A COMPARATIVE ANALYSIS OF LEGAL AND INSTITUTIONAL FRAMEWORK FOR ARBITRATION: COMOROS AND UGANDA

BY

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1164/01056/09527

BEING A RESEARCH THESIS PRESENTED IN PARTIAL FULFILEMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER'S DEGREE, SCHOOL OF LAW OF KAMPALA INTERNATIONAL UNIVERSITY IN UGANDA.

SEPTEMBER 2019

DECLARATION

By submitting this Dissertation, I declare that the whole of this work contained therein is my own, original work that I'm the sole author thereof, except where acknowledgement is made in the study.

Name ……..

Registration number ……..

Signature ……

Date …….

APPROVAL

I certify that I have read this research Dissertation titled "A Comparative analysis of Legal and Institutional framework for Arbitration: Case Study of Comoros and Uganda". And in my opinion, it conforms to the acceptable standards to scholarly presentation and is fully adequate in scope and quality for partial fulfillment for the award of the degree of master of laws of Kampala international university.

Name of supervisor …….

Signature of supervisor ……

Date ……..

DEDICATION

I dedicate this work to God Almighty my Creator, my Strong pillar, my Source of inspiration, Wisdom, Knowledge and Understanding. He has been the Source of my strength throughout this program and on His wings only have I soared. I also dedicate this work to the MMADI SOILIHI Family for their constant love, understanding, encouragement, sacrifices and prayers. God bless all of them.

ACKNOWLEDGEMENTS

All praise due to ALLAH. I give God the glory for giving me the strength to carry out this dissertation despite all the hurdles I encountered in the process. I also pray that God almighty blesses those who in one way or another contributed to the success of this intense research effort. Writing this thesis was a big challenge that required several months of hard work. In order to overcome this challenge the support of several people was essential and I would not have been able to finish this thesis without this precious help.

First and foremost I would like to thank my parents Mmadi Soilihi and Echata Hassani for making all of this possible. Also essential was the help of my brother Chadhouli Mmadi and my sister Maymouna Mohamed and her husband Machababy Hamadi for providing me all financial means during my course study.

I also want to acknowledge my supervisor Dr Bello Muhammad Magaji, who meticulously and painstakingly read through this work making corrections, inputs and constructive criticisms. To him I remain ever grateful. It will amount to ingratitude if I fail to appreciate all lectures of school of Law.

I also appreciate the help of my colleagues and friends of Kampala International University: Mpora Hendry, Paulin Mchimirimana, Djamil, Farouk, Emma, Zitoni Francis, Amine Ahmed Chamsi, Azihar Moussa, Hafsa, Ikerembe Sharifa, Abdoulafar, Omar Ali and all the Comorian students Association in Uganda.

Special acknowledgement goes through my nephew and nieces most particularly: Hilma, Haira, Hilal, Soumaya, Houmaya and the unforgettable one Soifouata Abdou. Finally, I appreciate all my kith and kin who contributed directly or indirectly toward this thesis.

Thank you very much everyone here acknowledged for your support and assistance in facilitating this work, and to earn this praise, God blesses you.

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LIST OF ACRONYMS

AAA: American Arbitration Association

ACA: Arbitration and Conciliation Act

ADR: Alternative Dispute Resolution

CADER: Centre for Arbitration and Dispute Resolution

CCJA: Common Court of Justice and Arbitration

GCEFAA: Geneva Convention of Execution of Foreign Arbitral Award

GPAC: Geneva Protocol of Arbitration Clauses

ICC: International Chamber of Commerce

ICA: International Commercial Arbitration

ICSID: International Center for Settlement of Investment Dispute

LCIA: London Court of International Arbitration

NYC: New York Convention

OHADA: Organization for the Harmonization of Business Law in Africa

PRESTO: Private Enterprise Support Training and Organizational Development Project

SAC: Supreme Arbitration Court

UAA: Uniform Act on Arbitration

UNCITRAL: United Nations Commission on International Trade Law

UNGA: United Nations General Assembly

USA: United State of America

UK: United Kingdom

UNECOSOC: United Nation Economic and Social Council

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ABSTRACT

Arbitration as an Alternative Dispute Resolution has been increasing steadily all over the world. The momentum of International Commercial Arbitration in particular was provided by the 1985 United Nations Commission on International Trade Law. Legislation based on the UNCITRAL model law has been enacted by many Countries most particularly the Union of Comoros and the Republic of Uganda. This Dissertation aims to examine and compare the Legal and Institutional framework governing International Commercial Arbitration, to critically examine the current arbitration rules put in place for proceed commercial dispute, to examine the efficacy of arbitration and highlight its advantages if any, and proffer legal solutions with the view to minimize challenges under Comoros and Uganda legal system. The methodology adopted by this work is doctrinal research, statutes and legal decisions are the primary sources utilized to achieve objectives. It was concluding in this work that the Legal System of Comoros offered best conditions to resolve International Commercial Arbitration than that of Uganda. This paper also discussed the arbitration practice challenges and the opportunities for improvements of the Arbitration rules of both Countries. This work found that most of the provisions governing the arbitral proceeding of both countries are the same and both are inspired by the UNCITRAL Model Law and the New York Convention. The discourse ended with an analysis of what Comoros and Uganda needs to do to enhance the practice of international commercial arbitration and to make them centers which are capable to attract foreign and local investors to have their disputes settled locally.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

In June 21, 1985, in Vienna Austria, the United Nations Commission on International Trade Law was approved. It aims specifically to diminish discrepancies in International Legal Systems. This international body was established by the United Nation General Assembly in December 1966 to work on the harmonization and unification of international trade law[1]. It published recommendations that can help arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL Arbitration Rules.[2] Thirty six countries signed this convention and in July 2006 this document was updated so it can be better serve the needs of arbitrators nowadays. This international agreement is a model law which should be used as an exemple of regulations to be adopted by other countries. From 1985 to 2006, 56 nations of the world had adopted some kind of Arbitrations rules, based on the UNCITRAL model law, including six American states. After the update of 2006 six countries have adopted regulations based on the new version of this International Law: New Zealand (2007), Ireland, Mauritania, Peru and Slovenia (2008).[3]

In 1980, Africa started to offer immense natural resources and business opportunities for foreign direct investment which are essential to the world economy.[4] Concurrently, "financial backers often complain about legal and judicial uncertainties in Africa."

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[1] General Assembly Resolution, 2205 of 17 December 1996 on the function of UNCITRAL within the United Nation.
[2] United Nation General Assembly 34/17 para 81, on the drafting of the model law by the working group on international contract practice. UN, A/36/17 para 81. Also F. Davidson, arbitration. 2000, 35/39
[3] Source: http://www.uncitral.orguncitral, texts/arbitration/1985model, arbitration, status.Html. Accessed on 02/07/2018.
[4] B. Cousin & M. Cartron, 2014. OHADA: A common legal systemproviding a reliable legal and judicial environment in Africa for international investors, p.43

Foreign investors are traditionally suspicious about African national judicial systems, which have been plagued by corruption, long and costly procedures, and lack of efficient enforcement of the law.

In 1990 facing a reduction in investment; East, West and Central African countries decided to combine their efforts to solve the reluctance of investors to come to Africa because of the disparity of and lack of cohesive business laws across borders. These countries established a High Level Mission in order to diagnose the problem and find an appropriate solution. The Mission concluded that a lack of judicial and legal security and lack of governance institutions created an unattractive investment environment. To solve this problem, the Mission proposed the creation of a new business law intended to be "modern," "harmonized," and "interpreted by lawyers well trained in business law," the application of which would be secured by a "unique supranational court."[5] This idea led in the one hand, to the signing of the Port-Louis Treaty in 1993 in Mauritius which created the Organization for the Harmonization of Business Law in Africa (OHADA, French acronym for *Organisation pour l'Harmonisation en Afrique du Droit des Affaires)*.[6] The Organization was aimed at harmonizing the business laws of different African countries from West and Central by establishing common rules that would be simple, modern and adapted to each Country's situation. This allowed them to be more competitive in the world economy.

On the other hand, the idea above of creating a new business law in Africa led to the signing of the East Africa Community treaty on 30th October 1999 in Arusha and enters into force July 2000.[7] The Article 9 of the treaty established the East African Court of Justice and Arbitration.

In 1999, Comoros adopted the Uniform Act on Arbitration of the Organization for the Harmonization of Business Law in Africa. This Uniform Act shall apply to any arbitration when the seat of the arbitral tribunal is in one of the States Parties. It usually used for Domestic Arbitration. In 1999, OHADA member States also created a regional institution or centre which

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[5] K. Mbaye, 13 October 2004. L'Histoire et les objectifs de l'OHADA, Petites affiches, 4 n°205,

[6] Current Member States include: Benin, Burkina-Faso, Cameroon, Central African Republic, Chad, Union of Comoros, Congo, Cote d'Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal and Togo.

[7] Current members : Tanzania, Kenya, Uganda, Rwanda, Burundi and South Sudan.

administers the arbitration procedure with a remit covering all the OHADA Member States. This centre is named Common Court of Justice and Arbitration which is in charge to settle International Arbitration within and out of the OHADA area. One of the particularities of the CCJA institutional arbitration is the double role: administrative and jurisdictional. The administrative function consists of that of an arbitration centre. In its jurisdictional function the CCJA acts as a Supreme Court which rules on appeals made against arbitration decisions, third party proceedings, and request for enforcement of foreign decisions, and opposition to foreign decisions. The OHADA Common Court of Justice and Arbitration is also a court in the true sense of the word. It is the highest court of appeal when it comes to the interpretation of the Uniform Acts, and thus also the Uniform Act on Arbitration.

In July 2000, the Arbitration and Conciliation Act, Cap 4 of Uganda was enacted 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. This Act is largely based on the United Nations Commissions on International Trade Law of 1985.

In 2008, the Arbitration and Conciliation Act No.3 of 2008 was enacted to specifically provide for the funding of the Centre for Arbitration and Dispute Resolution by Government. In Uganda the main institutional arbitration is the Centre for Arbitration and Dispute Resolution (CADER) established by the Arbitration Act. The Act empowers the Centre to make appropriate rules, administrative procedure and forms for effective performance of arbitration, conciliation or Alternative Dispute Resolution processes; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required necessary or conducive to the proper implementation of the objectives of the Act.

1.2 Statement of the Problem

International commercial arbitration faces some serious problems in practicing in Africa, most particularly in Comoros and Uganda. When a dispute arises in the commercial contract, foreign investors either want to export the dispute to another jurisdiction or import arbitrators to settle the dispute. This clear indicates that the legal and institutional frameworks for international arbitration of both countries is weak and incapable to attract foreign investors to have their dispute settled locally. This also denied the local arbitrators, the fora to put their skills and expertise in arbitration to use since disputants shun the local arbitral institutions for foreign institutions. Most African disputants prefer to appoint their non-African as arbitrators in international dispute, and thus resulting in instances where even some Africans go for non-African to be arbitrated. Indeed, it has been observed that the lack of African arbitrators in the International Convention for Settlement of Investment Dispute arbitration proceedings can in part be explained by the fact that African States predominantly appoint international arbitrators to represent their interests. These problems may not be unique to Comoros and Uganda but their frequent recurrence in the two legal systems of arbitration practice requires and justifies close examination and the search for possible legal solutions that can be a unique contribution to scholar and the practice of arbitration in both countries.

1.3 Research Objectives

The objective of this research is divided into two: General and Specific objectives.

1.3.1 General Objective

The main objective of this study is to analyze and compare the legal and institutional framework for arbitration of Comoros and Uganda with a view to conclude which arbitration rules offer best conditions to resolve International Commercial Disputes.

