

The New Tanzania Arbitration Act: A challenge to Party Autonomy?

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1. Introduction

On 18th January, 2021, the Tanzania Arbitration Act¹ (the “Act”) came into operation². The Act repealed and replaced the outdated Arbitration Act, CAP 15 R.E. 2019. This old piece of legislation was enacted in 1931 with very few amendments made over the years. The Rules made under the old legislation which were enacted in 1954 and hardly provided for favourable environment within which to conduct Alternative Dispute Resolution (ADR) in general and arbitration proceedings in particular in Tanzania. It should also be noted that political and economic ideologies in Tanzania have been changing from time to time and it was obvious that the repealed Arbitration Act was outdated and the enactment of the new Act was inevitable. Given the current political, social and economic situation of Tanzania, it is expected that new Act will strike a balance protecting public policies in matters of investment and other commercial transactions between private sector, public sector and private public partnerships (PPP) without compromising general principles of arbitration particularly parties’ autonomy. The question is how far has the Act succeeded in this balance?

It is important to note that there are other pieces of legislation that affect arbitration proceedings in one way or another.³ The general principle of law is that when there is a specific legislation which provides for a particular aspect, such law should prevail over the general law unless provided otherwise. As such, the new Act cannot override specific provisions related to arbitration proceedings as provided in other specific legislation including the Natural Wealth and Resources (Permanent Sovereignty) Act⁴ and the Civil Procedure Code of Tanzania⁵.

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¹ Act No. 2 of 2020

² Vide Government Notice No. 101 of 2021 titled, the Arbitration (Date of Commencement) Notice, 2021

³ Notably, the Civil Procedure Code, Chapter 33 R.E 2019, the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 and the Tanzania Investment Act, Cap 38 RE 2002

⁴ Act No. 5 of 2017

⁵ Chapter 33 of Revised Edition 2019

The new Act has heightened regulation of the arbitration process in Tanzania. The regulation start from the process of appointing arbitrator to the time of executing an award*. Court powers within the current legislation are more elaborate and factors which can be used to set aside arbitral awards are more clearer compared to what was provided under the repealed Act which had a blanket provision providing that courts may set aside an arbitral award where the arbitrator or umpire has miscondacted himself or an arbitration or award has been improperly procured⁶. There are regulations made under the Act and under the Civil Procedure Code which regulate and control the ADR process.⁷

This paper offers an analysis of the new Act with specific overview of areas that appear to interfere with parties' autonomy either by authorities established by the Act or other statutes and will also looks at the provisions which give courts powers to intervene with the process particularly at the time of enforcement of an award. The paper looks at the process of appointment of an arbitrator and courts' intervention during enforcement of arbitral awards.

2. Appointment of Arbitrators

One of the advantages of the arbitration process is the autonomy of the parties to appoint the "judge" of their own case.⁸ However, this autonomy is not absolute under the Act,. Where arbitration is conducted in Tanzania, the parties' choice of arbitrators, is limited to a pool of accredited arbitrators. Under the new Act, a person who intends to practice as an arbitrator in mainland Tanzania must obtain accreditation from the Accreditation Panel⁹. Thus, parties cannot appoint any person to act as an arbitrator despite of his or her experience and expertise either as an arbitrator or an expert in a certain area unless such person has complied with the accreditation process. Thus if a person intends to act as an arbitrator in Tanzania Mainland s/he must first apply and qualify for accreditation, and only after one is accredited and gazetted, can such a person qualify to be appointed as an arbitrator by parties. This would mean that, parties may agree to be arbitrated by a certain person due to some qualifications which such person possesses, but before the appointment is confirmed, parties must ensure that the person or persons so selected is accredited as an arbitrator.

⁶ Section 16 of The Arbitration Act, Cap. 15 R.E. 2019

⁷ The Arbitration (Rules of Procedure) Regulations, 2021, Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021, Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021

⁸ Dr. Clement J. Mashamba, *Arbitration Law and Practice in Tanzania*, Dar es Salaam, Theophilus Enterprises, 2015

⁹ Section 6 of the Arbitration Act, Cap. 15 R.E. 2020

Before the enactment of the new Act, parties were free to choose any person of their choice to arbitrate their disputes regardless of the qualifications of such persons and without any requirement of such person to be accredited by any accreditation body or authority. It is important to note that not every person can qualify for accreditation as an arbitrator. The law provides for the minimum qualifications for a person to qualify for accreditation as an arbitrator. The qualifications enumerated under the Rules¹⁰ are to the effect that a person may be eligible to be registered as an arbitrator if such person has either qualifications to be appointed as a judge of the High Court of Tanzania or has experience of at least five years in panels and tribunals that settle disputes at national or international level or has dispute resolution qualification from a recognised institution or is an advocate of the High Court of Tanzania with at least five years of practice as an advocate and is a holder of bachelor degree or its equivalent from a recognised institution. The Act makes it an offence for a person to act as an arbitrator without complying with the requirements of the law and upon conviction, such person may be liable to penal or monetary sanctions. It is important also to note that a person practicing as an arbitrator in another jurisdiction is also required to apply for accreditation to practice as an arbitrator in Tanzania. This in a way limit parties to enjoy services of foreign arbitrators in the proceedings to be conducted in Tanzania.

