be more confident to transact in and/or with Ugandan based businesses with assurance of an international approach to dispute resolution and enforcement of awards.

However, the potential gains of such a framework may be short lived if the courts in Uganda interfere with as opposed to being supportive of the arbitration process. While an Arbitration Act is already in place, there is not yet in place a comprehensive study examining the approach that the courts in Uganda have taken in respect of the arbitration process.

It is on this basis that this study was undertaken in order to examine how the courts in Uganda have approached the arbitration with a view to making proposals on how to ensure that the courts promote the process.

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[28]Id.

[29]See https://www.icamek.org/about-us/.

1.6 Objectives of the study

The major objective of this study was to assess the attitude of national courts towards arbitration. Specifically, the study sought to:

i. Highlight the legal basis for Ugandan courts' intervention in the arbitration process;
ii. Analyse how Ugandan courts have interpreted and exercised jurisdiction over the arbitration process;
iii. Examine the effect of Ugandan courts' attitude on the growth of arbitration as the preferred mode of resolving dispute;
iv. Propose areas where, and ways in which, Ugandan courts need to improve in order to facilitate the growth of arbitration.

1.7 Research questions

To achieve the above objectives, the study interrogated the following questions:

i. What is the legal basis for Ugandan courts' intervention in the arbitration process?
ii. How have the courts in Uganda interpreted and exercised jurisdiction over the arbitration process?
iii. How has the attitude of the courts in Ugandan impacted on the growth of arbitration as the preferred mode of resolving dispute?
iv. *What should be done to ensure that the courts in Uganda support the growth of arbitration?*

1.8 Significance of the study

The study is timely in the sense that it provides a rigorous and in-depth evaluation of the trends in Uganda regarding courts' understanding and execution of their role towards arbitration. The study therefore provides a point of reference for a broad range of stakeholders including the courts themselves which are offered with proposals on how to

improve in areas where they are still performing poorly. This is in addition to business entities who, it is hoped, will use the findings in the making of decisions on investment, as well as members of the academia who will use the study as a point of reference and basis for further research on related issues.

1.9 A note on the methodology

The study was qualitative in nature involving a desk review of literature, the legislation as well as the relevant cases handled by the courts in Uganda. This analysis was made through a mixture of both interpretive and critical epistemological points of view. In doing this, the study sought to establish how the Ugandan judiciary has facilitated the growth of arbitration in Uganda. The cases reviewed were mainly those from the High Court of Uganda which is established under the Ugandan Constitution as one with inherent original jurisdiction in all civil and criminal matters. However, where the cases were appealed to the Court of Appeal and/or Supreme Court, the rulings on the further appeals were also reviewed in order to appreciate the position as settled by those superior courts.

CHAPTER II – LITERATURE REVIEW

2.1 Introduction

Generally, there appears to be consensus, from the literature reviewed, that national courts have a contribution to make towards the success of the arbitration process. This is not withstanding that arbitration inherently seeks to do away with any interaction with national systems. It is perhaps for this reason that Blackaby and Partasides describe the relationship between national courts and arbitral tribunals as one that "swings between forced cohabitation and true partnership."[30] This section presents the findings from a review of the relevant literature on the intervention of national courts in arbitration as a guiding framework for the evaluation of whether or not the courts in Uganda are playing a supportive or disruptive role.

2.2 Independence from national laws and courts: the dream of Arbitration

In this regard, Professor Julian Lew's work of 2007 presents the dream of international arbitration being an environment where it exists "in its own non-national sphere" that is distinct and autonomous from national laws and jurisdictions.[31] It would appear, from this observation, that arbitration dreads court intervention for example in the form of injunctions that are issued to prevent the process from taking its course.[32]

Accordingly, Professor Julian's work observes that the courts should desist from replacing an international process with their "narrow national viewpoint."[33]This view aligns with the observation made by Lord Saville in 1995, to the effect that:

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[30]Nigel Blackaby, Constantine Partasides *et. al*., *Redfern and Hunter on International Arbitration* (Oxford University Press, New York, 2009) 439.

[31]Julian D. M. Lew, "Achieving the Dream: Autonomous Arbitration?" in Julian D. M. Lew and Loukas A. Mistelis (eds), "Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration' Volume 16, Kluwer Law International, 2007.

[32]Id.

[33]Id., at 477.

> "*…if parties agree to resolve their disputes through the use of a private rather than a public tribunal, then the court system should play no part at all… to do otherwise is unwarrantably to interfere with the parties right to conduct their affairs as they choose.*"[34]

Similarly, a later (2009) work by Professor Julian looks at the parties' choice of arbitration as an express and intentional rejection of jurisdiction of national courts based on an appreciation of the advantages had by the former over the latter.[35]The work notes that when parties choose to resolve their dispute by way of arbitration, the courts should sit back and let the arbitration tribunal execute its mandate.

2.3 National courts still key in facilitating effectiveness of the arbitration process

National courts are not totally excluded from participating in the arbitration process. In fact, Tweeddale boldly asserts that arbitration cannot exist independent of the courts.[36] According to Kerr, international arbitration would be 'wholly ineffective' if not complemented by national courts.[37]

According to Roodt, if arbitral tribunals were able to proceed completely independent from a supervisory court in particular circumstances, abuse of due process may/would ensue.[38]The intervention of national courts in the arbitration process is thus looked at as a way of guaranteeing parties' other rights such as access to court and the right to a fair trial.[39] The work notes, however, that such protection has to be balanced with arbitral autonomy and

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[34] Lord Saville (1995). *Arbitration and the Courts*. Denning Lecture, 157.

[35] Julian D. M. Lew, "Does National Court Involvement Undermine the International Arbitration Process", 24 Am. U. Int'l L. Rev. 489 (2009), pp.490-537, at 490.

[36]Tweeddale, A., &Tweeddale, K. (2005). *Arbitration of Commercial Dispute: International and English Law and Practice*. New York: Oxford University Press.

[37] The Rt Hon. Sir MICHAEL KERR, Concord and Conflict in International Arbitration, ARBITRATION INTERNATIONAL, Vol. 13, No. 2, at 127.

[3838] Christa Roodt, Autonomy and Due Process in Arbitration: Recalibrating the Blance. European Journal of Law Reform 2011 (13) 3-4 (citing *J.* Lurie, 'Court Intervention in Arbitration: Support or Interference?' 76 *Arbitration 2010,* p. 447).

[39]Id.

party autonomy.[40] It notes, therefore, that as long as there is a valid agreement to arbitrate, courts should refer back the matter to arbitration or let the process to continue.

Writing in similar terms, Professor Julian describes courts involvement in arbitration as a natural and inevitable affair ─ comparable to weather ─ and that it is this involvement which accords international arbitration process its legitimacy.[41] It observes, however, that the courts intervention role in arbitration is limited to supporting the arbitral process, recognising and enforcing agreements as well as awards.[42] Beyond this, the courts would be acting ultra vires. As such, the courts are not to be construed as mere zealous intruders who frivolously bring themselves into the arbitration process.

Mordi's 2016 work, which interrogated the question whether international Commercial Arbitration can be effective without national courts, similarly found that, indeed, national courts are deeply involved in the arbitration process.[43] For example, recourse is made to courts to determine the arbitrality of agreements.[44]

Furthermore, national courts are key in enforcing arbitral awards.[45] This is especially because upon issuing the award, the arbitral tribunal becomes *functus officio* and, in any case, the tribunal does not have the requisite authority to enforce, by way of compelling or sanctioning the defaulting party, in order to comply with its decision.[46]Based on the

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[40]Id.

[41] See Lew (2009) *supra*,citing William W. Park, The Lex Loci Arbitri and International Commercial Arbitration, 32 INT'L & COMP. L.Q. 21, 30 (1983).

[42]At 494.

[43]Chinwe A. Mordi, An Analysis of National Courts Involvement in International Commercial Arbitration; Can International Commercial Arbitration Be Effective without National Courts? Open Journal of Political Science, 2016, 6, 95-104. Published Online April 2016 in SciRes. http://www.scirp.org/journal/ojps; http://dx.doi.org/10.4236/ojps.2016.62009.

[44] Id., pp 98 – 99.

[45]Id.