1.3.2 Specific Objective

The specific objectives of this research are:

a) To examine the efficacy and highlight the disadvantages, if any of arbitration.

b) To critically examine the arbitration rules and the institutional mechanism put in place for proceedings commercial dispute.
c) To proffer legal solutions with a view to minimize challenges in the legal systems of both countries.

1.4 Research Questions

This research will seek to answer the following questions:

a) Are the arbitration rules of Comoros and Uganda adequate for the effective management and conducts the arbitral proceedings?
b) How can attract foreign investors to have their disputes settled locally?
c) What improvement can be made to render more effective the arbitration rules of both countries?

1.5 Scope of the Study

This research is focused under the commercial arbitration rules of the Union of Comoros and the Republic of Uganda. Therefore the temporal scope of the study is 1998 up to date.

1.6 Significance of the Study

The findings of this study will redound to the benefit of society considering that institutional arbitration plays an important role in commercial disputes. By identifying the problems and offering solutions, disputants who choose arbitration in both countries will be liberated from the uncertainty and challenges they will face when one seeks to be arbitrated from the two institutional jurisdictions. This study shall also assist the government to identify the strength and weakness of the existing legal systems and seek means of tackling it to ensure effectiveness of arbitration. This work shall be a source of material for future research work by students and researchers in this area.

1.7 Research Methodology

The choice of a methodology is influenced or determined by the subject matter of the intended purpose or objective. Therefore the research methodology compatible to this work is doctrinal research. Thus Statutes and Cases law will constitute the primary sources, while scholars, legal works, journals, newspaper, article, seminar papers, dissertations shall constitute secondary sources for this research.

1.8 Literature Review

Literature review of other works in this area of research is an important aspect of this research work. It will help the researchers see through the works of others, and what they did not do in this area, and how differently the researcher intends to go about his work in order to achieve result. It is against this background that the selected works below were reviewed.

A. Torgbor argued that, "A fundamental requirement for a valid arbitration agreement apart from formal requirements is consent. Indeed the presence of consent is so readily presumed from the arbitration agreement that it can be an uphill task for an arbitral party who subsequently denies his consent to arbitrate. In the common-law tradition, consent in the sense of "assent" or more technically "consensus ad idem" is an essential element of a contract. The lack of consent is germane to the contractual and legal bases of the arbitral process in that the absence of genuine consent not only impinges upon but also detracts from the validity of the agreement upon which the contractual and legal legitimacy of the arbitration is founded." This research agrees with the author's idea that genuine consent in arbitration is more important to validate the arbitration agreement.[8] However, this study shall establish the distinction between the" consent to arbitrate and the arbitration agreement" which the author did not examine in the context of Comoros and Uganda.

M. Samassekou observed that, neither the Model Law nor the national statutes in Africa drawn from it specifically provide for or deal expressly with consent as an essential prerequisite or ingredient of the arbitration agreement; and that consequently investigation of consent is left to the arbitral tribunal or court when consent is disputed or the validity of the agreement or the jurisdiction of the tribunal is challenged on this basis. In the light of these considerations the consensual basis of arbitration may be more of an illusion than a reality. If so the assumption that arbitration is consensual is a rebuttable truism. Perhaps it is sometimes nothing more than a pragmatic legal fiction, useful but tantalizing.[9] This study agreed with the author that consent to arbitrate is an essential prerequisite or ingredient of the arbitration agreement.

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[8] A. Torgbor, 2013. A comparative study of law and practice of arbitration in Africa, p.155

[9] M. Samassekou, 2011. Arbitration Agreement within the Organization for the harmonization of Business Law in Africa, P .36

However, this work shall focus on the impact of disputed consent, which is not studied under Comoros and Uganda.

S. Rajoo declared that: ¨ the object of arbitration is to provide fair and impartial resolution of disputes without causing unnecessary delay or expense. Parties are entitled to choose the form of arbitration which they deem appropriate in the facts and circumstances of their dispute. However, in most situations, the type of arbitration is chosen by the parties not so much because they like it but rather because they have no other choice. While there are intrinsic merits in each type of arbitration, more often than not, the option evaporates and the chosen method normally prevails by default.[10] This work agreed with the author about the object of arbitration.
However, this study shall focus on the advantages of arbitration over litigation which is not studied under both Countries.

P. Pougoue & J. Tchatchouwa assert that, "The difference between an ad hoc arbitration and an institutional arbitration is not a difference between one system of law and another; for whichever is the proper law which governs either proceeding. It is merely a difference in the method of appointment and conduct of arbitration. Either method is applicable to an international arbitration."[11] This work agreed with the author's idea. However, this study shall establish the advantages and disadvantages of the rules governing institutional and ad hoc arbitration which is not examined in Comoros and Uganda.

P. Lane sums up in his work, "We must be astute in discerning who is qualified to arbitrate. The mere fact that a person has a legal degree does not qualify him to be an arbitrator or to appear in arbitrations. Arbitrators must be skilled in the practice of arbitration and, even where they have some knowledge, he should continue to increase his learning. It is inadequate for a party, for instance, who has passed the Higher Diploma in arbitration regulated by the Association to

[10] S. Rajoo, 2010. Institutional and Ad hoc arbitration, advantages and disadvantages, law review. P 147
[8] P. pougoue & J. tchatchouwa, 2000. Droit de l'arbitrage dans l'espace de l'Organisation pour Harmonisation du Droit des Affaires en Afrique, p. 16

regard himself as being qualified to act as an arbitrator for the rest of his active career. It is a skill which has to be continuously honed."[12]

This work agreed with the author's idea. However, this study shall focus on the essence of a suitable arbitrator in arbitration which is not covered under Uganda Comoros legal systems.

J. Munyantwali, said that, arbitrators should keep control of the proceedings and don't let cases drift. Remember you are the masters of your own procedure, and then never try to fit every case into the same procedural strait-jacket because some won't fit. Be flexible, as flexible as you can in trying to meet the wishes of the parties, but above all be firm, politely firm, especially about delay. Why is it that some arbitrators seem frightened to grasp the nettle and take control of the cases and show that delay will not be tolerated? We all, I think, have some inbuilt fear of doing an injustice if we refuse to accept an excuse for seeking further time for pleading or discovery or a request, attractively if unjustifiably advanced, for an adjournment of the hearing. A judge may feel inclined to take the risk because there is always the Court of Appeal to direct him if he has gone too far in a particular direction.[13] This study agreed with the author's thought, however this work shall examine the question of who is impartial or independent arbitrator during the course of arbitration process. This is not studied in both Comoros and Uganda.

T. Okwenye asserts that, the discussion on arbitrators' immunity advances on the basis that arbitrators are akin to judges, performing tasks of a quasi-judicial nature. The arbitrator acts as a judge, must be impartial, independent and abide by fair procedures and natural justice. The rationale behind immunity is not because the law regards arbitrators with special tenderness but rather because the law identifies that, on balance of convenience, public policy demands that they have such immunity. The argument for immunity from liability thus centers around the fact that, if arbitrators were exposed to claims from the parties, any award or decision might result in further litigation, thereby undermining the judicial process. Thus, in raising the arbitrator to a similar level of that of a judge, the arbitrator is regarded as "the last bite of the cherry" in terms of making decisions, and as a pretext for rehearing a dispute. It therefore promotes an honest and

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[12] Lane. P, 1997. Cost Effective on Arbitration. P. 5 at 6

[13] J. Munyantwali, 2018. International Commercial Arbitration in practice in Uganda, p. 93.

forthright arbitral process thereby avoiding a defensive approach on the part of the arbitrator.[14] This research agreed with the author's idea. However, this study shall focus on the need of immunity of arbitrators in Uganda, which not yet examined.

K. Corby argued that, Parties to a multi-party contract or a number of related contracts with different parties should consider, at an early stage in the drafting and negotiating of those contracts, how they would wish any future disputes arising under such contracts to be handled. In considering this, the parties should consult and familiarize themselves with how their preferred arbitral rules deal with joinder and consolidation at the time of drafting the contract, as well as at the outset of any potential dispute itself. The arbitration clause in each contract should be the same, similar, or at the very least compatible. All parties should expressly record their consent to joinder or consolidation in the contract from the outset, to avoid lack of evidence or arguments around consent at a later date. An umbrella arbitration agreement may be useful where there are various contracts with different parties that are likely to give rise to related disputes. Of course, it goes without saying that drafting such express, precise multi-party arbitration friendly clauses will be an advantage to a party who wants to bring a claim against multiple parties, but may work against that party in circumstances where that party wishes to avoid being dragged into multi-party proceedings itself.[15] This work agreed with the author's thought. However, this study shall focus on the case of multiparty in arbitration agreement, which is not studied in Uganda.

Q. Mohammed argued that, in the process of arbitral proceedings the question of arbitrability is of utmost importance which means that the subject matter in dispute must be capable of settlement by arbitration. Basically, arbitrability determines as to what matter can and cannot be arbitrable. It tries to ascertain as to what disputes can be resolved by arbitration and what can be tried in court. There is no uniform approach as to what matters can be submitted to arbitration for their settlement, but it differs from one country to another.[16] This research agreed with the

[14] T. Okwenye, 2017. Principle of arbitrator immunity, P 14
[15] K. Corby, 2015. Multiparty arbitrations, practical guide, p. 104
[16] Q. Mohammed, 2015. Principle of arbitrability in international commercial arbitration, p 189

author's idea. However, this study shall focus on the matter which capable of being arbitrable and those which cannot, this is not yet examined in Uganda and Comoros.

J. Paulson found that, time is a particularly precious commodity in international arbitral proceedings that it is a curiosity of the legal process, and particularly so in its arbitral manifestation, which work tends to expand to exceed available time. This is what the timely arbitrator must prevent. The purpose of hearings is to help the tribunal resolve the dispute. Counsels are to be given a reasonable opportunity to put in their evidence and to persuade the arbitrators; but it is for the tribunal, not counsel to determine what is reasonable. Another frequent cause of wasted time is the failure to achieve an understanding on the part of all participants as to what will happen in the course of hearings. In most cases, this kind of misadventure is easy to avoid. What the presiding arbitrator needs to do is to consult with counsel in order to understand their desiderata and expectations, and to explain those of the arbitral tribunal.[17] This work agreed with the author's idea that time is precious in international arbitration and he focused only the parties' wasting time. However this study shall focus on the delay of the arbitral tribunal and national courts, which is not yet studied in Comoros and Uganda.

Redfern and Hunter argued that, In consensual arbitration the competence of the arbitrator comes from the agreement. Variously stated, this means the tribunal must stay within the terms of the reference, or must not exceed its mandate or must conform to its mission. Whether stated with reference to the arbitrator's competence, authority or mandate, the tribunal must not exceed its jurisdiction or it will face challenges to its jurisdiction, which may be a partial or total challenge. A partial challenge goes to only some but not all of the claims before the arbitrator and may be resolved by agreement. A total challenge assails the very foundation of the tribunal and is therefore more serious and requires a decision as to whether the tribunal is validly created.[18] This study agreed with the author's thought, and however this work shall focus on the need for substantive powers for the smooth conducting of the arbitral proceedings, which is not examined in Comoros and Uganda.

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[17] J. Paulson, 2006. The timely arbitrators, reflections on the Bockstiegal method, p. 29
[18] C. Redfern and M. Hunter, 2009. International Commercial Arbitration, 5ed. P.57

M. Kariuki argued that, some African countries require the arbitral process to be confidence. He went further to say the proceedings may be published unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings. This puts arbitration in the same league as litigation in terms of disclosure, and poses a threat to the development of arbitration as a more favourable course of action.[19] This study disagreed with the author's idea. However, this work shall focus on the essence of confidentiality of arbitration as by nature, it is purely private.

