UGANDA LAW REFORM COMMISSION

REFORM ON THE **ARBITRATION AND CONCILIATION ACT CAP.4**

ISSUES PAPER

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CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.0 Introduction

The Arbitration and Conciliation Act, Cap. 4 was enacted by the Parliament of Uganda on 19th May, 2000 and commenced on the same date. The Arbitration and Conciliation Act, Cap. 4 was enacted to regulate the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. The Act is largely based on the 1985 United Nations Commission on International Trade (UNCITRAL) model law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976. The model law was amended in 2006 to address evolving practices in international arbitration with regard to the form of arbitration agreements and interim measures.

The Uganda Law Reform Commission (Commission) with support of the Justice Law and Order Sector (JLOS) is undertaking a study to review and reform the Arbitration and Conciliation Act, 2000. The review is intended to update the law, establish the gaps if any in the law, address challenges faced in the implementation of the Act and make proposals for amendment.

1.1 Background

Dispute resolution mechanisms have constantly undergone continuous transformation throughout the history of commercial conflicts. The processes of litigation have been acknowledged to prove grossly inadequate and prone to more damage than resolution of conflict by hampering positive future relation and association between the parties to it. In modern commercial contracts, the parties have a choice to determine what dispute procedures to adopt.[1] Consequently, arbitration has shown to be the most widely embraced process for business disputes especially across national borders and boundaries.

In Uganda ,the first enactment of the law governing arbitration was the Arbitration Act, Cap 55 of 1964 subsequently ; the Arbitration and Conciliation Act, Cap. 4 was enacted in 2000 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 arbitration and conciliation matters. In 2008, the Arbitration and Conciliation (Amendment) Act No.3 of 2008 was enacted to specifically provide for the funding of the Centre for Arbitration and Dispute Resolution by Government.

Arbitration is defined as the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the

[1] *Earl S. Wolaver* 'The Historical Background of Commercial Arbitration, *83 U. Pa. L. Rev. 132 (1934).* *Available at:* http://scholarship.law.upenn.edu/penn_law_review/vol83/iss2/2

parties, and called "arbitrators," or "referees."[2].[3] As a dispute resolution mechanism, arbitration has long gained prominence among governments and inter/multinational organisations, for instance most contracts now contain clauses that mandate parties to explore arbitration options in the event of a disagreement. In general terms, arbitration is a consensual process in which a binding decision is taken by a privately appointed decision maker in accordance with neutral procedures that give each party the opportunity for a fair hearing and to present its case to the arbitrator(s)[4].

Parties generally opt for arbitration and agree to refer disputes to arbitration as a matter of contract. Due to the consensual nature of arbitration, the agreement to arbitrate is typically central to the conduct of arbitration. An arbitral agreement defines what disputes the arbitrators have the power or jurisdiction to determine and what arbitration rules will apply.[5]

In cases of international arbitration, the arbitral agreement will stipulate the seat or legal place of the arbitration. Parties often agree to arbitrate under a set of arbitration rules. The growth of international arbitration can be attributed to the expansion in international trade and commerce. Part of the growth, however, is attributed to the

[2] Black's Law Dictionary 2nd Edition

[3] Wuraola O. Durosaro 'The Role of Arbitration in International Commercial Disputes' Iinternational Journal of Humanities Social Sciences and Education (IJHSSE) Volume 1, Issue 3, March 2014, PP 1-8. www.arcjournals.org

[4] Steven P. Finizio and Duncan Speller, 'A practical guide to international commercial arbitration: Assessment, planning and strategy' Thomson Reuters 2010

[5] Section 3of the Arbitration and Conciliation Act ,Cap.4

relative attractiveness of international arbitration as a means of resolving commercial disputes between parties of different nationalities.[6]

Arbitration has thus gained popularity over time amongst the business community due to its advantages over litigation. One of the most outstanding benefits of arbitration over litigation is its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties confidence of realizing justice in the best way achievable.

Further, it has been observed that among the primary advantages of international arbitration are its finality and the relative ease of enforcement of arbitral awards throughout the world. Countries and various regions around the world have thus embarked on promoting international arbitration as the best dispute settlement approach in international disputes. It is in this recognition of international arbitration as one of the most viable approaches to international disputes management that structures/institutions for arbitration are being established across the continent.