[46]Id.

foregoing, this work concludes, the practice of arbitration has deviated from its intended setup as "a method of dispute resolution without the court."[47]

2.4 Support not Supplant: Defining the contours of courts' intervention

Commenting on a seeming contradiction between the proponents of court regulation of arbitration and those suggesting a hands off approach based on the inherent autonomy of the arbitration process, Malhotra SC notes that both views are right and should not be looked at as conflicting.[48]The work notes, instead, that both views are right and that they were simply corrupted by the unnecessary vigour of the proponents who raised legitimate arguments in support of each in what he describes as "an unhappy feature of discourse on arbitration."[49]

In any case, it notes, the debate has since been settled by a recognition "on both sides of the procedural divide that the courts must be partners, not superiors or antagonists…"[50] For example, courts are needed to protect the voluntary process of arbitration from potential abuse by those "who will not act as they have agreed."[51] That this is especially true in lieu of the fact that international arbitration is increasingly becoming "a business…often involving large sums" of money coupled with the "concurrent decline in the standards of some – certainly not all - of those who take part.[52]

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[47]Id.

[48] OP Malhotra SC*The Law and Practice of Arbitration and Conciliation* (New Delhi: LexisNexis, 2002).

[49] See foreword of Lord Mustillto Malhotra (note 48 above) cited in David AR Williams, 'Defining the Role of the Court in Modern International Commercial Arbitration,' *Asian International Arbitration Journal* Volume 10 (2014) Issue 2, 137-180, 138.

[50] Id..

[51]Id.

[52]Id.

As a way forward, it recommends that the courts should seek only to support as opposed to supplanting the process of arbitration which "…exists only to serve the interests of the community…"[53] Hence, the traditional impulse of judicial officers to rectify wrongly decided issues "must, at all costs, be resisted" except in those circumstances where the legislature has expressly provided for a right of appeal.[54]This way, the courts would be respecting the parties' choice to arbitrate. As such, the court is only entitled to intervene where there is a substantive departure from the agreed method to the effect that it occasioned real injustice. Even then, the courts are advised to ensure that they craft their intervention in such a way as to cause the least "interference with the forward momentum of the process."[55]

Therefore, as opposed to retrying the case, the court's role under the circumstances is "simply to ensure that the method of dispute resolution on which the parties agreed is what they have in the event received."[56]This is irrespective of the Judge's opinion regarding the appropriateness of the procedure or the efficiency of the arbitrator.

2.5 The role of the court at the different stages of the arbitration process

Professor Julian Lew highlights four stages at which the court may intervene in the arbitration namely: prior to the establishment of a tribunal; at the commencement of arbitration; during the arbitration process and during the enforcement stage.[57] This section summarizes these stage role as follows:

(1) Prior to the establishment of a tribunal

The duty of the court at this stage is dependent on the nature of the dispute. In the case of a dispute involving a challenge to the validity of an arbitration agreement or where

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[53]Id.

[54]Id.

[55]Id.

[56]Id.

[57]See J Lew (2009), supra. See also David William, supra note 49, at 43.

court proceedings are instituted without regard to, or in violation of the arbitration agreement, the court is duty bound to uphold the existing agreement by referring the matter back to arbitration.[58].The position will however be different where the court finds that there was no valid arbitration agreement between the parties before it. Instead, the court may grant an injunction against arbitration as illustrated in the English court decision in *Kazakhstanv Istil Group*[59]. In that case, the court restrained the parties from proceeding under arbitration in keeping with the court's earlier ruling against the validity of an arbitration agreement between the parties.[60]

Notably, the right to arbitrate may as well have been waived by the parties by agreeing to have a question between them resolved by courts. In such a case, the parties estop themselves from invoking the jurisdiction of the arbitration process.[61]

Furthermore, where a party needs urgent protection that cannot await the appointment of the tribunal, the court fills the gap until the tribunal is established to protect the status quo. Under such circumstances, the model law and some national laws allow the courts to grant interim relief before the tribunal has been established or where the applicable arbitration rules do not allow arbitrators to grant interim measures of protection.[62]Lew describes this as a beneficial kind of court intervention to the arbitration proceedings.

(2) At the commencement of the arbitration

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[58]See; article II (1) & (3) New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958; article 8(1) UNCITRAL Model Law 1985 (as amended in 2006).

[59][2007] EWHC 2729 (Comm).

[60] Id., cited in Richard Garnett, 'National Court Intervention in Arbitration as an Investment Treaty Claim,' 60 International Comparative Law Quarterly (2011) 485 at 494.

[61] See Albon v Naza Motor Trading SdnBhd [2007] EWCA Civ 1124 in Richard Garnett, 'National Court Intervention in Arbitration as an Investment Treaty Claim,' 60 International Comparative Law Quarterly (2011) 485 at 494.

[62] See art. 9(1) UNCITRAL Model Law; and section 44 of the English Arbitration Act 1996.

This generally involves assisting with the appointment of and challenges of arbitrators.[63] What the court does at this stage is to give effect to the parties' agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties where the prescribed appointment mechanism does not work. Citing the UNCITRAL model law, art. 11, § 5, this work notes that in making the appointment, the court put into consideration the qualifications required of the arbitrator by the agreement of the parties.

(3) During the arbitration process

Prof. Lew's work categorises the courts' intervention at this stage as positive if it involves the court making procedural orders that cannot be issued or enforced by the arbitrators, or orders to maintain the status quo.[64] Another example are orders for protecting and taking of evidence or otherwise protecting the integrity of arbitration.[65] It should be noted that there are also instances where the courts' intervention proves to be negative and therefore undermining the arbitration process. An example in this regard may be where the court issues an anti-suit injunction either against the parties or against the arbitration process.[66]

(4) During the enforcement stage

This happens in two instances namely: (1) at the place of arbitration, *i.e.* when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or (2) at the place of enforcement, where the successful party seeks the recognition and enforcement of the award.[67]It should be noted, however, that the very fact that this happens is, "in its simplest form a negation of the arbitration agreement," the normalcy and desirability of the principles on which it [the intervention] is

[63] Id.

[64]Lew, *supra.*

[65]Id.

[66]See, for example, Himpurna v Indonesia (1999) and SaliniCostruttoriSpA v The Federal Democratic Republic of Ethiopia (2001) discussed in Lew, *supra,* section 6.

[67] Id.

based not withstanding.[68] The work attributes this to the likely reliance of the national court on its own national law and procedures in approaching and determining the issues. Furthermore, the court may be influenced by its parochial, legal, cultural, economic, and political systems.

2.6 Proposal for an appellate arbitral tribunal

The above cited work by Mordi recommends that the arbitration process should be liberated from the national courts by creating an appellate arbitral tribunal.[69]The proposal for an appellate Arbitral Tribunal is made on a number of grounds namely: the need to protect the privacy of the parties which cannot be guaranteed by the national courts whose proceedings are public and are accessible to the public; the fact that the arbitral process is relatively much faster than the court proceedings especially where there are no issues such as validity of the arbitral agreement and the terms thereof; the need to have certainty of proceedings and standards.

To effectively carry out its proposed function, it is suggested that the Appellate Arbitral tribunal thereby created should be staffed by retired Judges who are already schooled and experienced in resolving disputes. Furthermore, it should be "recognized and given that status and backing of law to enable it carry out the functions that the courts undertake in respect to arbitration"[70]This proposal seems to attempt a solution to what Professor Jan refers to as the great paradox of arbitration which "…seeks the co-operation of the very public authorities from which it wants to free itself."[71]

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[68]Id.

[69] A similar view is made by Gantz, 2005, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes; Prospects and Challenges(Vol. 703). Tucson, AZ: University of Arizona, Rogers College of Law.

[70] Id., at 100.

[71] J Paulsson "Arbitration in Three Dimensions" (LSE Legal Studies Working Paper No. 1 2.2010 http://ssrn.com/abstract=1536093) at 2

This study recommends more research to be done on the practicability of such a proposal *vis a vis* promoting an understanding, by the courts, of their mandate and how to execute it better. It remains to be seen how the international community intends to address the issue. Recourse may be made to related trends in jurisdictions such as the European Union may be of great help. In the context of investment arbitration, the EU has already adopted the appellate court mechanism in its treaty practice with some countries. The most notable examples in this regard include the Comprehensive economic Trade Agreement (CETA) entered into with Canada in 2016 as well as the EU-Vietnam Trade Agreement of 2015.[72]

2.7 The need for pro-arbitration courts in Uganda

According to Carbon, the role and the extent of the powers that courts may exercise relating to arbitration vary from country to country, depending mainly on the general approach national legislation takes towards alternative dispute resolution mechanisms, which can range from an open mistrust to full acknowledgment of their autonomy.[73] In this regard, national courts in developed legal systems are increasingly taking cognisance of party autonomy.[74] Bwanika for example cites cases in which the courts in these two countries

[72]See Hannah Ambrose&Vanessa Naish (2017),'An Investment Court system or an Appeals mechanism?' accessed at: http://arbitrationblog.practicallaw.com/an-investment-court-system-or-an-appeals-mechanism-the-eus-2017-consultation-on-multilateral-reform-of-isds/; EU, Investment in TTIP and beyond–the pathfor reform, Concept Paper (2015), at: https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf.