D. Tan recognized the importance of interim measures as arbitration procedures have become more and more complex: "As international commercial litigation becomes increasingly complex, the courts can no longer rely solely on the statutory remedies to meet out suitable relief; instead, they must enlist the help of their wider common law and equitable remedial powers".[20] This work is in common sense with the author's idea. However, this study shall focus on the distribution and balance of power between the arbitral tribunal and court in the context of interim measures, which is not studied in Comoros and Uganda.

J. Abwuor asserted that courts have an important role to play through their intervention in the arbitral Process. In the absence of such intervention the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as supporting or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such intervention. Much will also depend upon the relative importance of the competing concepts of party autonomy and due process. There is a view, particularly amongst those involved with international arbitration, that the involvement of courts in the arbitral process generally constitutes unwanted interference. But the reality is that arbitration would not survive without the courts. Indeed, as Lord Mustill observed, it is only a court with coercive powers that could rescue an arbitration which is in danger of foundering."[21]

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[19] Kariuki M, 2015. 'Reawakening Arbitral Institutions for Development of Arbitration in Africa. Available http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institution.pdf> accessed on 22 Avril 2018.

[20] D. Tan, 2007. New solutions for interim measure of protections in international commercial arbitrations. P,101

[21] J. Abwuor, 2009. Does national courts involvement undermine the international arbitration process? P.52

This study agreed with the author's thought. However, this work shall focus on the common stages at which court can involve and support the arbitration process, which is not examined in both Comoros and Uganda.

A. Assouzu argued that, if an award which is not voluntarily carried out cannot be coercively enforced against a recalcitrant party, then a rationale for arbitration is eroded and confidence in the arbitral process would be shaken. Thus, in recognizing and enforcing arbitral awards, courts assist parties in realizing their legitimate expectations and thereby supporting the arbitral process, as well as reinforcing its efficacy and integrity. The court's duty has as an implication the assurance that the arbitral proceeding was conducted, or that a resultant award was procured, in a manner compatible with procedural fairness or otherwise not in conflict with other public policy considerations. In those respects, the court may also be carrying out international arbitral obligations.[22] This study agreed with the author's thought. However, this work shall focus on the impediments for the enforcement and execution of arbitral awards, which is not examined in Uganda.

1.9 Organizational Layout

This research thesis is divided into 5 chapters:

Chapter One is on General Introduction. This is followed by the Background to the study, the Statement of the problem, Objectives of the study, Research questions, Scope and Significance of the study, Methodology and the Chaptarization.

Chapter Two deals with the Role of National Courts in International Commercial Arbitration. There are four stages at which Court can and do become involved: Prior to establishment of a tribunal; at the Commencement of the arbitration; during the arbitration process and during the enforcement stage of the arbitral award.

[22] A. Assouzu, 1999. The adoption of the uncitral model law: implication of the recognition and enforcement of the arbitral award, p 154

Chapter Three deals with the Arbitration Agreement, Arbitral Proceedings and Termination of the Arbitration.

Chapter Four deals with the Recognition and Enforcement of International and Domestic arbitral Award.

Chapter Five is the Summary of the Work: Discussion of Findings, Conclusion and Recommendations.

CHAPTER TWO

ROLE OF NATIONAL COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION

2.1 Introduction

National courts involvement in international commercial dispute is a fact of life as prevalent as the weather. National courts become involved in arbitration for many reasons, but do so primarily because national laws are permissive and parties allow and encourage them to do so[23]. The court has an important role to play through their intervention at various stages of the arbitral process. In the absence of such involvement the fair resolution of disputes before an impartial tribunal, without unnecessary delay or expense, may not be achieved. Whether court intervention is viewed as sustaining or interfering with the arbitral process will depend upon a range of factors including the timing, manner and degree of such involvement. The UNCITRAL Model Law, which records what are generally considered the standards and practices of international arbitration and the most appropriate national law for international arbitration[24], contains similar provisions to the New York Convention but is more expansive as to the role of the courts[25]. Article 5 provides that "no court shall intervene except where so provided in this Law," and Article 6 designates just three areas for court involvement in arbitration within its jurisdiction. The aim of this chapter is to examine the most common forms of court involvement in commercial arbitration under Comoros and Uganda arbitration law.

2.2 Stages at which courts can and do become involved

The House of Lords in the case of ***Coppee-Lavalin vs. Ken-Ren Chemicals and Fertilizers Ltd*** lay down three clusters of instances where the courts must be involved in arbitration dispute. Lord Mustill recognized the need for this balance in the English House of Lords case of Coppee-

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[23] R. Allan Homing, 2005. Interim Measures of Protection; Security for Claims and Costs; and Commentary on the WIPO Emergency Relief Rules: Article 46 to 9, p 155/158

[24] UnitedNationsCommissiononInternationalTradeLaw,atannex1,U.N.Doc.A!40/17,U.N.SalesNo.E.08.V.4(2008).availabl e,at,http://www.uncitral.org/pdf/english!texts/arbitrationlml-arb/07 86998_Ebook.pdf. Accessed on December 2018.

[25] S. I. Strong, 1998. Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, P. 915, 975

Lavalin and stated thus: "Whatever view is taken regarding balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial."[26] There are four stages when courts are most likely to become involved with the arbitration process: prior before the establishment of a tribunal; at the commencement of the arbitration; during the arbitration process and during the enforcement stage.

2.2.1 Priori before the establishment of the arbitral tribunal

Prior before the establishment of the arbitral tribunal, courts become involved where a party starts proceedings to challenge the validity of the arbitration agreement, where one party institutes court proceedings despite, and perhaps with the intention of avoiding the agreement to arbitrate; and where one party needs urgent protection that cannot await the appointment of the tribunal. In all cases, the court's duty is to uphold the agreement to arbitrate. In the first and second cases, the court must deal with this in accordance with the New York Convention[27], refer the matter to arbitration if there is a valid arbitration agreement. In the third case, the court fills the gap until the tribunal is established to protect the status quo. Many national laws allow, as does the UNCITRAL Model Law by omission, for 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. Most would agree that, at this stage, national court intervention is not disruptive, and may be beneficial to the arbitration proceedings.[28]

2.2.1.1 Under Comoros legal systems

Under Comoros legal systems, The Common Court of Justice and Arbitration, hereinafter referred to as the "Court", shall be responsible for the supervision of arbitration proceeding[29]. The CCJA shall deal with issues relating to the arbitration agreement before the establishment of the arbitral tribunal. However, the CCJA rules provides where one party raises one or more

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[26] B. Adolf, 2017. Court intervention in international commercial Arbitration: support or interference, p.24

[27] New York Convention, on International Commercial Arbitration of 1958. Supra note 10, art. II, (1)

[28] Derains & A. Schwartz, 2005. A guide to the International Chamber of Commerce rules of arbitration, p. 294-95

[29] Treaty of the Organization for the Harmonization of Business Law in Africa, 1997. Article 21

objections concerning the existence, validity or the scope of the arbitration agreement, and where the Court is satisfied of the prima facie existence of the agreement, the court may, without prejudice to the admissibility or merits of the objection, decide that the arbitration shall proceed.[30] That was held in the case of ***Nicom Ltd vs. Centre Bank of Comoros***; the CCJA ruled that arbitral proceedings are a recognized means of resolving disputes and should not be taken lightly by both counsel and parties. However there must be an agreement to arbitrate, which is a voluntary submission to arbitration. Where there is an arbitration clause in a contract that is the subject matter of court proceedings and parties to the court proceedings promptly raise the issue of an arbitration clause, the court will order a stay of proceedings and refer the parties to arbitration. This procedure is valid even when the arbitral tribunal has not yet been constituted. In such case, the arbitrator shall rule on any issues relating to his own jurisdiction. This is called the Kompetenz-Kornpetenz doctrine[31], widely recognized in international arbitration, this principle gives priority to the arbitral tribunal to decide on any matter covered by the arbitration agreement, or on its own competence. For instance in the recent case of **Gerald Metals SA vs. Timis**, the court held that where an expedited emergency arbitrator could be appointed within the relevant timeframe, the court will have no jurisdiction to grant an urgent relief. This recent decision apparently supports the same argument that if an emergency arbitrator could be appointed and can exercise its powers to order the requested measure, the 'urgency' test will not be satisfied and thus, the court will have no power to order interim measures in that case.

[30] Article 10(3) of the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa.
[31] The Kompetenz-Kornpetenz doctrine. Article10 (3) of the Common Court of Justice and Arbitration rules.

2.2.1.2 Under Uganda system of rules

In Uganda the Arbitration and Conciliation Act expressly prohibits the intervention of courts except as permitted under the Act, this restriction is comparable to article 5 of the United Nations Commission on International Trade Law. The Uganda Arbitration and Conciliation Act allows party to an arbitration agreement to apply to the court, before or during arbitral proceedings for an interim measure of protection, and the court may grant that measure.[32] The Act provides that when seized of an action in a matter in respect of which the parties have made an arbitration agreement, the court is to at the request of one of the parties; refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.[33] The court of Uganda ruled thus in the case of **Swabri Ali Abu baker. Vs Kobil Uganda Ltd**, that since the arbitration agreement is arbitrable and valid, the court refer the dispute to arbitration. In the case of ***Seele Middle East FZE Vs. Drake & Scull International SA CO***, an application was made to the English High Court for an injunction in relation to a contract governed by English law, providing for arbitral proceedings under the ICC arbitration in London. The application was made on an urgent basis before commencement of the arbitral proceedings. The court recognized the urgency of the application, and further determined that at that point, the arbitral tribunal had no power to grant such measure, the court accepted jurisdiction and ordered the measure requested for the purpose of preserving evidence.

- In this procedure, both Arbitration rules of Comoros and Uganda are in conformity with the UNCITRAL model law and there is no difference between each other. Both country rules allow Courts Intervention in arbitration to take any interim measure that cannot await the Appointment of arbitrators, and also both countries recognize the principle of Competenz Competenz in international commercial arbitration which means that the arbitral tribunal once appointed by parties and confirmed by the court, shall rule on any matter concerning its own jurisdiction.

[32] Article 6 of the Arbitration and Conciliation Act; Cap 4, 2000.
[33] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 40

2.2.2 Commencement of the Arbitration

Court intervention at the commencement of arbitration generally involves assisting with the appointment, challenges and replacement of arbitrators. As it is reflected in the UNCITRAL Model Law and in most national laws, the court here uses its authority to give effect to the parties' agreement by establishing an appropriate tribunal to takeover and deal with the dispute between the parties where the prescribed appointment mechanism does not work[34].

2.2.2.1 Under Comoros legal systems

Under the Union of Comoros, the Court has an important role to play in the beginning of the arbitration; the court shall not itself settle the dispute. It will appoint or confirm arbitrators, who shall keep the court informed of the progress of the proceedings and submit the draft award to the court for its approval[35]. The CCJA rules provide that either one or three arbitrators can be appointed. Unlike the CCJA rules, the UNCITRAL model Law gives parties the power to choose any number of arbitrators[36]. If parties decide to have one arbitrator, they agree on the appointment, which is subject to confirmation by the Court. If parties fail to agree within thirty days after notification of the request for arbitration by the other party, the Court appoints the arbitrator. If they decide to have three arbitrators, each party appoints one arbitrator, either in the request for arbitration or in the answering statement. If one party fails to do so, the Court appoints the other arbitrator. The third arbitrator, deemed to be the president of the arbitral tribunal, is appointed by the Court, unless parties have provided that the appointment would be made by the other arbitrators already appointed. In this case, the Court will have to confirm the third arbitrator[37]. If parties did not provide the number of arbitrators, the Court appoints one arbitrator, unless it determines the dispute to require three arbitrators.