Conciliation on the other hand; is an alternative dispute resolution (ADR) process whereby the parties to a dispute use a conciliator, who meets with the parties both separately and together in an attempt to resolve their differences and then issues a non-binding suggested resolution[7]. Parties go through the conciliation process by lowering tensions, improving communications, interpreting issues, encouraging parties to

[6] Steven P. Finizio and Duncan Speller, 'A practical guide to international commercial arbitration: Assessment, planning and strategy' Thomson Reuters 2010

[7] Duhaime's Law Dictionary, http://www.duhaime.org/LegalDictionary/C/Conciliation.aspx as acessed on 28th February, 2017.

explore potential solutions and assisting parties in finding a mutually acceptable outcome.

Conciliation differs from arbitration in that the conciliation process, in and of itself, has no legal standing, and the conciliator usually has no authority to seek evidence or call witnesses, usually writes no decision, and makes no award.

The 1985 United Nations Commission on International Trade (UNCITRAL) model law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976 on which the provisions of the Arbitration and Conciliation Act (Cap. 4) was largely based was amended in 2006. The model law is intended to provide a uniform standard when developing national legislation on international commercial arbitration. Uganda which adopted the model law in 2000 and extended its scope of application to cover domestic arbitrations needs to ensure that the Arbitration and Conciliation Act (Cap. 4) conforms to the international uniform standards stipulated in the 2006 (UNCITRAL) model law. This will enhance Uganda as one of the most sought out arbitration seat in the world.

1.2 Statement of the problem

Currently, the Arbitration and Conciliation Act (Cap. 4) does not provide for the immunity of an arbitrator. The lack of immunity would cause fear of liability for decisions that could have been made out of improper interpretation of the law. Having a law that supports an arbitrator's immunity ensures the efficient and speedy administration of justice.

The definition and form of arbitration agreement in the law is inadequate. The definition does not take into consideration electronic communication that the parties make by means of data message. With the technological advancement, this definition should cover all the different forms of communication that have since developed since the enactment of the Act sixteen years ago.

The provisions relating to interim measures and preliminary orders in the Act refer a party to court during the proceeding. This disregards the spirit of arbitration where such matters should be restricted to the arbitral tribunal.

It pertinent therefore that the law on arbitration and conciliation address the challenges and the gaps identified to ensure that the legislation is robust to handle both domestic and international disputes where arbitration and conciliation is resorted to as an alternative dispute resolution mechanism for commercial investments and business in Uganda and globally.

1.3 Justification of the study

With increased globalization, arbitration has become the preferred mechanism for settling international disputes. Although Uganda adopted a huge number of provisions of the 1985 UNCITRAL model law and rules there under, UNCITRAL has since amended several provisions to cater for changing times in technology and to promote international commercial arbitration. Uganda on the other hand has not moved with the changes made by the UNCITRAL model law and the consequence of not taking into

consideration the changing times could affect international investment and business in Uganda. There is need to strengthen our law to ensure that Uganda becomes a competitive arbitral destination for international disputes.

1.4 Objectives of the study

The main objective of the study is to review and examine the adequacy of the Arbitration and Conciliation Act to ensure effective and efficient arbitration and conciliation procedures and promote Uganda as the leading choice for international commercial arbitration.

The study shall be guided by the following specific objectives;

i) identify the gaps in the legal framework with reference to the exiting legal regimes that are relevant to arbitration and conciliation with the view to bridging the gaps;
ii) explore solutions and proposals aimed at addressing the current challenges such interim measure and immunity of arbitrators among others;
iii) identify international best and next practices on arbitration and conciliation procedures;

1.5 Scope of the study

The study is intended to cover aspects arbitration and conciliation in particular the study will cover the following issues-:

i) ascertain whether immunity should be granted to arbitrators to ensure efficient and speedy administration of justice and the promotion of the practice of international commercial arbitration in Uganda;
ii) to expand the definition and form of arbitration agreement to cater for electronic communication and other growing technological mechanisms in international commercial law; and
iii) to provide for comprehensive provisions on interim and preliminary orders in arbitration in Uganda.

1.6 Methodology

The method adopted to undertake this study is the qualitative research method. This method will be used to generate and establish a detailed description of the arbitration and conciliation as a form of alternative dispute resolution mechanisms and enable a deeper understating of the issues affecting this area and the need for reform.

The following qualitative techniques will be used for data and information collection during the study. Documented sources from within Uganda and other jurisdictions will be reviewed, the views, opinions and proposals of selected key stakeholders on the subject of arbitration and conciliation as an alternative dispute mechanism will be consulted through technical working meetings, key informant interviews and bench marking exercise will be carried out in the United Kingdom.