[73]Giulia Carbon, The Interference of the Court of the Seat with International Arbitration. Journal of Dispute Resolution.Vol. 2012

[74] Christa Roodt, Autonomy and Due Process in Arbitration: Recalibrating the Blance. European Journal of Law Reform 2011 (13) 3-4.

helped Ugandan businesses to recover their resources by recognising the arbitral awards rendered in Uganda.[75]

As already noted in chapter one, Uganda's legal framework is supportive of ADR mechanisms which are increasingly being promoted as a solution to the backlog problem. However, mere inclusion, in the national legislation, of ADR mechanisms is not enough. As the experience in Kenya has showed, a conflict may still exist between the mandates of these mechanisms and that of the courts.[76]

Hence, as Bwanika observes, given the increasing globalisation of trade, national courts in developing countries need to play a reciprocal role by supporting the growth of arbitration since this is the preferred mode of dispute resolution for businesses. Such an approach would in turn facilitate the growth of foreign direct investment as foreign investors are guaranteed of protection.

It is on this basis that this study sought to examine the approach of Ugandan courts towards arbitration.

[75]Christopher Bwanika, Arbitration and the Ugandan Courts, a presentation made at the Uganda Law Society Continuous Legal Education Training for Advocates in 2016. (Paper available on file with the author).

[76]*KamauKarori& Ken Melly, '*Attitude of Kenyan Courts Towards Arbitration' in Rethinking the Role of African National Courts in Arbitration (Edited by Emilia Onyema) Wolters Kluwer, 2018.

CHAPTER III - UGANDA'S ARBITRATION LAW

3.1 Introduction

This chapter highlights the applicable legal framework on arbitration in Uganda in order to understand both the position of Arbitration in Uganda's legislation as well as the basis for courts' intervention in the process. Seeing that the current Arbitration and Conciliation Act, Cap 4 is based on the UNCITRAL model law, this chapter provides a measure of assessment of national courts' attitude towards the arbitration process *vis a vis* their mandate under what is arguably an elaborate and up to date legal framework. The chapter begins with a brief discussion of the historical development of the arbitration law in Uganda followed by a summary of the contents of the law's provisions on key issues namely: nature and form of the agreement to arbitrate; effect of the agreement to arbitrate; effect of the arbitral award; as well as the powers of the court.

3.2 Types of arbitration

Two types of arbitration are recognised namely: arbitration ordered by court and contractual arbitration.

3.2.1 Arbitration ordered by Court

Uganda's law provides for arbitration that is done pursuant to an order of court or as part of the court process. Examples of such legal provisions include the Judicature Act[77] which provides for situations where the High Court may, at any time, order that the matter (wholly or in part) be tried before, among others, a special referee or an arbitrator agreed to by the parties.[78] This may happen in situations where: (a) all the parties interested in the

[77] Chapter 13, Laws of Uganda.

[78] Section 27.

matter competently give their consent; (b) the cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers; or (c) the question in dispute consists wholly or partly of accounts.[79]

Under Section 28 of the Judicature Act, a referee or arbitrator is deemed to be an officer of the High Court who is seized with the powers of the court and, subject to the rules of the court, is expected to conduct the matter before them as directed by the High Court. Order XLVII of the Civil Procedure Rules provides in similar terms.

It is noteworthy that even under this type of arbitration, the parties' consent to the choice of such an arbitrator is key.[80] This is also true for the cases/ questions to which government is a party in which case the consent is given by the Attorney General.[81]

3.2.2 Contractual arbitration

The term contractual arbitration is adopted in this regard to refer to the second type of arbitration which is based on an undertaking by the parties to a legal relationship reduced into an arbitration agreement, that all or a section of the dispute that arises between them shall be resolved by arbitration. This form is done under the principle of party autonomy and is distinct from the first form to which the parties resort after the dispute has already emerged.

3.3 The pre-Arbitration and conciliation Act period

Uganda's earliest law on arbitration was the Arbitration Ordinance[82] which came into force on December 31, 1930. This Ordinance was later rebranded the Arbitration Act,

[79]Section 27.

[80]See Section 27 above.

[81]Section 32 (a).

Chapter 55. However, the old Arbitration Act did not guarantee resounding support towards arbitration as the British colonial adversarial system continued to be preferred, so much so that arbitration was viewed as an attempted ouster of court's jurisdiction.[83] However, this attitude has been changing both in Uganda and the world over and preference for alternative dispute resolution is increasingly becoming the norm.

Hence, different developments have taken course in Uganda seeking to institutionalise ADR mechanisms including arbitration. In this regard, the Civil Procedure Act[84] and Civil Procedure Rules S.I 71-1 which were revised in 1998, give parties an opportunity to consider the non-litigious mechanisms of settling disputes. For example, before proceeding with hearing of a matter presented to it, the court is required to hold a Scheduling Conference to enable the parties "to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement."[85]Recently, in 2013, the Judicature (Mediation) Rules SI No. 10 of 2013[86] were issued with the effect of making pre-trial mediation mandatory in every civil actions.[87]

It is noteworthy that even where the parties to a dispute do not feel the need to have their dispute referred to arbitration, the court is empowered to order that the matter be settled

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[82] No. 29 of 1930.

[83]See Helga Akao, 'Roots of alternative dispute resolution in Uganda,' published by *Daily Monitor* on January 1, 2019 at https://mobile.monitor.co.ug/Roots-alternative-dispute-resolution-Uganda-Arbitration-Act/691260-4934176-format-xhtml-11qb65jz/index.html.

[84]Chapter 71, laws of Uganda.

[85]Civil Procedure Rules, Order XII, Rule 1 (1).

[86]Accessed at https://ulii.org/ug/legislation/statutory-instrument/2013/10.

[87]Rule 4 (1).

by way of ADR before a member of the bar or bench if it is convinced that the case has a good potential for settlement by that mechanism.[88]

3.4 The Arbitration and Conciliation Act (ACA)

Currently, arbitration in Uganda is regulated by the Arbitration and Conciliation Act (ACA)[89] which commenced on May 19, 2000. According to its long title, this Act seeks to:

> "…amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing."

Importantly, the provisions of the ACA are largely based on the UNCITRAL Model Law on Arbitration albeit with some notable differences.[90] According to Section 1, the Act applies to both domestic and international arbitration.

The forthcoming discussion highlights the major provisions of the Arbitration and Conciliation Act relating to: the nature and form of the agreement to arbitrate; effect of the agreement to arbitrate; effect of the arbitral award; as well as the role of the court.

3.4.1 Nature and form of the agreement to arbitrate

The Act defines an arbitration agreement 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."*[91]

This provision is coached in similar terms as Article 7(1) of the UNCITRAL Model law.

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[88] Id., Order XII, Rule 1 (2).

[89] Chapter 4, Laws of Uganda.

[90] Kim Rosenberg, Brian King and Erin Miller Rankin, 'Construction Arbitration in East Africa' *Global Arbitration Review,* 18 April 2017.Accessed at https://globalarbitrationreview.com/chapter/1139730/construction-arbitration-in-east-africa.

[91] Section 2 (1) (c).

Aside statement of the fact of choice of arbitration as the preferred mode of dispute resolution, the ACA provides for a number of issues that the parties to an arbitration agreement can agree upon including: number[92] or nationality[93] of arbitrators; the procedure to be followed by the tribunal in conducting the arbitral proceedings[94]; the place of arbitration[95]; the rules of law to applicable to the substance of the dispute[96] among others.

The ACA requires an arbitration agreement to be in writing.[97] What amounts to a writing for purposes of an arbitration agreement is provided for under section 3 (3) (a) and (b). Thereunder, it is provided that an arbitration agreement is in writing if it is contained in:

> *(a) a document signed by the parties; or*
> (b) *an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement.*

It is however not clear which other forms of telecommunication are envisaged beyond those that are listed under this provision. This is distinct from the situation in Kenya whose Arbitration (Amendment) Act of 2009 has expressly defined the contours of such options to two namely: "facsimile, electronic mail".[98] The Kenyan Act of 1995 further provides for a third alternative in which an arbitration agreement maybe written. That is; "an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party."[99]

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[92]Section 10 (1).