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[34] United Nations Commission on International Trade Law of 1985. Art 11(5) requiring that a court appointing an arbitrator "have due regard to any qualifications required of the arbitrator by the agreement of the parties.

[35] Common Court of Justice and Arbitration rules of 1999. Section 2

[36] United Nations Commission on International Trade Law of 1985. Section 10

[37] A similar appointment procedure is provided in article 2 of the ICC Rules and in article 11 of the UNCITRAL Model law. Like for the CCJA rules, those provisions give the court the power to appoint arbitrators where the parties have not provided for a specific procedure.

In this case parties have fifteen days to appoint the arbitrators. In a multi-party case, with multiple claimants and respondents, if parties cannot agree on the appointment of arbitrators, the Court can appoint the entire arbitration panel[38]. Arbitrators can be chosen from the roster established by the Court and renewed annually[39]. In appointing arbitrators, the Court takes into account the parties' nationality, their locations and the location of their counsels and the arbitrators, the parties' language, the nature of the subject matter and, eventually, the choice by the parties of the law to govern their relationship[40] An arbitrator who is considered for appointment, before his or her nomination or confirmation by the Court, should informs the parties of any fact or circumstance which can, according to them, call into question the arbitrator's independence vis-a-vis the parties. He has the same obligation throughout arbitration proceedings, from his or her nomination or confirmation by the court to notification of the award[41]. In the scope of their work, arbitrators designated by the Court and those designated by parties but confirmed by the Court enjoy diplomatic immunity and privileges[42]. The immunity given to those arbitrators is questionable, especially in cases where they make some mistakes on purpose without being held accountable. This provision of the CCJA rules may have been adapted to the context of OHADA Member States in order to guarantee the arbitrators' independence and freedom while accomplishing their mission. An arbitrator can be challenged for lack of independence, impartiality or any other reason. The party challenging the arbitrator must submit its challenge within thirty days after notification of nomination of confirmation by the Court, or within thirty days after it becomes aware of the alleged facts or circumstances[43].

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[38] The appointment procedure is provided in article 3 (1) of the Common Court of Justice and Arbitration rules.

[39] Section R-11 of the American Arbitration Association rules of 1928, also gives the right to appoint arbitrators from a National Roster

[40] Article 3(3) of the Common Court of Justice and Arbitration rules of 1999. Similar considerations are provided in section 14 of the American Arbitration Association rules.

[41] Common Court of Justice and Arbitration rules of 1999. Section 4 (1)

[42] Article 49 of the Treaty creating the Organization for the Harmonization of Business Law in Africa, which was revised by the Conference of Head of States and Governments on October 17th, 2008. The revision extended these privileges and immunity to arbitrators designated by parties but confirmed by the Court.

[43] Common Court of Justice and Arbitration rules of 1999. Section 4 (2)

Under the CCJA rules, parties do not need to go to national courts to challenge an arbitrator and submit their requests to the CCJA, which decides the matter. In the case of **Commonwealth Coatings Vs. Continental Casualty Co. Ltd**; the neutral arbitrator failed to disclose that he had previously served sporadically as an engineering consultant for one of the parties. This relationship was sporadic in a sense that it was used only from time to time, and parties had no dealings for about a year immediately before the arbitral proceedings. However, the Court held that the neutral arbitrator's failure to disclose the prior relationship justified vacatur of the arbitral award on grounds of evident partiality, the court go further to emphasize that an "arbitrator is required to disclose to the parties any dealings that might create an impression of bias." An arbitrator can be replaced due to death, when the Court has confirmed his or her challenge or when his or her resignation has been accepted by the Court. He can also be replaced when the Court determines that the arbitrator is prevented de jure or de facto from fulfilling his or her mission, or that he failed to fulfil his or her mission according to Title IV of the Treaty and the CCJA rules. ***In Marine Products Export Corp. vs. M.T. Globe Galaxy***, a party arbitrator died after the panel issued several interlocutory discovery orders but prior to any further hearings or ruling on the merits. That party sought to have the arbitration begun a new with a new panel. The court stated that "the general rule is that where one member of a three-person panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence a new with a full panel. When an arbitrator's resignation is denied by the Court, and the arbitrator refuses to continue his or her work, the Court may replace him or her if he or she is the sole arbitrator or the president of the arbitral tribunal. In any other case, the Court considers the evolution of the process and the opinion of the other two arbitrators, and can decide to proceed with the arbitration[44]. ***In Ins. Co. of North America vs. Public Service Mutual Ins. Co***, A party arbitrator resigned after learning that he had cancer and feared that the treatment therefore would render him unable to fulfill his duties. After

[44] Article 4(.3) and 4(4) of the Common Court of Justice and Arbitration rules of 1999.

an extended effort to complete the panel, counsel learned that the arbitrator who had resigned had recovered his health and was accepting new appointments.

At issue was the ability to reappoint the original arbitrator or replace the entire panel. The court allowed the reappointment of the original arbitrator.

2.2.2.2 Under Uganda arbitration rules

In Uganda the parties are free to determine the number of arbitrators. If the parties have not previously agreed on the number of arbitrators, and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed[45].

In making the appointment, the appointing authority shall use the list of procedure, unless both parties agree that the list of procedures should not be used or unless the appointing authority determines in its direction that the use of the list-procedure is not appropriate for the case. At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names, within fifteen days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in order of his preference, after the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the list returned to it and in accordance with the order of preference indicated by the parties. If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator[46]. In making the appointment, the appointing authority shall have regard to such considerations as are likely: to secure the appointment of an independent and impartial arbitrator, including the nationality of the arbitrator. If three arbitrators are to be appointed, each party shall nominate one arbitrator, the appointing authority shall appoint the third arbitrator who will act as the presiding arbitrator of the tribunal and shall not be party nominated arbitrator, if within thirty days after the receipt of a party's notification of the nomination of an arbitrator the other part has

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[45] Article 5 of the Centre for Arbitration and Dispute Resolution rules of Uganda, 1998.

[46] Article 6 of the Centre for Arbitration and Dispute Resolution rules of Uganda, 1998.

notified the first party of the arbitrator he has nominated, the first party may request the appointing authority to appoint the second arbitrator[47]. Any arbitrator may be challenged if circumstances exist that gives rise to justifiable doubts as to the arbitrator's impartiality or independence and he shall disclose forthwith any such circumstances should they arise after that and before the arbitration is concluded. A party may challenge the arbitrator nominated by him only for reasons of which he becomes aware after the appointment has been made[48].

For instance in the case of ***Total petroleum Ltd Vs. Buramba General Agencies***, a Transport Agreement concluded between the Applicant Total Ltd and the Respondent Buramba General Agencies, Buramba undertook to transport and distribute Total's petroleum products. Subsequently, Total claimed a breach of that Agreement by Buramba; where upon the parties agreed to refer the issue to arbitration by three arbitrators, whose award dated 14/11/97 found in favour of Buramba. The present appeal by Total before this Court, challenges that arbitration award principally on the ground that one of the arbitrators Mr. Kafuko Ntuyo, appointed to the panel of the arbitrators by Total itself, was biased in carrying out his functions; in as much as he filed a reply to the formal statement of claim on behalf of Total; and, that therefore, Mr. Kafuko-Ntuyo ceased to be an impartial arbitrator; and "is deemed to have commenced his role' as an arbitrator with pre-conceived ideas and notions"; and should have disqualified himself altogether from participating in the arbitration proceedings. A party who intends to challenge an arbitrator shall be send notice of his challenge to the Appointing authority within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral by the appointing authority; the notification shall be in writing and shall state the reasons for the challenge[49]. If the other party agrees to the challenge the arbitrator may also, after the challenge, withdraw from his office in neither case does this imply acceptance of the validity of the ground for the challenge. If the other party does not agree to the change, and

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[47] Article 7 of the Centre of Arbitration and Dispute Resolution rules Uganda, 1998. Similar appointment procedure is provided in article 11(3) of the UNCITRAL model law

[48] Article 10 of the Center for Arbitration and Dispute Resolution rules of Uganda, 1998.

[49] Article 11 of the Centre for Arbitration and Dispute Resolution rules of Uganda, 1998.

the challenge arbitrator does not withdraw, the decision on the challenge will be made by the appointing authority and such decision shall be final[50]. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 of the CADER rules of Arbitration. Furthermore, in the event of death or resignation of an arbitrator during the course of the arbitral proceedings a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided by the agreement.

- Therefore both arbitration rules are in principle in conformity with the UNCITRAL model law but there are some differences in the appointment of arbitrator(s). Under Comoros legal system, parties in a dispute have two choice, either they appoint One or Three arbitrator(s) whereas in Uganda there is unlimited number of arbitrators; parties are free to appoint more than three. In Comoros also, arbitrators appointed by parties and confirmed by the court enjoy diplomatic immunity and privileges, whereas in Uganda there is no such provision protecting the arbitrators while performing their duty. In addition the arbitration rules of Comoros provides provisions for appointing arbitrators in a dispute concerning multiple parties whereas in Uganda the Arbitration Act did not provide such provision, So in this step, the arbitration rule of Comoros offer best conditions of arbitration than that of Uganda.

2.2.3 During the Arbitration Process

Court involvement during the arbitration process comes in many forms and is rarely dealt within arbitration Statutes. Properly exercised, this involves courts' making procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo. These measures are generally helpful. There are also orders for protecting and taking evidence, or otherwise protecting the integrity of the arbitration. This type of intervention is generally unobjectionable and appropriate in circumstances where the tribunal cannot take the measures sought, and the intervention has the agreement of the tribunal.

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[50] Article 12 of the Center for Arbitration and Dispute Resolution rules of Uganda 1998.

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.[51]

2.2.3.1 Under Comoros Legal Systems

In Comoros the Court shall deal with issues relating to arbitration process conducted by it pursuant to Part IV and Article I of the CCJA Rules.[52] The court may where necessary draw up its own internal Rules. It may, in accordance with these internal rules, delegates to a restricted panel of the court the power to take certain decisions, provided that any such decision shall be reported to the Court at its next session. These rules shall be deliberated upon and adopted at the General Assembly. They shall become binding upon approval by the Council of Ministers pursuant to Article 4 of the Treaty[53]. The President of the Court or any other member of the court delegated to this effect by him shall have the power to take, in case of urgency, decisions necessary for the smooth conduct of arbitral proceedings other than those that must be taken by the Court sitting in its judicial capacity, provided that any such decision shall be reported to the Court at its next session.[54] The decisions which the court shall take for the purpose of ensuring the proper conduct of arbitration proceedings and the proceeding linked to the scrutiny of the award, are of an administrative nature. In the case of ***Seele Middle East FZE Vs. Drake & Scull International SA CO***, an application was made to the English High Court for an injunction in relation to a contract governed by English law, providing for arbitral proceedings under the ICC arbitration in London. The application was made on an urgent basis during the arbitral proceedings, under Section 44 of the England Arbitration Act which basically lays down the powers granted to English courts in support of arbitration seated in England and Wales.

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[51] Article 9 of the United Nations Commission on International Trade Law of 1985.

[52] Article 2(3) of the Common Court of Justice and Arbitration rules of 1999.

[53] Article 4 of the treaty creating the Organization for the Harmonization of Business Law in Africa, Rules for the implementation of the present treaty and decisions taken shall be enacted, where necessary, by an absolute majority of the Council of Ministers.

[54] Article 2(5) of the Common Court of Justice and Arbitration rules of 1999.

The court recognized the urgency of the application, satisfying Section 44(3), and further determined that at that point, the arbitral tribunal had no power to grant such measure, which is in accordance with Section 44(5). Thus, the court accepted jurisdiction and ordered the measure requested for the purpose of preserving evidence.