As the study progress the Commission will seek to consult and gather views and feed back on issues highlighted in this paper. Among the institutions as key to this study

include; Centre for Arbitration & Dispute Resolution (CADER), the Commercial Division of the High Court, Ministry of Energy and Mineral Development, Uganda National Oil Company, legal practitioners, Academia and the London Court of International Arbitration in the UK.

CHAPTER TWO

ISSUES FOR CONSIDERATION

2.0 Introduction

This part provides for an in-depth analysis into the issues under review. The analysis is based on literature reviewed.

2.1 Immunity of Arbitrators

Immunity from suit is clearly a prerogative reserved to the State. In affording arbitrators with immunity, the State will weigh the wrong such immunity can cause against the benefits distilled from the public policy reasons to find that the concession is worthwhile[8]. Arbitrators are individuals whom the legal system permits to perform a function that is in principle reserved to the State. In further extending this concession to, inter alia employees, agents and advisors , excluding this immunity , it would most likely influence parties to choose other jurisdictions as their seat of arbitration, where their immunity is not circumscribed[9].

An arbitrator in his position has moved from one where it was considered prudent to hold a professional insurance policy so as to protect from risk against any possible

[8] The Principle of Arbitrator Immunity ; accessed on 3/3/2017 https://www.lawteacher.net/free-law-essays/commercial-law/the-principle-of-arbitrator-immunity-commercial-law-essay.php

[9] Ibid

changes in the law on the one hand, to blanket immunity on the other. From the point of the unsuccessful litigant however, it can be argued that they are now faced with an arbitrator armed with a charter for incompetents, who lacks elementary skill, increases costs and delay, and can now carry on in that regard without fear of litigation.[10] Thus instead of providing a positive motivation to those considering arbitration, it can be argued that the extension of immunity may in fact amount to a turn off.

What is certain though is that the model, which adheres to the best international practice laid down by the UNICTRAL has the potential to help attract international arbitration business and create a centre of excellence for international arbitration, arguably something which the common law provision could not. In the leading case of **Sutcliffe v. Thakra**[11]**,** Lord Salmon stated that it is well settled that judges, barristers, solicitors, enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. This presumption should be equally applied to arbitrators on the grounds of public policy.

The Arbitration and Conciliation Act is silent on the immunity of an arbitrator which is covered under the UNCITRAL Model law, the lack of immunity would cause fear of liability for decisions that could have been made out of improper interpretation of the law. Jurisdictions such as the UK, USA, and Singapore have all laws supporting an

[10] Jenny Brown; Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion Journal of Dispute Resolution Volume 2009|Issue 1 Article Page 227

[11] [1974] A.C. 727 et seq.

arbitrator's immunity for efficient and speedy administration of justice which is needed on the ground of public policy.[12]

Issue for consideration

Should the Act be amended to provide for immunity of an arbitrator against matters that they have presided over?

2.2 Limitations concerning Interim and Preliminary measures

The availability and handling of interim measures in international commercial arbitration has become one of the main issues in developing a legal setup for arbitration. In arbitration, the availability or otherwise of provisional measures can have a substantial effect on the final result, especially when issues relating to protection of evidence and assets arise before or during the course of the proceedings.[13]

A report submitted by the UN Secretary General on settlement of commercial disputes clearly outlines the importance of interim measures and also the growing need for interim relief from the tribunals, among the parties[14]. As arbitration moves into fields like environmental disputes and intellectual property, where quick decision could mean

[12] Rules supporting immunity of arbitrators, International Chamber of Commerce (ICC) Rules, International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules, WIPO Arbitration Rules, London Court of arbitration Rules, etc.

[13]Sandeep Adhipathi ; Interim Measures in International Commercial Arbitration: Past, Present and Future (2003). *LLM Theses andEssays.* Paper 1.http://digitalcommons.law.uga.edu/stu_llm/1 accessed on 3/03/17

[14] *Settlement of Commercial Disputes - Possible uniform rules on certain issues concerning settlement of commercial disputes: conciliation*, *interim measures of protection*, *written form for arbitration agreement*, *Report of the Secretary General*, United Nations Commission on International Trade Law Working Group on Arbitration, 32nd Sess., at 24 (Para. 104), A/CN.9/WG.II/WP.108 (Jan. 2000

a lot, the need for interim measures in arbitration is going to increase[15]. In the report, the Secretary General also notes the various legislations and amendments that have been made by the nations and also in the model law[16]. The three main issues when dealing with interim measures in arbitration are power of the courts to grant interim orders, power of the arbitrators to order interim relief and the possibility of enforcement of interim orders granted by the tribunal.