[93]Section 11.

[94]Section 19 (1).

[95]Section 20 (1).

[96]Section 28 (1).

[97]Section 3(2).

[98]See section 3 of the Amendment Act of 2009 amending section 4 (3) (b) of the 1995 Arbitration Act which was originally coached in similar terms as section 3 (3) (b) of Uganda's ACA.

[99] Kenyan Arbitration (Amendment) Act 2009, Section 4 (3) (c).

Even then, it can be seen that Uganda's ACA still gives the parties to a contract as many options as is possible on how to record the terms of the arbitration agreement as long as it provides a clear record of that agreement.

Notably, it is not mandatory for the parties to include the agreement in the contract by way of an arbitration clause. This is because it allows for the making of a separate agreement as long as reference thereto is made in the contract.[100]

3.4.2 Effect of the arbitration agreement

The ACA holds the parties' choice of arbitration as a preferred means of dispute resolution in very high regard. This is so much so that even where a contract containing an arbitration clause is held to be invalid for example under section 16 (1) (a), the arbitration clause still stands unless if it is invalidated by some other grounds.

Relatedly, where proceedings have been brought to court in a matter that is subject to an arbitration agreement, and a party, after filing a statement of defence, applies for the matter to be referred to arbitration and a hearing of that application is done, the judge or magistrate is obliged to recognise the arbitration agreement unless they find the agreement to be null and void, inoperative or incapable of being performed or that the matter in question is not what is envisaged under the arbitration agreement.[101]A similar duty applies in respect of arbitral agreements entered into in any of the foreign countries that are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[102]

Furthermore, the pendency of proceedings in a court in a matter that is subject to arbitration does not stop the arbitration process from being commenced or continued for

[100] See sections Sections 3 (1) and (4).

[101]Section 5 (1) (a) and (b).

[102]Section 40.

purposes of issuing an arbitral award.[103]

3.4.3 Form and effect of the arbitral award

3.4.3.1 Form of the award

The ACA provides that an arbitral award must be made in writing and signed by the arbitrator or arbitrators.[104] It further provides, in mandatory terms, that the award "shall" state the reasons upon which it is based save for where the parties agree to the withholding of reasons or in the case of an award on settled terms.[105] Additionally, the award is required to state the date on which as well as the place where it was issued.[106]

3.4.3.2 The majority signature rule

In the case of proceedings presided over by more than one arbitrator, the ACA stipulates that the signatures of the majority of all arbitrators are sufficient as long as a reason for the omission of the missing signatures is given.[107] This relaxation is important because it helps to address the possible difficulties that may arise where it is not practically possible to have all the arbitrators sign the award for example where one of the arbitrators is inaccessible within the timelines the record of the award is required to be produced.

More importantly, the flexibility contained in this rule further guarantees the integrity of the arbitral tribunal in the event that one of the arbitrators wilfully refuses to sign the award, either because they do not agree with the majority decision or if they withdraw from

[103]Section 5 (2).

[104] Section 31 (4)

[105]Section 31 (6) (a) and (b).

[106] Section 31 (7)

[107]Section 31 (5).

the panel in order to frustrate the proceedings by 'truncating' the tribunal as it happened in the Iran-U.S Claims tribunal proceedings in the 1980s.[108]

3.4.3.3 Status and effect of the arbitral award

Although Uganda's ACA alludes to "status and effect" in section 30 in reference to an arbitral award on agreed terms which, it says, "has the same status and effect as any other arbitral award on the substance of the dispute", it does not go ahead to expressly state what the effect of an arbitral award issued thereunder is. This omission is perhaps because even the UNCITRAL model law does not go to an extra length. However, in neighbouring Kenya, the Arbitration (Amendment) Act 2009 introduced a new Section 32A which is to the effect that:

> *"**32A.** Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."* [109]

The above notwithstanding, basing on the other provisions of the ACA, it can be said that the Act envisages an arbitral award to constitute a final determination of the issues it is concerned with. In this regard, section 9 prohibits courts from intervening in matters governed by the Act. As such, the moment an arbitral tribunal issues its award, the court has no room to intervene unless the award thereby issued is challenged on the specific grounds listed under Section 34.[110]

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[108]See Stephen M Schwebel, 'The Validity of an Arbitral Award Rendered by a Truncated Tribunal' (1995) 4 Asia Pac L Rev 1; Munir Maniruzzaman, 'The Authority of a Truncated Arbitral Tribunal – Straight Path or Puzzle?' (2012) Kluwer Arbitration Blog at: https://researchportal.port.ac.uk/portal/files/174959/MUNIR_2012_pub_KAB_The_authority_of_a_truncated_arbitral_tribunal_%E2%80%93_straight_path_or_puzzle.pdf

[109]Kenya Arbitration (Amendment) Act, Section 24.

[110]See section 3.4.4.5 below for a summary of these grounds.

3.4.3.4 Duty to recognise and enforce arbitral awards

Once an arbitral award has been issued and the time for its challenge has elapsed, or where the award has been upheld by court in the case of a challenge under section 34, the ACA provides that it has binding force and the courts are obliged to enforce it upon a written application by the holder.[111] That enforcement is done like any other order of court. The court may require that such an application be accompanied by "the duly authenticated original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of that agreement."[112] In the case of an award that was made in a language other than English, it is mandatory for the holder of such an award to submit to court a duly certified translation.[113]

An arbitral award that has not been challenged or has been confirmed attains the same status as a decree of the court and is enforceable as such.[114]

3.4.4 Courts' role in arbitration

As already noted, the general rule under Uganda's ACA is that court intervention in the arbitration process is prohibited except as provided for under the Act.[115] The definitive section of the ACA defines court as the High Court.[116] As such, any reference to "court"

[111]Section 35 (1).

[112]Section 35 (2)

[113]Section 25 (3).

[114]Section 36.

[115]Section 9.

[116]Section 2 (f).

under this section should be read as the High Court which is vested with inherent original jurisdiction in civil and criminal matters.[117]

The ACA provides for a number of windows for court's intervention as highlighted below.

3.4.4.1 Stay of legal proceedings

The first window is where court is moved to issue an order referring a dispute before it, to arbitration.[118] This happens where proceedings are brought before court in a matter that is subject of an arbitration agreement and the party against whom they have been brought, makes an application for the reference.[119] Notably, the ACA requires that such a party must first have filed their defence and the court is required to accord both parties a hearing in respect of the application.[120]

Where such an application has been made, the court is under duty to refer the matter to arbitration unless it finds either, that the arbitral agreement is invalid, inoperative or incapable of being performed; or that the dispute before it is not what is envisaged under the arbitration agreement.

3.4.4.2 Applications for grant of interim measures

The second scenario provided for under the ACA is with respect to applications for interim measures. Under section 6, court is mandated to issue interim measures of protection before or during the arbitral proceedings. A similar mandate is provided for under section 17 where the court may be called upon, either by the appointing authority or a party with the

[117] See 1995 Constitution of the Republic of Uganda, Article 139.

[118]Section 5 (1).

[119]Id.

[120]Id.

approval of the former, to exercise on behalf of, or in the place of the appointing authority, the power to order any party to take appropriate interim measures of protection in respect of the subject matter of the dispute before the arbitral tribunal.[121]

In exercising this mandate, the court is restricted in the extent of its interventions. This is evident in sub section 2 of section 6, which limit court to such rulings or orders as may have been made by the arbitral tribunal. The court is required to treat such rulings or orders as conclusive for purposes of the application before it.

3.4.4.3 Appeals challenging the jurisdiction of an arbitral tribunal

One of the underlying principles of arbitration is that of *kompetenz kompetenz* that is; the idea that an arbitral tribunal has the capacity to determine its own jurisdiction. The ACA of Uganda caters to this principle under section 16 which authorizes the arbitral tribunal to rule on challenges to its jurisdiction as preliminary questions[122]. This is in keeping with the provisions of Article 16 (3) of the UNCITRAL model law.

However, again in keeping with the model law provisions, the ACA provides for the right of appeal to the court where a party is aggrieved by the ruling of the tribunal.[123] The exercise of the right of appeal under this section is however subject to a time limit of thirty (30) days.[124] Furthermore, the logging of an appeal to the High Court under this section does not automatically stop the arbitral tribunal from continuing the arbitral proceeding or even making an appropriate award.[125]

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[121]Section 17 (3).