2.2.3.2 Under Uganda legal systems

In a bid to promote a more responsive and quick dispute settlement mechanism, the Commercial Division of the High Court of Uganda piloted a project of Court assisted arbitration and mediation to facilitate the process of dispute resolution. Parties can request for interim measures to the Court if such request is compatible with the agreement to arbitrate. A request for interim measures addressed by any party to the high Court shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement[55]. 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 if they are in conformity with the agreement[56]. Where a party applies to the court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application. In taking evidence, the Arbitration and Conciliation Act empowers the arbitral tribunal, or a party with the approval of the arbitral tribunal to request from the court, assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence[57]. In the case of ***Biwater Gauff Limited vs. United Republic of Tanzania,*** The case involved three requests for provisional measures, two joint submissions regarding requests for production of documents and a petition seeking amicus curiae status. The ICSID Court however consider the request under Article 43 of the Convention as it held that there might be case management reasons which justify the granting of the request ahead of the

[55] Article 26 of the Centre for Arbitration and Dispute Resolution rules. Similar provision is provided in art 9 of the United Nations Commission on International Trade Law.

[56] Art 6 of the Arbitration and Conciliation Act of Uganda; Cap 4, 2000.

[57] Article 27 of the Arbitration and Conciliation Act of Uganda; Cap 4, 2000.

planned document disclosure procedure. It allowed the production of one of the categories of documents which it found specifically identified, narrow and of relevance and materiality to the issues in dispute.

- It is clear that both arbitration rules are in principle in compliance with the UNCITRAL model law. The legal systems of Comoros and Uganda provide provisions that allow parties to request from the National court assistance in taking evidence, injunction or interim measure of protection. But the difference here, the arbitration rules of Comoros give court unlimited power whereas under Uganda the power of the court is restricted. For instance in Comoros, court may where necessary during the proceeding draw up internal rules for the smooth running of the arbitration, whereas in Uganda court may execute a request of parties only within its judicial competence; means that it cannot itself create internal rules for the purpose of resolving the request.

2.2.4 During the Enforcement Stage

Finally after an award has been rendered, the courts may become involved in two places: at the place of arbitration, 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 at the place of enforcement, where the successful party seeks the recognition and enforcement of the award.

2.2.4.1 Under Comoros Arbitration Rules

The court's dual role as a jurisdiction, it may review the award drafts before the arbitral tribunal renders its decision and verify that the awards comply with the CCJA rules; after the awards are rendered, the court is also competent for recognition and enforcement of the same awards within OHADA member states[58]. By conferring this role to the CCJA, OHADA has therefore created a regional recognition of arbitral awards in the area, as parties are not required to seek recognition and enforcement of the awards in each Member State. This is an original procedure instituted by OHADA, which eases the enforcement of foreign arbitral awards. Under Comoros legal systems, parties have right to challenge the validity of the award and shall only be admissible if the parties

[58] Article 23(1) of the Common Court of Justice and Arbitration rules of 1999.

have not waived this possibility in their arbitration agreement. It may only be based on one or several of the grounds enumerated in article 30 (6) for the challenge of an exequatur[59]. The application for challenge an award shall be filed as soon as the award is rendered.

It shall no longer be admissible if it is not filed within two (2) months of notification of the award as provided for in article 25 of the CCJA rules. The Court shall hear and determine the matter in accordance with its rules of procedure. If the Court refuses the recognition and the res judicata effect of the award, it shall annul the award. It shall re-hear the matter on the merits if the parties have so requested. If the parties have not requested the Court to re-hear the matter on the merits, the proceeding shall, upon the application of the most diligent party, resume before the arbitral tribunal, where necessary, from the last act of the arbitral tribunal considered valid by the Court[60]. In a recent case of ***Getma International vs. Guinea***, the CCJA annuls the arbitral award. In 2011, French company Getma International commenced arbitration proceedings against the Guinean State for wrongful termination of a port and railway concession contract. The proceedings were held under the arbitral rules of the CCJA with a Tribunal comprised of three arbitrators. In April 2014, the Tribunal ruled in favour of Getma, ordering Guinea to pay over €38 million in damages plus interest. Getma commenced proceedings to enforce the award in the US courts. During this time, Guinea applied to set-aside the award before the CCJA on the grounds, amongst others, that the arbitral tribunal had not fulfilled its mandate and had breached CCJA provisions by entering into the private fee agreement with the parties. In a judgment on 19 November 2015, the CCJA ruled that the award should be set aside on the grounds that the arbitrators had indeed breached their mandate by negotiating directly with the parties over their fees, in breach of a 2011 court order issued by the CCJA which limited their fees to 40 million CFA francs.

2.2.4.2 Under Uganda Arbitration Rules

The high court of Uganda has two important roles to play in the enforcement stage. Firstly in the enforcement of national or foreign arbitral award, and secondly where party seek to set aside an

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[59] Article 29(2) of the Common Court of Justice and Arbitration rules of 1999.

[60] Airtic1e 29 of the Common Court of Justice and Arbitration rules of 1999.

arbitral award. Where parties have agreed to submit to arbitration all or certain disputes, which have arisen between them and have obtained an award as a result; or it is a foreign arbitral award, such awards are enforceable by the court in Uganda. The Act provides that an arbitral award shall be recognized as binding and upon application in writing to the court shall be enforced[61]. Doing so, a party wishes to enforce an arbitral award in Uganda, have to submit to the high court the duly authenticated original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it. If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language. In such way the court can enforce the award either national or international after having verified that the award is not contrary to the public policy of Uganda.

In matter concerning recourse against an arbitral award, party can file an application for setting aside furnishing proof that a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; the arbitral award is not in accordance with the Act or finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda.[62]

For example, in the case of ***Roko Construction Ltd vs. Mohammed Mohammed Hamid***, the High Court of Uganda set aside an arbitral award of the Centre for Arbitration and Dispute Resolution on a finding that the arbitration clause had been excluded from the contract.

- Thus both countries' arbitration rules are in accordance with the New York Convention and the UNCITRAL model law. The simple difference here; in Comoros, if the Award come from the CCJA, there is no need to seek enforcement. The OHADA created an automatic regional

[61] Arbitration and conciliation act of Uganda; Cap 4, 2000. Section 35
[62] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 34

enforcement of the arbitral award. If the award comes from outside of the OHADA area, the national court should apply the New York Convention on the Recognition and Enforcement of International Arbitral Award. In Uganda, it is the high court which is in charge of enforcing an award either national or international. The Act inserts provisions of the New York Convention under the rule of arbitration which is applied directly to a National or International Award. To conclude this step, I can say that the rule of Comoros is effective than that of Uganda although both countries used the New York Convention. The fact that Comoros created a regional recognition facilitated parties in arbitration.

CHAPTER THREE

COMMENCEMENT, CONDUCT AND TERMINATION OF THE ARBITRAL PROCEEDINGS

3.1 Introduction

This main chapter examines the Arbitration Agreement, then the Conduct and Termination of Arbitral Proceedings under Comoros and Uganda Legal Systems.

3.2 Arbitration Agreement

The arbitration agreement is the cornerstone of almost every arbitration. There can be no arbitration between parties which have not consent to arbitrate their dispute[63]. The UNCITRAL Model Law defined 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. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.[64] Neither the CCJA Arbitration Rules nor the Act Uniform on arbitration of Cornoros has defined the Arbitration Agreement. The Uganda Arbitration and Conciliation Act came up with the same definition given by the UNCITRAL Model Law.

3.2.1 Arbitration Agreement under Comoros legal systems

Under Comoros rules, parties are allowed to use an arbitration agreement at the outset of their contractual relationship. The Uniform Act on Arbitration also provides that the parties may enter into such an agreement even if they have already commenced proceedings before a court. The OHADA treaty lay down three conditions for an arbitration agreement to be valid: the first condition requires the dispute to be contractual, the second condition requires one of the parties to have its domicile or usual residence in an OHADA member states, the last condition is that the

[63] Lew. Mistelis & Kroll, 2003. Comparative international commercial arbitration, P.99
[64] Article 7 of the United Nations Commission on International Trade Law, 1985.

contract will be performed wholly or partly in the territory of one or more States parties.[65] Another condition is providing under the Uniform Act on Arbitration stipulates that the arbitration agreement shall be in writing, or by any other means permitting it to be evidenced, notably by reference made to a document stipulating it.[66] In the case of ***Alfred Topper Inc vs. Edokpolor***, the plaintiff, a New York company brought an action for the enforcement of an award given in a foreign arbitration, which was governed by the law of New York Convention; a state that had no reciprocal arrangement with Nigeria. The supreme court of Nigeria held that the lower court ought not to have struck out the suit for lack of reciprocity since the plaintiff could sue upon the foreign judgement under common law. However to do this, the plaintiff must prove the existence of a valid arbitration agreement, the proper conduct of the arbitration in accordance with the agreement, and the validity of the award. The lack of a valid arbitration agreement that is an agreement in writing could make the award invalid and therefore unenforceable. It is not wholly clear how the latter part of the above provision should be interpreted. The provision further stipulates that such means would include in particular, a reference to another document which itself stipulates an agreement to arbitrate. This would happen, for example when a contract simply makes reference to the general conditions of contract of one of the parties, which in turn include an arbitration clause. This is in accordance with the actual trend in many countries to validate arbitration clauses by reference and is again an instance where the parties to an agreement must be cautious. In addition to arbitration clauses by reference, the article 3 of the Uniform Act implies that other means of entering into an arbitration agreement might be possible, for example by oral agreement before Witnesses, who could then attest to the existence of the agreement. However, even if this were possible and the Common Court of Justice and Arbitration has not yet had the opportunity to express any view on this point and it would be inadvisable, as the Uniform Act itself requires a copy of the arbitration agreement to be produced in the enforcement stage in the Member States. In addition, if enforcement is sought in other countries the New York Convention may come into play. This convention also requires the arbitration agreement to be in writing. For these reasons, it is strongly recommended that if

[65] Article 21 of the treaty creating the Organization for Harmonization of Business Law in Africa, 1997
[66] Article 3 of the Uniform Act on Arbitration, 1999.

arbitration is the desired means of settling disputes, it should be clearly spelt out in the contract[67]. The Article 3 of the Uniform Act adopts the same provision as article 7(2) of the UNCITRAL Model Law which recommends the arbitration agreement in writing form. It further argues that an arbitration agreement is in writing form if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. The Uniform Act expressly lays down the principle of autonomy of the arbitration agreement as established by modern case law. This principle has two main implications: the arbitration agreement is independent from the main contract and its validity is unaffected by any finding that the main contract itself is null and void. The arbitration agreement is not necessarily governed by the same law as the main contract or any particular national law, but it is to be interpreted in accordance with the common intention of the parties.[68] Furthermore in the English case of ***Heyman vs. Darwins Ltd***, the court held that the arbitration clause will survive to decide the mode of resolving the dispute, even when the contract fails. In the ***Gosset case***, the French High Court held that the concept of separability in law remains unaffected by invalid contracts. The CCJA rules of arbitration provide where prima facie, there is no arbitration agreement between the parties requiring the application of the present rules of arbitration, if the defendant objects to the arbitration of the Court or does not file a reply within a period of forty five days provided for at Article 6 of the CCJA Rules of Arbitration, the claimant shall be informed by the Secretary General of his intention to apply to the Court for a decision that the arbitration shall not proceed. The Court shall rule, based on the claimant's comments submitted within the next thirty days, if the latter deems it necessary to file such comments.[69]

3.2.2 Arbitration Agreement under Ugandan Rules of Arbitration

In June of 2008, the Arbitration and Conciliation Act8, was enacted with the objective of providing for funding of the Centre for Arbitration and Dispute Resolution by government. Refocusing the sourcing of funds for the Centre is enabled the revival of its operations in the settlement of disputes. Both CADER rules and Arbitration and Conciliation Act require a valid