Probably of interest here is also the fact that the accreditation panel is chaired by the Attorney General. For purposes of maintaining independence of the accreditation panel, it can be argued that the chairperson should be appointed by members of the panel and not a senior government official.

As mentioned earlier, there are other legislations which restrict parties' autonomy to appoint arbitrators, and the place of arbitration. Until recently, section 11 of the Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017 ("Permanent Sovereignty Act") prohibited disputes related to natural wealth and resources to be subjected to proceedings in any foreign country. Under this specific legislation, disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources were to be adjudicated by judicial bodies or other organs established in the United Republic of Tanzania and in accordance with laws of Tanzania. The effect of this provision was that parties could not appoint foreign arbitral institutions to arbitrate disputes related to natural wealth and resources in Tanzania unless such institution is established in Tanzania. Notably, Tanzania is rich in natural resources

¹⁰ Rule 6 of Government Notice No. 147 of 2001

and there are significant projects involving exploration and exploitation of gas, oil and minerals involving the government and private investors.

In what has seen to be a positive move by international investors, the new Arbitration Act has stepped in to amend section 11 of Permanent Sovereignty Act such that disputes related to natural wealth and resources can now be arbitrated by foreign arbitral institutions but the arbitration must be conducted in Tanzania. Since the law requires any arbitrator who intends to act as an arbitrator in Tanzania to be accredited, the choice of parties as to who should arbitrate their disputes involving wealth and natural resources remains limited to only those accredited as arbitrators in Tanzania.

Section 22 of the Public Private Partnership Act (PPPA) was amended in 2018 to the effect that all disputes arising under a PPP agreement would be resolved through negotiation and in case the matter is not settled at negotiations stage, it would be referred to mediation, arbitration or adjudication, after which proceedings would be subjected to judicial bodies or other organs established in Tanzania. This provision has now been amended by section 102 of the Arbitration Act which has done away with the requirement to have the matter adjudicated by judicial bodies or other organs body established in Tanzania. This would mean that international arbitration centres can be engaged in arbitrating disputes which arise out of PPP agreements with a condition that the arbitrators so appointed must be accredited and registered in Tanzania.

From the above analysis, it may be debatable whether parties' autonomy in appointing arbitrators of their choice is limited by provisions related to accreditation of the arbitrators and other provisions of the law which governs place of arbitration. Much as international arbitration institutions are allowed to arbitrate disputes in Tanzania, the requirement for accreditation of arbitrators who want to practice in Tanzania can be seen as narrowing down the choice of parties to use international arbitration institutes in arbitration proceedings conducted in Tanzania.

3. Court's power to set aside Arbitral Awards.

An award made by an arbitral tribunal may by leave of the Court be enforced as judgement or order of the Court.¹¹ The new Act, provides more clarity on grounds under which one can challenge the enforcement of an arbitral award when compared to the repealed Act. Generally there are two main grounds for a party to challenge arbitral award¹². The first ground is on jurisdiction and the second is on serious

¹¹ Section 73(1) of the Arbitration Act, 2020

¹² Sections 74 and 75 of the Arbitration Act

irregularity. The new Act provides for particulars of what may amount to serious irregularity and as we shall see later, the provision provides a list of matters which the court should consider when determining whether there are irregularities which can cause or likely cause substantial injustice.

If the award is challenged on grounds of either substantive jurisdiction or allegations of serious irregularity and the Court agrees with those grounds or any of them, the Court can vary the arbitral award and if that happens, the variation made by Court shall have effect as part of the arbitral award. In this situation the final award is composed of the decision of the arbitral tribunal and that of the court to the extent of the variation made. Looking at this critically it is clear that the final award to be executed is not only arbitrator's decision but also the court's decision. The court may also remit the award to the arbitral body in whole or in part, for reconsideration and if this happens, the arbitral body shall make a fresh award in respect of the matter remitted. The court may also declare the award to be of no effect either wholly or partially.

The provisions of the new Act relating to when and how the court can use its power when an award is submitted for enforcement by the court have been tested by the High Court of Tanzania (Commercial Division).¹³ In its decision in the cited matter, the High Court insisted that courts should be very cautious when deciding whether the arbitral award should be enforced or not. The court should not be trapped into the temptation of re-appreciating the evidence. The High Court quoted with approval the decision of the same Court¹⁴ in which it was held;

“When a court called upon to set aside an arbitral award... has to decide is, whether the arbitral award was prima facie good or right on face of it, not whether the reasons (whether of law of facts or both) given by the arbitral tribunal for the award were right or sound, unless the reason(s) form part of the award.”

The court was of the firm view that the purposes of the Act is to drastically reduce the extent of intervention of the court in the arbitral process. The court proceeded to hold that it may intervene on the ground of irregularity only when such irregularity is serious

¹³ Consolidated Misc. Commercial Cause Nos. 25 & 11 of 2021, M/s Marine Services Co. Limited versus M/s Gas Entec Company Limited, High Court of Tanzania (Commercial Division).