[122] Section 16 (5).

[123]Section 16 (6).

[124]Id.

[125]Section 16 (8).

It should however be noted that once the high Court decides on the appeal under this section, there cannot be a further appeal. That is; the decision of the court is final.[126]

3.4.4.4 Evidence taking

One of the other import roles prescribed by the ACA to be played by the court is that of assisting in the taking of evidence.[127] This however follows a request, either of the arbitral tribunal itself, or of a party with the tribunal's approval.[128]

3.4.4.5 Setting aside an award

Under the ACA, setting aside the arbitral award is the only ground for recourse to court.[129] The grounds upon which such an application may be made to court are also limited namely: that there was incapacity on the part of one of the parties at the time of entering into the arbitration agreement; invalidity of the agreement under the law to which it was subjected by the parties or, in the absence of such a law, under the law of Uganda; if the party challenging the award was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or even an opportunity to present their case; that all or part of the dispute over which an arbitration award was issued does not fall within the ambit of the arbitration agreement; improper appointment of the arbitral tribunal contrary to the arbitration agreement and/or the provisions of the ACA; where the arbitral award was procured by corruption, fraud or undue means or where the process was marred by evident partiality or corruption in one or more of the arbitrators; or, generally, that the arbitral award contravened

[126]Section 16 (7).

[127]Section 27.

[128]Id.

[129]Section 34 (1).

the provisions of the ACA.[130] A time limit of one month is provided for as the latest beyond which an application to set aside may be not be entertained.[131]

3.4.4.6 Awards recognition and enforcement

As already noted, courts are a key player in the recognition and enforcement of arbitral awards. Therefore, as highlighted in section 3.3.2.3 above, the ACA obliges the court to recognise and enforce uncontested or confirmed arbitral awards.[132]

3.4.4.7 Determining question of law in domestic arbitration

The final window of courts' intervention in arbitration is provided for under section 38 of the ACA in respect of domestic arbitration where an application for a determination of any question of law, either arising in the course of the arbitration or out of the award.[133] Such an application is however conditioned on an agreement between the parties.[134] Unlike the other appeals to the court which are final, a further appeal may lie to the Court of Appeal under this section if the parties so agree and the Court of Appeal grants such leave.[135]

[130]Section 34 (2).

[131]Section 34 (3).

[132]Sections 35 and 36.

[133]Section 38 (1).

[134]Id.

[135]Section 38 (3).

CHAPTER IV - THE ATTITUDE OF UGANDAN COURTS TOWARDS ARBITRATION

This chapter presents the attitude of Ugandan courts through an examination of the relevant cases they have handled on the subject of arbitration.

4.1 Effect of an arbitral agreement

To begin with, the courts in Uganda have generally recognised arbitral agreements and have accordingly referred back to arbitration a matter that is found to be a subject of that process. The general principle in this regard as stated in the case of ***Chevron Kenya (Ltd) & Chevron (Ug) Ltd v. Deqare Transporters Ltd***[136]is that when the parties have decided on the means and process of resolution of their dispute, the court is obliged to honor and enforce that agreement with regard not only to dispute resolution, but to other terms of the agreement as well.[137]

It follows that the courts in Uganda will refer a dispute to arbitration when there is a valid arbitration agreement.[138]For example in ***Emmanuel Mugabo v. 1. Saava Stephene Kikonyogo & Joseph Kigala*** *(administrators of the estate of the late Kasalina Nkizi Nalinya)****; 2. The Commissioner Land Registration***[139] where the court upheld a preliminary objection raised by the respondent to the effect that the application in question had been wrongly placed before the court contrary to an existing arbitration agreement between the parties. In this regard, Counsel cited sections 5(9) and 40 of the ACA requiring the parties to adhere to their agreement to arbitrate, as well as section 9 of the same Act which bars the court from interfering in matters governed by the Act.

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[136] HCT Misc Appl No. 490 of 2008 arising from arbitration No. 6 of 2008.

[137]Id.

[138] See *Power & City Contractors Ltd v. LTL Project Ltd*, High Court Misc. Application No. 62 of 2011.

[139] High Court Misc. cause no. 65 of 2012.

On the other hand, counsel for the applicant invited the court to overrule the objection. In determining the matter, the Judge made reference to a clause in the parties' memorandum of agreement by which they undertook to have "any dispute arising from the memorandum of agreement… referred to an independent arbitrator agreeable to both parties whose decision shall be final."

The court noted that since the existence of the arbitration agreement was not contested by the applicant ─ who in fact had themselves annexed the agreement in which it was contained to the documents they submitted ─, the proper course of the ACA under such circumstances had to be taken. Accordingly, the matter was referred back to arbitration, the court further observing that if it did not do so, it would have been guilty of condoning an abuse of court process.

From these cases and many others not mentioned here, it can be concluded that the courts in Uganda have recognised the legal obligation to enforce arbitration clauses by referring disputes that are filed in the civil courts whereas the parties are subject to an arbitration agreement. This way, they have been supportive towards arbitration.

4.2 Examination of evidence before an arbitral tribunal

In keeping with the international practice, the courts in Uganda have been careful in exercising their jurisdiction over arbitration matters. One of the areas this has manifested is the issue of examining the evidence before the arbitral tribunal. An example in this regard is the case of ***Simbamanyo Estates Ltd v. Seyani Bros Co. (Ug) Ltd***[140]**,** where the applicant sought to challenge and therefore set aside an arbitral award on among other grounds: that there was evident partiality in the way the tribunal evaluated the evidence as well as the fact that the arbitrator had omitted to apply or properly apply the law as agreed upon by the

[140] HCT Misc. App No. 555 of 2002.

parties. In the sum, the applicant's argument was that the impugned award went beyond the contours of the scope of issues they contemplated to be arbitrable.

In determining the matter, the High Court considered the impugned award and noted that the arbitrator in question had made reference to the parties' agreement and that he had referred to the particular clauses of the contract. The Court faulted the applicant for not citing the specific incidents where the arbitrator ignored or misapplied the ACA, as a result of which the application fell short of disclosing sufficient basis upon which the court could set aside the award. Importantly, the Judge clarified that it is not for the court to examine the evidence before an arbitral tribunal even if doing so would lead to a different conclusion.

Similarly in ***AYA Investments (Ug) Ltd v. Mugoya Construction & Engineering***[141]**,** which was an application to set aside an arbitral award on grounds of impartiality, the Court declined to re-evaluate matters that had already been considered by the Arbitrator as matters of fact.

Also in the **Chevron case**[142], the court described as 'untenable' the call to it to assume appellate jurisdiction by way of sifting through the evidence before an arbitrator and reappraising the same. Just in like other cases, the court emphasized that there are exceptions for example in respect of an application that shows that the impugned Award is inconsistent with the Constitution, national interest or that it is contrary to public policy, justice and morality.

It can thus be seen from this case that if the arbitrator has jurisdiction to hear the matter, then it is not upon Court to enter into the merits of the dispute and sit in judgment over them except under the limited grounds laid down under section 34 of the ACA.

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[141]High Court, Miscellaneous Application no. 210 of 2008.

[142]Supra.

The other notable case in this regard is that of ***Wilsken Agencies Ltd v. International Rescue Committee (IRC)***[143]where this author successfully argued for the respondent both in arbitration and at the High Court. In that case, the court overruled an application seeking, among others, to fault the arbitrator's interpretation of how a penalty clause in the contract should be applied. Although the applicant vehemently insisted that the arbitrator's approach was contrary to the principles of fairness and justice, the Court declined to intervene in the matter, observing that it is not for the court to judge the reasonableness of the Arbitrator's reasons. The court cited the case of ***NIC ARCONSULTS ARCHITECTS (1984) 1 KALR*** wherein, Tsekooko J (as he then was) observed, at page 112, as follows:

> "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous eye endeavouring to pick holes, inconsistencies and faults in awards and with the objectives of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it" **[emphasis mine]**.

Hence, the court noted, since the parties chose the forum of arbitration to interpret the contract between them, the applicant had no choice but to concede the power of appraisement of the evidence to the arbitrator and not to appeal the resultant interpretation to the Court as being unreasonable.

These holdings are supportive of arbitration and are reflected of the standard practice which disregards the mere fact that a different conclusion would be reached, as a ground for setting aside an award under the ACA.

4.3 No automatic right of appeal

The courts have stressed the model law position on the right of appeal from decisions of the High Court rendered in respect of arbitration. Examples in this case abound. In ***Roko***

[143] HCT Miscellaneous Application No 464 of 2012 arising from Arbitration No. 8 of 2012.