[67] Martor Pilkington & Thouvenot, 2002. Organization for the Harmonization of Business Law in Africa and the Harmonization process, p.263

[68] Article 4 of the Uniform Act on Arbitration, 1999.
[69] Article 9 of the Uniform Act on Arbitration, 1999.

arbitration agreement to be in 'writing'. It may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The Arbitration and Conciliation Act emphasized that the reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.[70] The court of India ruled thus in the case of ***Banarasi Das vs. Cane Commr*** that an Arbitration Agreement shall be in writing, An oral agreement to submit a dispute to Arbitration is not binding. If the Agreement is in writing it will bind, even if some of its details are filed in by oral understanding. The Act clarifies that an arbitration agreement is in writing if it is contained in a document signed by the parties or an exchange of letters, a telex, a telegram or other means of telecommunication which provides a record of the agreement[71]. The Arbitration and Conciliation Act establishes minimum legal formalities. To a large extent however, the parties are at liberty to determine how the arbitration will proceed. As a minimum, Arbitration commences by way of a written notice by the claimant to the defendant. The article 3 of the CADER Rules provides the procedure to be following by the parties wishing to initiate recourse to arbitration: the claimant shall give notice to the defendant, a notice of arbitration. The notice of arbitration shall include the following: A demand to refer the dispute to arbitration, the names and addresses of the parties, a reference to the arbitration clause or the separate arbitration agreement that is invoked, a reference to the contract out of or in relation to which the dispute arises, the general nature of the claim and the amount involved, a proposal as to the number of arbitrators if the parties have not previously agreed. This is similar to article 21 of the UNCITRAL model law. The Act does not expressly stipulate which matters can be arbitrated and those that cannot. By implication however, only matters that fit the requirements for arbitration can be arbitrated, and therefore all other matters that do not meet the requirements are not competent for arbitration. For a dispute to be arbitrable there must be a valid arbitration agreement. This means that the arbitration agreement must first and foremost meet all the requirement of a valid contract. Secondly, there must be a dispute with regard to matter which the parties have agreed to refer specific disputes there under to

[70] Article 3 of the Arbitration and Conciliation Act; Cap 4, 2004.
[71] Case of Macfoy vs. United Africa Company, 1961.

arbitration, and not at all disputes arising from the contract. In that case, the dispute in question must relate to those matters in the contract which the parties have agreed to refer to arbitration. Subject to the exception involving court referred arbitration, the requirement that a valid arbitration agreement must exist implies that only contractual matters can be arbitrated. None contractual matters like taxation, marriage, insolvency and criminal matter are therefore not arbitrable. The Uganda court have upheld the view that none contractual matters are not arbitrable in the recent case of ***Tullow Oil vs. Uganda Revenue Authority***. In that case an Oil and Gas agreement exist between Tullow oil and Uganda Revenue Authority, it provided for arbitration in case of dispute. A dispute arose in relation to taxes owed to Uganda Revenue Authority. Tullow oil attempted to refer this dispute to arbitration in London as per the contract however, the Uganda court disagreed stating that in principle, there can be a contract relating to tax obligations between parties because tax obligations are imposed by law and are not negotiated by parties. Therefore there cannot be a valid arbitration agreement in relation to a matters determined by law. In the case of ***Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors***, the Supreme Court carved out six categories of cases which are not capable for being settled by private arbitration even though parties agreed for their settlement through private arbitration namely: disputes relating to rights and liabilities which give rise to or arise out of criminal offences; matrimonial disputes relating to divorce, judicial separation, restitution of conjugal child custody; guardianship matters; insolvency and winding up matters; testamentary matters and eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction. The supreme court of India, in the case of ***Shri Vimal Kishor Shah. Vs. Jayesh Dinesh Shah*** has also added one more category in the list namely case arising out of trust Deed and the trust Act.

- Therefore both Comoros and Uganda arbitration rules are in Principe in compliance with the UNCITRAL Model Law. Both arbitration rules provide that the arbitration agreement should be in written form. The one of Comoros is so effective than that of Uganda for the simple reason that it provides another means for entering into an arbitration agreement, such as Oral Agreement before witnesses who can attest the validity of the arbitration agreement. Whereas there is no such provision under the arbitration rule of Uganda.

3.3 Conduct of the Arbitral Proceedings

Generally, there are no fixed rules of procedures in arbitration; this provides a high degree of flexibility on how to conduct arbitral proceedings. Even though Institutional and Ad hoc rules of arbitration provide for an outline of various procedural steps, the detailed regulation of the procedure to be followed is established either by agreement of the parties or by directions from the arbitral tribunal. The UNCITRAL Model Law outlined steps that all States parties of this convention should take into consideration while conducting arbitral proceedings.

3.3.1 Deposit of Costs

Towards the beginning of arbitration proceedings, parties are often ordered to pay a deposit on account of the expected costs of the arbitration. The requirement to pay this deposit or 'advance on costs' to the institution administering the arbitration is found in most institutional rules, including those of the International Chamber of Commerce, the London Court of International Arbitration or the American Arbitration Association. The amount of the advance on costs is based on an estimate of the arbitrators' fees and the costs charged by the arbitral institution for administering the arbitration. Depending on how such costs are calculated, the advance can be substantial. For example, The ICC calculates the advance on costs based on the monetary value of the claims and refunds any amounts not disbursed at the end of the proceedings. The UNCITRAL model law does not cover this first step of arbitral proceedings, but generally it is automatic to the parties to advance a sum of money requested by the arbitral institution according to the rules of procedure. Parties ought to pay this advance to enable the tribunal to administer and go further with the arbitration; otherwise arbitrators shall stop to perform their duties

3.3.1.1 Under Comoros Legal Systems

In Comoros, in determining the amount of deposit of costs, the court shall take into consideration the costs of arbitration resulting from the claims of which it is seized. This deposit shall later be adjusted if the amount of the claim is later modified by at least one-quarter or if new elements make the adjustment necessary. Distinct deposits for the principal claim and counter-claim may

be determined if one party requests for it[72]. Paragraph 2 of the article 11, emphasizes that the deposit shall be in equal shares by the claimant or claimants and defendant or defendants. However, this payment can be made in full by each of the parties for the principal claim and the counter-claim, where the other party abstains from making the deposit. The deposit thus determined shall be paid in full to the Secretary General of the Court before the case is handed to the arbitrator. For the three quarters at most, their payment may be guaranteed by a satisfactory bank surety. When a supplementary deposit has been rendered necessary, the arbitrator shall suspend his work until the supplementary deposit has been paid to the Secretary General.

For example, in the case of ***Getma international vs. Republic of Guinea***, the court stopped to proceed with the arbitration due to lack of payment of the advance of cost. The dispute arose out of a 25-year concession agreement between the Republic of Guinea and French corporation, Getma International, to develop and operate Guinea's main port in its capital, Conakry. The concession agreement provided that disputes would be resolved according to the arbitration rules of the Organization for the Harmonization of Commercial Law in Africa's Common Court of Justice and Arbitration. In March 2011, Guinea terminated the concession agreement and signed a new concession agreement with a different company. Shortly thereafter, Getma commenced CCJA arbitration proceedings against Guinea for wrongful termination of the concession agreement. The schedule of arbitrators' fees annexed to the CCJA arbitration rules provides for an ad valorem system, meaning that the fees payable to an arbitrator are calculated by reference to the amount in dispute. In this case, the quantum of the claims was said to exceed US$50 million and the CCJA contemplated fees of just over EUR €60,000 for the entire Tribunal. In April 2013, with the arbitral proceedings well underway, the Tribunal sought permission from the CCJA's Secretary General to ask the parties for a very significant increase in fees, from €60,000 to €450,000. This permission was granted and, both parties disagreed with the increasing of the arbitration fee. Thereafter, the arbitral tribunal stopped to go further with the arbitration.

[72] Common Court of Justice and Arbitration rules of 1999. Section 11(1) Comoros

3.3.1.2. Under Uganda legal Systems

In Uganda, the arbitral tribunal may direct each party to deposit an equal amount as an advance for the costs which he expects will be incurred. If the required deposits are not paid in full by both parties within thirty days, the arbitrators may suspend the proceedings or may make a written declaration of termination of the proceedings to the parties, to take effect on the date of the declaration. Upon termination of the arbitral proceedings, arbitrators shall render an account to the parties of the deposits received and shall return any unexpected balance to the parties.[73]

In a recent case of ***BDMS* vs. *RAFAEL***, concerned sums allegedly due to BDMS by RAFAEL under a consultancy agreement. The agreement contained an arbitration clause which specified that the arbitration would take place under the 1998 ICC-Rules and would have its seat in London. After filing the request for arbitration on 28 April 2011, the ICC fixed the advance on costs at $27,000 and invited both parties to pay half of the advance on costs. BDMS paid its part of the advance, RAFAEL however was only willing to pay its part of the advance if BDMS would provide an adequate security for costs, a demand BDMS was not willing to meet. Equally, BDMS was not willing to pay the other half of the advance on costs. Subsequently, the ICC had 'no other choice than to invite the arbitrator to suspend his work and to inform the parties that the claim would be considered withdrawn. On 13 March 2012, almost one year after the request for arbitration, the ICC informed the parties that the claim was withdrawn.

- Thus both Comoros Legal Systems and Uganda rules of Arbitration are in principle the same. Each Country provides best conditions to resolve commercial dispute. Similar provision of deposit of costs in equal share by parties is found under the ICC[74] or the LCIA[75]rules.

3.3.2 Equal Treatment of Parties

The principle of equal treatment of parties, which is a manifestation, at a procedural level, of the equality of the parties as laid down in Section 18 of the UNCITRAL Model law, is one of the essential principles not only of arbitration, but also of any adversary civil proceeding;

[73] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 64
[74] International Chamber of Commerce; 1923, Paris. Section 37
[75] London Court of International Arbitration; 1996, England. Section 24

compliance with this principle is essential at every stage of proceedings. The UNCITRAL model law emphasizes this principle by stipulating that: parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.[76] The criterion of proportionality should apply to any conflict between the effects of a specific principle on the procedural situation. Equal treatment should also be grasped as a principle which is always interpreted according to the specific conditions and circumstances of the proceedings.

3.3.2.1 Under Comoros Legal Systems.

The OHADA Members States, adopts the same provision as the UNCITRAL model law. The Uniform Act on Arbitration provides that parties to any arbitration, shall be accorded equal treatment and each party shall be given full opportunity of presenting his or her case.[77]

For instance, in the ***Caribbean Niquel vs. Overseas Mining case***, the parties entered into a joint venture with the objective of operating a mine. A dispute arose before the mine had even become operative. As a result, one of the parties commenced arbitration and sought damages pursuant to the theory of 'lost profit'. In its decision, the tribunal indeed awarded the claimant a compensation for damages, but based on the theory of 'lost chance'. In setting aside the proceedings, the court held that the award violated the parties' right to be heard, because the parties had not had an adequate opportunity to comment on the different legal basis for the calculation of damages.