The push towards interim measures has not been without criticism. The major argument against interim relief is that being a contractual relationship, there is no need for interim relief. Also, the critics point out that more than 80% of awards are executed without any problem and the provisional measures will only serve as a tool to delay the procedure. Another major concern for many is the tribunal's lack of power to enforce its interim orders[17].

In Uganda, the Arbitration and Conciliation Act under section 6 provides that a party to an arbitration agreement may apply to the court before or during arbitral proceedings, for an interim measure of protection and the court may grant that measure. The spirit of arbitration is that all proceedings should be carried out in the tribunal for quick relief. Involving court for interim measures during arbitration proceedings may cause unnecessary delays which the parties tried to avoid when they chose to arbitrate. An

[15] Bernardo M. Cremades, *Is Exclusion of Concurrent Courts Jurisdiction over Conservatory Measures to be Introduced Through a Revision of the Convention*, J. of Int'l Arb.; Dr. Francis Gurry , *The Need for Speed*, WIPO Arbitration And Mediation Center Biennial IFCAI Conference October 24, 1997, Geneva, Switzerland; David E. Wagoner, *Interim Relief in International Arbitration: Enforcement is a substantial problem*, 51-OCT Disp. Resol. J. 68, 72 (1996)

[16] supra note 14 (Para 103)

[17] Supra note 11

arbitration tribunal should be empowered to grant interim measures and modify, suspend and terminate them.

Issues for consideration

1) **Should the tribunal be given powers to grant interim measures during the proceedings and enforce such orders?**
2) **What procedure should the tribunal follow to grant such interim orders?**

2.3 Scope of arbitral matters

Arbitrability refers to whether or not arbitrators have the authority to rule on a dispute[18]. This depends on whether certain parties have agreed to have certain disputes between them resolved through arbitration; thus, there is potentially, in any dispute, a question of whether the parties did agree to arbitrate and how the issue should be resolved.

In **Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors.**, [19] the supreme court carved out six categories of cases which are not capable for being decided by private arbitration even though parties agreed for their settlement through private arbitration namely; (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration

[18] Baker McKenzie Who decides arbitrability? http://www.lexology.com/library/detail.accessed on 3/02/17

[19] (2011) 5 SCC 532

and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction. The supreme court of India in **Shri Vimal Kishor Shah Vs Jayesh Dinesh Shah & Ors**[20] has also added one more category in the list (vii), namely, cases arising out of Trust Deed and the trust act.

In Uganda, the Arbitration and Conciliation Act is silent on matters which can or cannot be taken for arbitration. The study will seek to explore how the above mentioned categories of cases are applicable in Uganda basing on the prevailing circumstances of corruption, case backlog in the courts of law and the fact that there is only one Centre for Arbitration and Dispute Resolution.

Issue for consideration

What disputes should arbitrators have the power and jurisdiction to determine?

2.4 Definition and form of arbitration agreement

An arbitration agreement is a written contract in which two or more parties agree to settle a dispute outside of court. The arbitration agreement is ordinarily a clause in a larger contract[21]. Parties are free to agree to use arbitration concerning anything that they could otherwise resolve through legal proceedings. An arbitration agreement can be as simple as a provision in a contract stating that by signing that contract a party is agreeing to arbitration in the case of any future disputes.

[20] SCCA of India No.8164 of 2016

[21] What is an arbitration agreement? http://law.freeadvice.com/litigation/arbitration/agreement_arbitration.htm

The Arbitration and Conciliation Act under section 2(c) defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of a defined legal relationship , whether contractual or not. The definition of an agreement under Arbitration and Conciliation Act was based on the model law of 1985 which has since been amended. The new definition takes into consideration among others the form and has broadened the means of communication to include electronic communication that the parties make by means of data message. This definition is all inclusive and has taken care of the new forms of communication that have since evolved and there is a need to incorporate it in our law to make such agreements effective.

Issue for consideration

Whether the definition an arbitration agreement should be amended to incorporate the new forms of communication?

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12. Steven P. Finizio and Duncan Speller, 'A practical guide to international commercial arbitration: Assessment, planning and strategy' Thomson Reuters (2010)

13. Earl S. Wolaver 'The Historical Background of Commercial Arbitration'' 83 U.Pa.L Rev.132 (1934)