Construction Ltd v Mohammed Mohammed Hamid[144],the court of appeal considered whether the appellant had a right, in law, to lodge an appeal from the decision of the High Court. The court held there being no such right.

Relatedly in ***Babcon Uganda Limited v. Mbale Resort Hotel Limited***[145]**,** the appellant sought to challenge the order for setting aside of the award made by the High Court in ***Mbale Resort Hotel v. Babcon***.[146] However, the respondent raised a preliminary objection of law that the appellant had no right of appeal since the parties had not entered into an agreement to appeal. The applicant sought to invoke the statutory provisions of the civil procedure Act (CPA) and the rules thereunder, specifically section 66 which provides for a right of appeal to the Court of Appeal "from the decrees or any part of the decrees and from the orders of the High Court." However, the court held that the said right of appeal does not apply to arbitration.

The above holding of the Court of Appeal was appealed to the Supreme Court which confirmed the ruling and further clarified that when the high court is hearing an application under S.34 of the ACA, it is not exercising original jurisdiction since that original jurisdiction would already have been exercised by the arbitral tribunal.[147] As such, an appeal from the High Court can only be possible under section 38 of the ACA where the parties have agreed for that course of action on questions of law.

The Supreme Court pronouncement in these terms is instructive since Uganda operates a common law system. Being the highest appellate court in the land, a pronouncement by the Supreme Court in support of arbitration binds all subordinate courts which then must interpret arbitration-related disputes before them accordingly.

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[144]Civil Appeal No.51 of 2011.

[145] Civil appeal No 87 of 2011.

[146]Supra.

[147]See Babcon Uganda Limited v. Mbale Resort Hotel Limited, Supreme Court Civil appeal No. 06 of 2016.

4.4 Interpretation of Section 9 of the ACA (i.e.; the ouster clause) and the judicial review jurisdiction of the High Court

Ugandan courts have expounded on the effect of Section 9 of the ACA (i.e.; the ouster clause) on the judicial review jurisdiction of the high court. Notably, the Constitution of the republic of Uganda guarantees the right to

> "fair and just treatment for any person appearing before any administrative official or body and a right to apply to court in respect of any administrative decision taken against any such person."[148]

This, together with provisions contained in other laws such as the Judicature Act cap 13[149] and the Judicature (Judicial Review) Rules, 2009, is what accords the High Court the judicial review jurisdiction.

The Uganda Court of appeal has observed that the object of Section 9 of the ACA is to limit the intervention of courts in order to bring finality to the matters governed by arbitration.[150]That even where a court finds fault in the arbitral award, its power is restricted to setting aside (as opposed to substituting) the award in question either in whole, or in part based on the review of the evidence before court.[151]

The recent case of ***International Development Consultants Limited v. Jimmy Muyanja, the centre for Arbitration and Dispute Resolution (CADERS) & Rajesh Dewani***[152], which was a construction dispute, is also very instructive in emphasising this position. The cause arose from a ruling by the 1st respondent in his capacity as the Executive

[148] Art. 42.

[149]See Sect. 36(1)(a), (b) & (c).

[150]*Babcon Uganda Limited v. Mbale Resort Hotel Limited,* Civil Appeal No 87 of 2011.

[151]Id.

[152] High Court Misc Cause No. 133 of 2018.

director of the 2nd respondent which the applicant had approached, vide *CADER Misc. Appn. No.67 of 2017– International Development Consultants Ltd. v. AECOM (RoA) Pty S.A. Ltd. & Uganda National Roads Authority,* invoking the 2nd respondent's exclusive powers as the appointing authority under section 68 of the Arbitration and Conciliation Act No.4, to appoint an arbitrator in a dispute between the applicant on the one hand, and two other entities (namely *AECOM (RoA) Pty S.A. Ltd. & Uganda National Roads Authority*) on the other hand, with whom the applicant had been engaged as contractors on a road construction project. The application to CADER followed the failure of the two sides to agree on the possible arbitrator as provided for under section 11 of the ACA.

The applicant was however not contended with the 2nd respondent's decision to appoint the 3rd respondent as the arbitrator in the matter. The applicant laid down the grounds for their disgruntlement thus:

- the hearing, which took place on November 20, 2017, was singly presided over by the 1st respondent; who
- as soon as he called the matter for hearing, took on a hostile attitude towards the applicant's representative including threatening to strike out the application because of it not having been accompanied by a copy of the contract containing *the Arbitration clause yet the same was before him as a matter of fact and, in any case, the existence of the said contract and arbitration clause was not in issue between the parties to the application;*

The applicant therefore prayed to court for declarations that the proceedings, rulings and orders thereby made by the respondent are *null* and *void ab initio* and of no legal effect and that they should be quashed by an order of certiorari.

One of the important issues for court's determination was whether the court has jurisdiction to entertain the application before it. On its part, the applicant submitted that the

ouster clause (section 9 of the ACA) is a statutory provision which is inferior to the constitutional provision of Article 42 which established the court's judicial review jurisdiction.[153] To buttress its argument, the applicant cited the common law position in respect of ouster clauses which, it submitted, do not and cannot operate where judicial review is sought on the basis that the decision taken by a tribunal was *ultra vires* and therefore a nullity in law.[154]

In considering the matter, the court referred to the 1st respondent's averment that he functioned in the exercise of authority delegated to him by the 2nd respondent. According to the Judge, since the 2nd respondent was a statutory delegate under section 68 of the ACA, which section does not authorize the 2nd respondent to delegate to the 1st respondent, therefore the 2nd respondent violated the administrative law principle of '*delegatus non potest delegare.*' The court found that on this ground alone, "the decision and all actions of the 1st respondent in relation to the application before it was null and void."

It further observed that the jurisdiction to entertain an application for appointment of an Arbitrator vests exclusively in the 2nd respondent and/or the appointing authority. As such, the 1st respondent whose office as Executive Director of the Second Respondent is established under section 70 (1) of the ACA whose functions as laid down under section 70 (2), are restricted to acting as the latter's administrative officer charged with the day-to-day operations of that institution, could not assume the exercise of power he did not have.

Based on the above, the court reached a conclusion that the 1st respondent's wrongful exercise of power was a proper candidate for judicial review, in the exercise of which the court "does not in any way conflict with section 9 which bars intervention in matters governed by the Arbitration and Conciliation Act" except as provided for by that law.

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[153]NB: In Uganda, the constitution is the supreme law of the land therefore all other laws are subordinate to it (Article 2).

[154]Citing Peter Kaluma, Judicial Review, Law, Procedure and practice (2nd Ed), Law Africa, pgs 272 – 282.

The court further emphasized the duty of arbitration to comply with constitutional principles and values. According to the court, where these are violated, arbitration can be challenged on the grounds that it is unconstitutional and invalid. In this regard, the court cited the Kenyan case of ***Sadrudin Kurji & another v. Shelimar Limited & 2 Others [2006] eKLR*** where it was observed that the protection offered by the Arbitration Act towards the arbitration process,

> *"…does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of Arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors."*

Notably, Ugandans courts have already held that there are limited grounds for setting aside an arbitral award and that it is only upon the grounds laid down in Section 34 that the court can set aside the award.[155]

Hence, as was held in ***Mbale Resort v. Babcon***[156]**,** an arbitrator's award is ordinarily final and conclusive. In that case, the High Court observed that the courts should approach arbitration with a desire to support the process. It noted that there are only limited circumstances under which an arbitral award may be set aside by the court in superintending the arbitration process. Two scenarios were highlighted in this regard, namely: where the award is bad on the face of it; or where there has been something radically wrong or vicious in the proceedings with the effect of violating natural justice.

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[155] See *SDV Transami Ltd v. Agrimag Limited & Jubilee Insurance Co. of Uganda Ltd*, HCT-00-00-AB-0002-2006 available at https://ulii.org/system/files/judgment/commercial-court/2008/33/commercial-court-2008-33.rtf

[156] High court misc. Application No. 265 of 2010 from CADER Arbitration cause No. 21 of 2008.

In the case of ***NSSF v. Alcon International Limited***[157], for example, the Supreme Court of Uganda set aside an Arbitral award which it found to have been procured by fraud contrary to public policy. The matter was thus remitted back to the high court for re-trial.