3.3.2.2 Under Uganda Arbitration rules

In Uganda, the principle of Equal Treatment of parties in arbitration is retained, the Arbitration and Conciliation Act provides that parties shall be treated with equality, and each party shall be given reasonable opportunity for presenting his or her case.[78] In a case involved a claim filed by ***Russkaya Telefonnaya Kompaniya*** **vs.** ***Sony Ericsson Mobile Communications*** with the Arbitration Court of the City of Moscow under a contract for the sale of mobile phones. During

[76] United Nation Commission of International Trade Law of 1985, section 18.
[77] Uniform Act on Arbitration of the Organization for the Harmonization of Business Law in Africa, 1999.Section 9
[78] Arbitration and Conciliation Act of Uganda Cap 4, 2000. Section 18

the consideration of the case at first instance, Sony Ericsson filed an application to dismiss the claim without prejudice on the basis of the existence of the arbitration clause. The Court of the City of Moscow granted the application and dismissed the claim. However, the Court of Moscow disagreeing with the lower courts, reversed the judgments rendered and remanded the case to the first instance court for consideration. In setting aside the judgments, the Supreme Arbitration Court of Moscow held that the dispute resolution clause in issue provided the option for only one of the parties to refer disputes to a state court of competent jurisdiction and, therefore, placed that party in a privileged position thus disrupting the balance of the parties' interests.

The SAC noted that the principle of equality of the parties contemplate the parties' equal procedural rights to assert their respective interests. Consequently, the SAC held that a dispute resolution agreement must not vest only one of the parties with the right to refer disputes to a state court of competent jurisdiction.

- it is clear that both Comoros and Uganda rules are in compliance with the UNCITRAL model law. Both Countries inserts provision providing the principle of Equal treatment of Parties during the arbitral proceedings.

3.3.3 Determination of Rules of Procedures

The UNCITRAL model law gives parties the possibility to choose the applicable rules of procedure for their dispute, and this provide a high degree of flexibility on how to conduct the arbitral proceedings. Party autonomy is the guiding principle in determining the procedure to be followed in arbitration. On this basis, the parties may confer upon the arbitral tribunal such powers and duties as they consider appropriate regarding the specific case. They may for instance choose formal or informal of conducting the arbitration; adversarial or inquisitorial procedure; and documentary or oral methods of presenting evidence. The Article 19 of the UNCITRAL model law provides that: Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

3.3.3.1 Under Comoros Legal Systems

In Comoros, the CCJA rule adopts the same provision as the Model Law. It is provided that parties shall agree upon the rules of law to be applied by the arbitrator to the merits of the dispute. In the absence of any such agreement, the arbitrator shall apply the law determined by the conflict of law rules which it considers appropriate in the circumstance. In any event, the arbitrator shall take into account the terms of the contract and the usages of the trade.

The arbitrator shall decide as amiable compositeur if the parties have so authorised in the arbitration agreement or thereafter.[79]

3.3.3.2 Under Uganda Arbitration Rules

Generally, as this is a fundamental principle in arbitration, the Arbitration and Conciliation Act reproduce the same provision as the Model Law by stipulating that: Subject to this Act, the parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings. If there is no agreement, the arbitral tribunal may, subject to this Act, conduct the arbitration in the manner it considers appropriate. The power of the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Every witness giving evidence and every person appearing before an arbitral tribunal shall have at least the same privileges and immunities as witnesses and advocates in proceedings before a court.[80]

- In this step, there is no difference between the Arbitration Rules of Comoros and Uganda, and both are complied with the UNCITRAL model law. Similar provision is provided under the Arbitration rules of AAA[81] and ICC[82].

3.3.4 Place of Arbitration

The seat of the arbitration is significant as it will normally determine the law of the procedure which the arbitration adopts as well as the involvement, as appropriate, which the courts

[79] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 17, Comoros.

[80] Arbitration and Conciliation Act; Cap 4, 2000. Section 19. Uganda

[81] America Arbitration Association, 1928. Section 30, USA

[82] International Chamber of Commerce, 1923. Section 21, Paris

exercising jurisdiction over the seat, will have. The UNCITRAL model law leaves the choice free for the parties to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. Notwithstanding the provisions of paragraph of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents.[83]

3.3.4.1 Under Comoros Legal Systems

In Comoros, the rules provide that the seat of the arbitration shall be determined by the arbitration agreement or by a later agreement of the parties. Failing such agreement, it shall be determined by a decision of the Court rendered before the file is transmitted to the arbitrator. After consultation with the parties, the arbitrator may decide to conduct the hearing in any other place. In case of disagreement, the Court shall rule on the matter. Where the circumstances render impossible or difficult the conduct of hearings at the decided place, the Court may, at the request of the parties, or any of them, or the arbitrator, fix another seat.[84]

3.3.4.2 Under Uganda Arbitration Rules

In Uganda, under the Arbitration and Conciliation Act, the place of arbitration is left to the parties to agree where they want to settle their dispute. If the parties fail to agree, the place of arbitration shall be determined by the arbitral tribunal having regard to the costs and the circumstances of the case and to the convenience of the parties. Notwithstanding subsection, the arbitral tribunal may, unless agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for the inspection of documents, goods or other property.[85]

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[83] United Nation Commission on International Trade Law, 1985. Section 20

[84] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 13. Comoros.

[85] Arbitration and Conciliation Act; Cap 4, 2000. Section 20. Uganda

- Therefore both Arbitration Rules have the same principle. But the only difference here, the one for Comoros provide a later agreement if parties failed to agree about the seat of the arbitration in the out seat of the arbitration agreement[86], whereas such possibility is not provided under the Arbitration rules of Uganda. In Uganda once parties failed to agree the seat of arbitration in the moment of conclusion of the agreement, the arbitral tribunal shall determine the place of the arbitration.

3.3.5. Confidentiality of the Arbitral Proceedings.

Confidentiality is usually mentioned among the advantages of international commercial arbitration. The thought that confidentiality is an innate attribute, seems to be an attractiveness considered to choose ICA to settle disputes. For a long time, it did not seem to be questioned that the private nature of the arbitration process also forced the parties to maintain confidentiality.
There is no provision under the UNCITRAL model law providing the arbitration to be confidence. As arbitration is purely private, thus the arbitral proceedings are automatically confidence.

3.3.5.1 Under Comoros Legal Systems

The legal system of Comoros requires the arbitral proceedings to be in confidential. All the work of the Court relating to conduct of arbitral proceedings is subject to this confidentiality; so too is the meeting of the Court held for the purpose of supervision of the arbitration. Confidentiality shall also apply to documents submitted to the Court or drawn up by it in the course of the proceedings it is following up. Unless otherwise agreed by all the parties, the parties and their counsel, the arbitrators, the experts and any person involved in arbitral proceedings shall be bound by the duty to respect the confidentiality of the information and documents produced during the said proceedings. Confidentiality shall extend, under the same conditions, to the arbitral awards.[87] For example, in a case involving ***Burlington home Shopping Pvt vs. Rajnish chibber***; the claimant Burlington home shopping was a mail order service provider that retails

[86] Similar provision is found under the American Arbitration Association, 1928. Section 11, USA.
[87] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 14, Comoros.

directly to its customers by sending them mail order catalogues. A list of customers was maintained for the same reason. This list had been prepared by the plaintiff over a period of three years. The defendant an employee of the plaintiffs' during the period of compilation of data. The plaintiff contend that the defendant, who after quitting his job with the plantiffs established his own mail order service, used their data based, a copy of which he had taken from the premises of the plaintiff, to set up his own clientele. The defendant denies using the list and affirms he is using data he has collected himself. However, upon investigation by the court it was found there were remarkable similarities between the original list and the list used by the defendant, including errors in spellings at the same places. It was held that a mail order catalogue can be considered trade secrets and so the defendant breached confidentiality when he took the data collected by his former employers out of their office for his personal use. The court granted interim measure preventing the defendant from utilizing the data while the suit was going on.

3.3.5.2 Under Uganda Arbitration Rules.

In Uganda, the Arbitration and Conciliation Act does not cover the matter of confidentiality. The Centre for Arbitration and Dispute Resolution of Uganda applies the common law system. In Common law system, it is not written out in one document like an Act of Parliament. It is a form of law based on previous court cases decided by judges and is also referred to as 'judge-made' or case law. The law is applied by reference to previous cases and is said to be 'based on precedent'. The general position is that, if information is given in circumstances where it is expected that a duty of confidence applies, that information cannot normally be disclosed without the information provider's consent. In practice this means that all patient or service user information, whether held on paper, computer, visually, by audio recording or held in the memory of the professional, must not normally be disclosed without the consent of the patient or service user. In a case involving ***the Government of Uganda and both heritage tullow & Uganda tax.*** The government of Uganda and the two parties in this case signed an agreement that the arbitration should be kept confidential. While appearing before the House Committee on Legal and Parliamentary Affairs, Attorney General Peter Nyombi said the decision to sign to a confidential clause was in line with the United Nations Commission on International Trade Laws. "In the agreement we signed before going to the arbitration tribunal, we agreed on a clause to keep the award confidential".

- Thus the legal system of Comoros is more effective, simply because the principle of confidentiality is provided under Statute[88]. Whereas in Uganda, it is provided under previous Case Law.

3.3.6 Commencement of Arbitral Procedure

The UNCITRAL model law provides that: Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.[89]

3.3.6.1 Under Comoros Legal Systems

In Comoros, Arbitral proceedings shall be deemed to commence when one of the parties refers the dispute to the arbitrator or arbitrators in accordance with the arbitration agreement or in the absence of such appointment, as soon as one of the parties commences the procedure for the composition of the arbitral tribunal.[90] Any party wishing to have recourse to arbitration under OHADA space, and whose modalities are fixed by the present rules of arbitration, shall submit the request to the Secretary General for arbitration by the Court. This Request shall contain: the surnames, given names, capacity, corporate name and address of the parties, with indication of the address for service for the continuation of the proceedings, as well as an indication of any amount claimed; the arbitration agreement entered into between the parties as well as any contractual or non-contractual documents likely to throw light on the circumstances of the dispute; a brief statement of the relief sought and the grounds upon which the request is based; any useful information and proposals concerning the number and choice of arbitrators; the agreement entered into between the parties, if any, relating to: the seat of the arbitration, the language of the arbitration, the rules of law to be applied to, the arbitration agreement, the

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[88] Similar provision is found under the International Chamber of Commerce; 1923, Paris. Section 6

[89] United Nation Commission on International Trade Law, 1985. Section 21

[90] Uniform Act on Arbitration of the Organization for the Harmonization of Business Law in Africa, 1999. Section 10, Comoros.

arbitration proceedings, and, the merits of the claim, failing such agreements, the applicant for arbitration shall state his views on these issues.[91]

3.3.6.2. Under Uganda Arbitration Rules.

The legal systems of Uganda provided the same provision as the model law. The Arbitration and Conciliation Act stipulates that unless the parties agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.[92]

- In this step, the rule of Uganda is more reasonable and effective, and also in compliance with the UNCITRAL model law than that of Comoros. The fact that arbitral proceedings commence the day on which the respondent receives a notice of arbitration from the arbitral institution is a best condition respecting the principle of Due process. Whereas in Comoros, the fact that arbitration commence the date on which the claimant seizes the arbitrators without let knowing or send a notice to the respondent is unreasonable[93]. Sometimes the arbitral institution delays to noticed the respondent about the dispute refered to it, and the respondent will find himself with unrealistic time.

3.3.7 Language of Arbitration

With the growth of international trade, parties of diverse nationalities increasingly come to the arbitral tribunal with differing linguistic and cultural backgrounds. The resulting communications challenges can be formidable. Parties may enter into contracts written in a language other than their own and, perhaps, different even from the language used in their course of dealings. The UNCITRAL model law allows parties to agree on the language or languages to

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[91] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 5, Comoros.

[92] Arbitration and Conciliation Act; Cap 4, 2000. Section 21, Uganda

[93] International Chamber of Commerce of Paris, 1923. Section 4.

be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[94]

3.3.7.1 Under Comoros Legal Systems

In Comoros, there is no specific provision providing the language of the arbitration. However, as the OHADA members are French countries, the CCJA apply automatically French as the language of the arbitral proceedings. For instance the Uniform Act on Arbitration requires party who seek recognition and res judicata effect of the arbitral award, if the said documents are not in French; the party shall produce a translation certified by a translator registered on the list of experts established by the competent courts[95].