¹⁴ Misc. Commercial Cause No. 1 of 2020, CATIC International Engineering (T) Limited versus University of Dar es Salaam

and could cause substantial injustice, The court is bound by the list of irregularities stated in section 75 (2) of the Act and that the grounds provided by the legislation is exhaustive and these irregularities are capable of faulting the arbitral award and indeed it is a closed list in the sense that courts cannot invent new grounds other than what is provided for in the said provision. This would mean that courts are bound by what is provided as irregularities by the Act and cannot invent new sets of irregularities as ground of setting aside an arbitral award. The person challenging the award on the ground of irregularity has a duty to establish that the irregularity alleged falls within the ambit of section 75(2) of the Act.

Under section 75(2)(g) of the Act, one of the ground for challenging the arbitral award is fraud or procurement of an arbitral award in a manner that is contrary to public policy. This appears to give courts wide room in interpretation of what actually can be considered to be contrary to public policy. While the High Court was of the view that the list of irregularities is exhaustive under the Act, there is still a number of sub-grounds that could qualify as being contrary to public policy. In the CATIC's case mentioned above¹⁵, the court held that illegality of the subject matter is against public policy and explained that the doctrine of illegality is based on the fact that illegality is against public interest. The High Court in the case of M/s Marine Services Limited cited earlier determined that variation of a contract initiated without complying with public procurement process was bad in law and this had disastrous effects occasioning an illegality. However, given the wording of Section 75 (2) of the new Act, one may argue that illegality alone is not sufficient to set aside the arbitral award but it is mandatory and necessary for a party to establish that such illegality caused or is likely to cause injustice.

Notably, what amounts to "contrary public policy" could attract wide and different interpretation by courts in future cases and without a clear definition of what amounts to public interest, the provision can be used to enlarge the list of what can be used to challenge enforcement of the arbitral award and at the end the list provided by legislation by effect shall not be a closed list or exhaustive.

One of the benefits of arbitration is for parties to obtain a fair resolution of disputes which entails avoiding unnecessary delays among others¹⁶. However, this advantage may be diluted by court process during enforcement of the arbitral award. While

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¹⁶ Dr. Julius Clement Mashamba, International Arbitration in East Africa, Law and Practice, Dar es Salaam, Lex Law Publishing & Dispute Resolution and Management Co, Ltd 2021

arbitration is assumed to be quick and less time consuming because of its finality when a decision is made, the situation changes once the court comes in during enforcement of the award. The decision of the court when a person challenges registration of an award under section 75 of the Act, is not final and conclusive. A party aggrieved with the decision whether to enforce the award or refusal to enforce the award, has the right to appeal subject to obtaining leave of the court¹⁷. While an appeal might be good for purposes of meeting ends of justice, the Act in this situation makes the process much longer by imposing the requirement to obtain leave of the court. This would mean that an aggrieved party must start with the application for leave to appeal and it is only after leave has been granted that the appeal is lodged. It is obvious that the process could have been shortened by giving parties the automatic right to appeal without necessarily imposing the requirement to obtain leave of the court. The process can be longer if the High Court refuses to grant leave and the aggrieved party decides to seek the leave at the Court of Appeal of Tanzania.

From what is discussed above, the Act generally provides clear grounds that can be used to challenge arbitral awards. However, it would have been great if the Act provided the scope of what matters contrary to public policy as this would restrict wider interpretation of the phrase hence provide an exhaustive list of grounds to challenge the arbitral awards.

4. Conclusion

The new Arbitration has generally made arbitration process in Tanzania more defined compared to the period before the enactment of the new Act. The Act has a lot of positive changes in the ADR system in Tanzania. The process of arbitration is well elaborated under the new Act and Rules made under it, however, there is room for further improvement that would have a better effect for parties that choose arbitration. The parties' autonomy to choose the arbitrator(s) of their choices is limited to a pool of accredited arbitrators which restricts resources and expertise of non-accredited members and this might not be very healthy in attracting investors. The law should allow parties to choose arbitrators of their choice without necessarily compromising the intention of regulating the conduct of arbitrators.

Furthermore, the Act is restrictive on the use of foreign arbitration institutions in matters of natural wealth resources. The law requires such arbitration proceedings to be conducted in Tanzania. This has an impact on investment as most investors would

¹⁷ Section 75(4) of the Act

prefer to exercise the right of parties to choose the place of arbitration and in most cases they would prefer a neutral ground.

Challenging an arbitral award is well defined both substantively and procedurally under the new Act, but the effect of this will mainly depend on how courts interpret the list of grounds which can be used to invalidate the arbitral awards. Courts should be mindful to exercise fairness in limiting their jurisdiction to the extent to which they can interfere with the validity of the arbitral award. For purposes of shortening the arbitral process and allowing the winner to enjoy the fruits of the award, it is a call that the Act should be amended to simplify the appeal process against decision of the High Court by removing the requirement to obtain leave of the court before a party can institute an appeal against challenging enforcement of the award.

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