Similarly, in the ***Mbale Resort*** case above, the applicant challenged the arbitral award on the grounds that: the award was not in accordance with the ACA; the award was perverse and had prima facie errors; and that the arbitrator had misconducted himself. They further contended that by misconstruing the terms of the parties' contract, the Arbitrator grossly misdirected himself on the rights of the parties.

The court, after reviewing the entire proceedings and the evidence before it, reached a conclusion that indeed the special damages awarded had not been proved as there had not been an investigation into the matter. On this basis, the court set aside the award, finding that it was unreasonable and unsafe to be supported.

It appears, from these cases, that while Ugandan courts are hesitant to intervene in arbitration, they are similarly unwilling to stay on the look as perceived or visible abuses of the arbitration process go on. This way, the courts have provided a necessary checks and balances to the arbitration process. This gives the public an assurance that while they elect to have their matters resolved by arbitration, they still have recourse to the courts in the event that blatant abuse or disregard of fundamental rights and freedoms occurs. However, this has to be done within the permitted contours provided by the law.

4.5 Quality of and timelines for filing applications to set aside

Despite the Ugandan courts' willingness to support the arbitration process, it appears that some practitioners have not yet appreciated the proper procedure to be followed in setting aside an arbitral award as seen in the nature of some of the mistakes and arguments that they make. The key mistakes in this regard include the filing of wrong applications and

[157] Civil appeal No.15 of 2009.

filing out of time. Nonetheless, the courts have insisted on enforcing the provisions of the ACA meaning that it is up to the practitioners to meet the standard thereby established.

Of specific mention is the case of ***Infinity Telecom (Ug) Ltd, Kinetic Telecom Ltd & Mukama Atukwase Enterprises v. Orange (U) ltd.***[158]This was anapplication to vary or set aside an arbitral award, which was first filed at the High Court registry as an appeal with the chamber summons reading "*An Appeal from the Arbitral Award of Mr. S.W.W. Wambuzi (Chief Justice Emeritus) given at his residence at Ntinda Kampala on the 29th September 2016"* and accordingly recorded as Civil Appeal No. 44 of 2016. However, it appears that counsel later realised that the proper procedure was that of filing a Miscellaneous Application. Hence, they later cancelled the heading *Civil Appeal No. 44 of 2016* and changed it to *Miscellaneous Application No.3 of 2017*, moreover without an application to amend the initial application.

The Civil Appeal was based on the grounds that the arbitrator did not properly evaluate the evidence on record and had thus come to a wrong decision and award. It also prayed for damages. When it came up for hearing, the Respondent, through their Advocates, raised preliminary objections namely; that the Application to set aside was time barred, that it was in the form of an Appeal and the High Court had no jurisdiction to entertain it. Furthermore, that the Application did not meet the requirement of section 34 of the Arbitration and Conciliation Act. The issue before court was whether the High Court can entertain an appeal against an Arbitral award.

The court held against the appeal and/or application, finding that Appeals are not provided for by the ACA as one of the windows for court's intervention to set aside an arbitral award. In the view of the court, if it entertained the Appeal, it would have been acting outside its jurisdiction.

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[158] Misc. App No. 03 of 2017 arising from Arbitration No. 24 of 2016.

Notably, this case also dealt with the other mistake made by applicants seeking to challenge arbitral awards; that of filing out of time. Section 34(3) of the ACA specifies one month as the time limit within which an application to set aside an arbitral award can be made. It provides:

> *"An Application for setting aside the arbitral award may not be made after one month has elapsed from the date on which the party making the application had received the arbitral award."*

Although the language used in this section appears to be discretionary, the courts are reluctant to revise it, since they were not seized with the express jurisdiction to enlarge the time within which to file application to set aside an arbitral award.[159] This rigidity is guided by an earlier case of case of ***Makula International vs. Cardinal Nsubuga [1982] HCB*** where it was observed that "a court has no residual or inherent jurisdiction to enlarge a period of time fixed by statute and any extension of time by a High Court judge is always a nullity".

It follows that the position of the law in Uganda in respect of arbitration matters is that as provided for under the ACA. Hence, since the applicants in the above case of ***Infinity Telecom*** had filed in excess of the specified time and sought to be protected by the Civil Procedure Rules which provides for a wider period of 90 days (three months). The court however ruled that the civil procedure rules time period could not apply where there was a specific procedure laid down under the ACA. According to the court, if it expanded the time for the application beyond what was provided for under the applicable legislation, the court would have occasioned a violation of section 9 of the ACA.

Similarly, the case of ***Roko Construction Ltd v. Mohammed Mohammed Hamid***[160]*a*lso held that an application for setting aside an arbitral award filed after the expiry of a period of 30 days from the date of receipt of the award is a nullity in law.

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[159] See, for example, the case of *Soroti Joint Medical Services Ltd. vs. Five Africa Medicines Heather Ltd* Ar. Miscellaneous Cause No. 452/11.

[160] Civil Appeal No. 51 of 2011.

As to when the counting of the 30 days for purposes of lapse of time for filing an application to set aside under the ACA starts, the courts have held that that this should be the date when the applicant received an award. According to Justice Kainamura in the case of ***Roofclad ltd v. Salzgitter Management Int GMBH (Company)***[161], this should be "the day it was delivered and not necessarily on the day the parties were physically given or availed the award."[162]

Through these cases, the courts have both provided clarity on what the one month period referred to by the ACA means (30 days) and also emphasised the need to ensure finality of the arbitration process by way of allowing the successful party in the arbitration to collect their fruits from the lading process by way of enforcing the award in a timely manner where no challenge to the same has been made within the one month (30 day) time period stipulated by the Act.

[161] HCT Misc Cause No. 34 of 2015.

[162]Id.

CHAPTER V - CONCLUSION

This dissertation has shown that the courts in Uganda are generally supportive of the arbitration process. For example, the courts seem to be inclined to observing their obligation to recognise a valid arbitration agreement. They have generally desisted from being dragged into an extra territory of examining evidence that is before the arbitral tribunal as though they were an appellate platform. Simply put, the courts are trying to give priority to the parties' choice of arbitration as a form of resolving their commercial disputes.

A blend of an increasingly positive attitude of the courts towards arbitration and the fact that Uganda is a model law country only serves to show that the future of arbitration in Uganda is bright. This is especially so in lieu of the enduring challenges of limited human resource and a high number of case backlog which make it close to difficult for businesses to obtain judgment in record time.

However, the generally positive attitude of the courts and having a relatively fair legal framework in place does not mean that the process of arbitration has had a totally smooth ride. Rather, there are some concerns which need to be addressed.

For example, it has been observed that a good number of Ugandan lawyers are yet to sufficiently understand how the process of arbitration works as distinct from the ordinary litigation system. This has been cited, for example, in instances where an application to set aside an arbitral award is filed as a Miscellaneous application or as an appeal as well as citing of ordinary rules of civil procedure on the time limits for filing of applications. This is clear evidence that Ugandan lawyers need to be sensitised on the entire arbitration process especially in issues right from commencement of an action to challenging and enforcing an arbitral award as the case maybe. Training of lawyers is important because they are the ones

who are best suited to guide court, through their submissions, to participate in the arbitration process in such a way as not to suffocate it.

Notably, the judicial officers themselves also need to be sensitized as well to ensure that the efforts of pro-arbitration lawyers are not slaughtered at the altar ofa non-responsive bench. Importantly, trained judges will be required to develop and consolidate the local jurisprudence on arbitration and the level of intervention that the Judges should make in a number of instances as they arise.

Another notable hitch in the long road of arbitration taking its position as an efficient process has been ambiguity in some parts of the ACA for example regarding the real intention of parliament in section 34 of the ACA where a limitation period of one month is provided for the filing of an application to set aside an arbitral award yet it still looks like it is discretionally.

Although the courts have ruled that the time limits set by the ACA are not discretionary and that they cannot be extended, the law needs to be clarified in order to expressly state the mandatory nature of the obligations it contains. If there are any circumstances under which the limit may not be expected to be rigidly applied, that too needs to be stated.

Furthermore, the institution that is supposed to be at the centre of promoting arbitration, CADER, is reportedly significantly under resourced which affects the execution of its mandate. For example, since its establishment in 2000, CADER is yet to have a Council constituted as required by the ACA.

Notably, the lack of a Council has now stalled the process of arbitration following a High Court decision in the above cited case of ***International Development Consultants***

Limited v. Jimmy Muyanja& CADER which quashed the powers of the 1st defendant, the Executive Director of the 2nd defendant, to solely appoint arbitrators in the absence of a Council**.**

As a result of the High Court ruling in the ***Muyanja case***, CADER is stuck with many cases involving colossal sums of monies in disputes that are subject to arbitration but for which CADER has no mechanism with which to appoint arbitrators. Between March and May 2019 alone, there were over 20 cases pending allocation according to the Executive Director of CADER.

In lieu of the foregoing, CADER has since filed Constitutional Petition No. 11 of 2019, ***CADER & JIMMY Muyanja v. Attorney General*** (undecided) on among other grounds that the above ruling of the High Court constitutes a failure of the Ugandan courts to recognize it as a subordinate court established by Parliament pursuant to Art. 129 (1) (d) of the 1995 Constitution of the Republic of Uganda. According to CADER, such an approach fails to fulfil Articles 5, 6 and 11 of the Model Arbitration Law as well as Sections 9 and 11 of the ACA.

As it is, we await to hear the pronouncement of the Constitutional Court of Uganda regarding the fate of CADER and, by necessary implication, that of the cases before it and generally the arbitration process.

BIBLIOGRAPHY

Laws

Arbitration and Conciliation Act, No. 4 of 2000

Civil Procedure Act, Chapter 71, laws of Uganda.

Constitution of the Republic of Uganda

English Arbitration Act 1996

Kenyan Arbitration (Amendment) Act 2009

New York Convention, 1958

The Judicature Act, Chapter 13, Laws of Uganda.

UNCITRAL Model Law on International Commercial Arbitration.

Books

Lord Saville. *Arbitration and the Courts*. Denning Lecture, 1995.

Nigel Blackaby, Constantine Partasides *et al Redfern and Hunter on International Arbitration* New York: Oxford University Press, 2009.

OP Malhotra SC. *The Law and Practice of Arbitration and Conciliation.* New Delhi: LexisNexis, 2002.

Phillip Capper. *International Arbitration: A Handbook (Dispute Resolution Guides).* Routlege, 2004.

Tweeddale, A., &Tweeddale, K. *Arbitration of Commercial Dispute: International and English Law and Practice*. New York: Oxford University Press, 2005.

Book Chapters

Julian D. M. Lew. "Achieving the Dream: Autonomous Arbitration?" in Julian D. M. Lew and Loukas A. Mistelis (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*. Volume 16, Kluwer Law International, 2007.

Kamau Karori& Ken Melly."Attitude of Kenyan Courts Towards Arbitration" in Emilia Onyema (Ed.) *Rethinking the Role of African National Courts in Arbitration*. Wolters Kluwer, 2018.

Journal Articles

Anthony C. Kakooza. "Arbitration, Conciliation and Mediation in Uganda: A Focus on the Practical Aspects" Uganda Living Law Journal, Vol. 7 No. 2, 268-294 (December 2009).

Chinwe A. Mordi. "An Analysis of National Courts Involvement in International Commercial Arbitration: Can International Commercial Arbitration Be Effective without National Courts?" Open Journal of Political Science Vol. 6, 95-104 (2016).

Christa Roodt. "Autonomy and Due Process in Arbitration: recalibrating the balance" The Comparative and International Law Journal of South Africa Vol. 44, No.3, 311-339 (November 2011).

Cremades, Bernardo M. &Plehn, Steven L. "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" Boston University International Law Journal, Vol.2 (1984).

David A. Gantz. "An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges"(September 8, 2005). *Bepress Legal Series.* Working Paper 703.

David A.R. Williams, 'Defining the Role of the Court in Modern International Commercial Arbitration,' *Asian International Arbitration Journal* Volume 10 (2014) Issue 2, 137-180

Edna Sussman. "Why arbitrate?" NYSBA Journal, October 2009 & Vol 7 (1) TDM (2010).

Emilia Onyema. "Power shift in international commercial arbitration proceedings" Caribbean Law Review, Vol 14 (Nos 1 & 2) 62-77 (2004).

Geoffrey. W. Kiryabwire. "Alternative Dispute Resolution – A catalyst in Commercial Development: A case study from Uganda" Uganda Living Law Journal, Vol. 3: No. 2 (December 2005).

Giulia Carbon. "The Interference of the Court of the Seat with International Arbitration." Journal of Dispute Resolution. Vol. 2012, Issue 1, 217-244.

Julian D. M. Lew. "Does National Court Involvement Undermine the International Arbitration Process", 24 Am. U. Int'l L. Rev. 489, 490-537 (2009).

Kim Rosenberg, Brian King and Erin Miller Rankin. "Construction Arbitration in East Africa" *Global Arbitration Review,* 18 April 2017.Accessed at https://globalarbitrationreview.com/chapter/1139730/construction-arbitration-in-east-africa

Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arb Int 121.

Richard Allan Homing. "Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules (in Toto): Article 46" 9 AM. REV. INT'L ARB. 155, 156-57 (1998).

Richard Garnett, 'National Court Intervention in Arbitration as an Investment Treaty Claim,' 60 International Comparative Law Quarterly (2011) 485.

Sir Michael Kerr. "Concord and Conflict in International Arbitration" ARBITRATION INTERNATIONAL, Vol. 13, No. 2.

Stephen M Schwebel, 'The Validity of an Arbitral Award Rendered by a Truncated Tribunal' (1995) 4 Asia Pac L Rev 1

Papers

Benjamin J. Odoki. "The relevance of Commercial Courts to the Modern Judiciary: A case Study from Uganda" A Paper presented at the Southern African Chief justices Forum Conference held from 13th to 14th August 2010 in Johannesburg, South Africa (accessed at https://www.venice.coe.int/sacjf/2010_08_RSA_Johannesburg/Uganda.pdf).

Christopher Bwanika. Arbitration and the Ugandan Courts, a presentation made at the Uganda Law Society Continuous Legal Education Training for Advocates in 2016. (Paper available on file with the author).

Funke Adekoya SAN. "Is International Arbitration truly international? The role of Diversity" A Keynote Address made at the 3rd Annual Conference on Energy Arbitration and Dispute Resolution in the Middle East and Africa on 6thMarch, 2018. (accessed at https://docs.wixstatic.com/ugd/54e92e_28ab07d307084b42a414cd3969436da1.pdf).

Jan Paulsson. "Arbitration in Three Dimensions." LSE Legal Studies Working Paper No. 12. 2010.

Official Reports

European Union, Investment in TTIP and beyond–the path for reform, Concept Paper (2015), at: https://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

Judiciary of Uganda website titled 'Backlog Committee Releases Report.' Accessed at http://www.judiciary.go.ug/data/news/311/5714/Backlog%20Committee%20Releases%20Report.html.

Report of the Judiciary National Court Case Census, 2016. Accessed at http://www.judiciary.go.ug/files/downloads/Census%20Report%202015.pdf.

World Bank (Legal Vice Presidency), 'Uganda Legal and Judicial Sector Study Report,' July 2009 at 65 (accessed at http://documents.worldbank.org/curated/en/922811468309343817/pdf/497010ESW0P11010Box341968B01PUBLIC1.pdf).

Other online Sources

Badru Kasadah, 'Lawyers, bankers to set up joint dispute resolution center,' *Eagle news*, March 23, 2018 (accessed at https://eagle.co.ug/2018/03/23/lawyers-bankers-to-set-up-joint-dispute-resolution-center.html).

Hannah Ambrose&Vanessa Naish, 'An Investment Court system or an Appeals mechanism?' (2017) accessed at: http://arbitrationblog.practicallaw.com/an-investment-court-system-or-an-appeals-mechanism-the-eus-2017-consultation-on-multilateral-reform-of-isds/

Munir Maniruzzaman, 'The Authority of a Truncated Arbitral Tribunal – Straight Path or Puzzle?' (2012) Kluwer Arbitration Blog at: https://researchportal.port.ac.uk/portal/files/174959/MUNIR_2012_pub_KAB_The_authority_of_a_truncated_arbitral_tribunal_%E2%80%93_straight_path_or_puzzle.pdf

Helga Akao, 'Roots of alternative dispute resolution in Uganda,' published by *Daily Monitor* on January 1, 2019 at https://mobile.monitor.co.ug/Roots-alternative-dispute-resolution-Uganda-Arbitration-Act/691260-4934176-format-xhtml-11qb65jz/index.html.

Judiciary of Uganda, 'Lawyers, and Bankers Root for Independent Arbitration Centre' (accessed at https://judiciary.go.ug/data/news/576/1803/Lawyers,%20Bankers%20Root%20for%20Independent%20Arbitration%20Cenre.html posted on August 8, 2018).