3.3.7.2 Under Uganda Arbitration Rules

In Uganda, the Act emphasized the language of the arbitral proceedings. The Act provides that the arbitral proceedings will be conducted in the English language unless the parties otherwise agree to an interpreter. If the parties fail to agree, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings. An agreement or determination shall, unless specified, apply to any written statement by a party, any hearing and any arbitral award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.[96]

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[94] United Nations Commission on International Trade Law of 1985. Section 22

[95] Uniform Act on Arbitration of the Organization for the Harmonization of Business Law in Africa, 1999. Section 31, Comoros.

[96] Article 22 of the Arbitration and Conciliation Act, Cap 4, 2000.

- In this step, the Arbitral Institution of Uganda offers best rule than that of Comoros. First it confirms to the UNCITRAL model law and secondly, it gives parties the possibility to agree on the language or languages to be applied by the tribunal. Whereas in Comoros, there is no such possibility of languages and parties have to use French as the procedural language.

3.3.8 Statement of Claims and Defense

In International Commercial Arbitration, the Arbitral Tribunal shall in all cases, conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case. The parties shall be given time to submit their Statement of Claim and Statement of Defense. The UNCITRAL model law requires during the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.[97]

3.3.8.1 Under Comoros Legal Systems

In Comoros, after receiving the arbitration file form, arbitrators shall summon the parties or their duly qualified representative and their counsel, to a meeting which shall hold as soon as is possible and not later than sixty days from the date of receipt of the file. The purpose of the meeting shall be to establish the fact that arbitration has been seized and to determine the claim submitted to them for determination. Arbitrators shall proceed to list the claims as contained in the submissions filed by the parties as of that date, with a summary of the reasons for these claims and the grounds raised in support thereof; to declare if there exists an agreement between

[97] United Nations Commission on International Trade Law of 1985, section 23

the parties. In the absence of such an agreement, the arbitrator shall declare that the arbitral award shall contain a ruling on this issue. The arbitrator shall, if necessary, enquire the parties if they intend to confer on them the powers of amiable compositeur. The answer of the parties shall be recorded in writing; to establish a provisional calendar, fixing the dates of the filing of the respective submissions deemed necessary, as well as the date of hearing arguments after which the hearing shall be declared closed. The hearing date fixed by the arbitrator shall not exceed six months from the date of the meeting except otherwise agreed by the parties. The arbitrator shall draw up a report of the meeting. This report shall be signed by the arbitrator. The parties or their representatives shall also be invited to sign the report. Where one of the parties refuses to sign the report or expresses reservations about the report shall be submitted to the Court for approval. A copy of the report shall be given to the parties and to their counsel, as well as to the Secretary General of the Court.[98] In the course of the proceedings, the parties shall be free to raise new grounds in support of their claims. They may also file fresh claims, whether counter claims or not if the said claims are within the limits of the arbitration agreement, and unless the arbitrator considers that he does not have to authorize such an extension of his mission, due in particular, to the delay in filing the claim.[99]. For example, ***In Oriental commercial & Shipping Co. vs. Rosseel, N.V***, it was held that courts will permit discovery when a movant demonstrates "exceptional circumstances" and the discovery will aid arbitration. In another case involved ***Ferro Union Corp. vs. SS. Ionic Coast Ferro***, the court granted the plaintiff's discovery request upon satisfaction of the exceptional circumstances test.

3.3.8.2 Under Uganda Arbitration Rules

In Uganda, the Act provides similar provision with the Model Law. The Act provide that during the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his or her claim, the points at issue and the relief or remedy sought, and the respondent shall state his or her defense in respect of these particulars, unless the

[98] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 15, Comoros.
[99] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 18, Comoros.

parties have agreed as to the required particulars of such statements. The claimant shall have a right to file a reply to the defense. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit to provide for a reply to the defense as a cardinal rule of law for a person to be heard. A party may amend or supplement his or her claim or defense during the course of the arbitral proceedings unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.[100]

- It is clear both Arbitration rules are in compliance with the UNCITRAL model law. But the one for Comoros[101] is very clear and detailed than that of Uganda.

3.3.9 Hearing and Written Proceedings

Arbitration is processes whereby the Arbitrators hear arguments and review evidence to decide on the merits of a case by issuing a decision known as the Arbitral Award. Arbitrators ask questions to parties about their case and may examine witnesses or documents. The UNCITRAL model law requires arbitral institutions to comply with the principle of due process in arbitration. The article 24 of the Model Law provides that subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentiary

[100] Arbitration and Conciliation Act; Cap 4, 2000. Section 23, Uganda
[101] Similar provision is found under the American Arbitration Association of 1928 of USA on the preliminary hearing. Section 20

document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.[102]

3.3.9.1 Under Comoros Legal Systems

In Comoros, as short a time as possible, arbitrators shall proceed to establish the facts of the case by all appropriate means. After examining the written submissions of the parties and the documents filed by them, the arbitrator shall hear the parties together in person if so requested by any of the parties; failing such a request, the arbitrator may of his own motion decide to hear them. The parties may appear either in person or through their duly authorized representatives. They may be assisted by their counsel. The arbitrator may decide if he deems necessary to hear the parties separately. In this case, the hearing of each party shall take place in the presence of counsel of both parties. The hearing of the parties shall take place on a day and at a place to be determined by the arbitrator.[103]

3.3.9.2 Under Uganda Arbitration Rules.

The Arbitration Act of Uganda also reproduces the whole provision of the Model Law. The Act provides that: subject to any agreement to the contrary by the parties, the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or have oral argument or written submissions. Unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings. The arbitral tribunal shall have power to administer oaths to the parties and witnesses appearing. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal. All statements, documents or other information furnished to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidential document on which the arbitral tribunal may rely in making its decisions shall be communicated to the parties. At any hearing or meeting of the arbitral tribunal of which notice

[102] United Nation Commission on International Trade Law, 1985. Section 24
[103] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 19, Comoros.

is required to be given, or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.[104]

- Therefore both Comoros and Uganda arbitration rules are in principle in conformity with the Model Law. But the one of Uganda is more effective than that of Comoros. It emphasizes some points that not provided under the Comoros rules of arbitration.

3.3.10 Default of a Party

In International Arbitration, obtaining an award against a party that fails to appear in arbitration may prove more costly and time-consuming than appearing in court. In general, in court, a court may issue a default judgment if a party does not timely appear or otherwise fails to defend itself, often simply by demonstrating effective service on the defaulting party, and providing a minimal showing of the basis of its claim.[105] By contrast, most arbitration providers require the arbitrators to continue the arbitration in the absence of the defaulting party and to closely examine the evidence. The UNCITRAL model law provides that unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate his statement of claim, the arbitral tribunal shall terminate the proceedings; the respondent fails to communicate his statement of defense, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it. The claimant fails to proceed with his or her claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.[106]

3.3.10.1 Under Comoros Legal Systems

In Comoros, in principle, when parties agree to arbitrate, they shall be bound by that agreement. It should therefore follow that when a party initiates arbitration proceedings, the other party will

[104] Article 24 of the Arbitration and Conciliation Act, Cap 4. 2000.
[105] M. Levis, 2012. Default of parties in international commercial award, p.54.
[106] United Nations Commission on International Trade Law, 1985. Section 25

avail itself of the opportunity to present its case and participate in the proceedings. Ideally, a respondent will participate effectively; it will comply with the provisions of the arbitration agreement, the provisions of the arbitral rules, if any, and the arbitral tribunal's directions. The CCJA arbitration rule maintains the position of the Model Law, by providing that any of the parties duly summoned, fails to appear, the arbitrator, after establishing that the summons was properly served on him, shall, unless there is a good reason, nevertheless proceed to accomplish his mission, and the hearing shall be deemed to be after full hearing. A copy of the report on the hearing of the parties, duly signed shall be forwarded to the Secretary General of the Court.[107]

3.3.10.2 Under Uganda Arbitration Rules

In Uganda, the Arbitration and Conciliation Act reproduce the same provision of the Model Law as it is. The Act provides that: unless agreed by the parties, if, without showing sufficient cause the claimant fails to communicate his or her statement of claim, the arbitral tribunal shall terminate the arbitral proceedings; the respondent fails to communicate his or her statement of defense, the arbitral tribunal shall continue the proceedings without treating the failure by itself as an admission of the claimant's allegations; any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it; the claimant fails to proceed with his or her claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.[108] For example, An English court recently ruled on important questions relating to arbitration due process. **In *Interprods Ltd vs. De La Rue International Ltd***, the Queen's Bench Division of the High Court dismissed an application to annul an arbitral award rendered by a sole arbitrator sitting in London. The circumstances that gave rise to the challenge included the applicant's failure to attend a procedural conference-call and the evidentiary hearing that were held in this case.

[107] Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa, 1999. Section 19, Comoros.
[108] Article 25 of the Arbitration and Conciliation Act; Cap 4, 2000.

In this step, both arbitration rules are in compliance with the Model Law, and there is no significant difference between Comoros and Uganda arbitration rules.

3.3.11. Expert Appointed by Arbitral Tribunal

An 'expert' may be any professional having an in-depth understanding of the subject matter; these may include technical experts such as architects, engineers, scientists or researches. They can provide an expert opinion on the technical matters which require simple and easy deciphering for consumption of the legal counsels or arbitrators. The expert is usually appointed by the respective parties and in some cases; the arbitration tribunal would make the appointment. Irrespective of the mode of appointment, the duty of the expert is toward the tribunal and his report is used to decide on the quantum of damages to be paid to the damaged party. Experts may sometimes also give an opinion on a dispute matter of accounting position or financial assertion. The various ways in which experts are used in international arbitration present opportunities for more effective and efficient decision-making.[109] The UNCITRAL model law provides that, unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.[110]

3.3.11.1 Under Comoros Legal Systems

In Comoros, arbitrators may appoint one or more experts, define their terms of reference, receive their reports and hear them in the presence of the parties and their counsel.[111] In a decision issued

[109] Source: http://www.forbesindia.com/blog/economy-policy/the-crucial-role-of-experts-in-arbitration/.Accessed on 25/01/2019
[110] United Nations Commission on International Trade Law, 1985. Section 26
[111] Common Court of Justice and Arbitration rule of the Organization for the Harmonization of Business Law in Africa, 1999. Section 19(3)

on June 2011, involved a dispute between ***Turkish company and its polish contractor*** with regard to the construction of the boiler in an industrial power plant in Bulgaria. The pertinent contracts provided for ICC Arbitration in Zurich and when a dispute arose as to the responsibility for the delays in the performance of the work, the Turkish company filed a request for arbitration. A three member arbitral tribunal sitting in Zurich under the ICC rule was constituted. In its award on September 2010, the arbitral tribunal rejected the claim and partly upheld the counterclaim. An appeal was made and the following points from the opinion are interesting: both parties had resorted to party-appointed experts and the appellant argued that the arbitral tribunal would have relied solely on the opinion of the other party's expert instead of the arbitrators appointing their own experts; by failing to ask the arbitrators to appoint their own experts during the proceeding, the appellant forfeited its right to argue in a subsequent appeal that this would be a violation of the right to be heard.

3.3.11.2 Under Uganda Arbitration Rules.

In Uganda, the Act provides the same provision as the Model Law. The Act stipulates that, unless the parties agree otherwise, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and require a party to give the expert any relevant information or to produce or provide access to any relevant documents, goods or other property for inspection. Unless the parties agree otherwise, and the parties so request or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or oral report, participate in an oral hearing where the parties shall have the opportunity to put questions to him or her and to present expert witnesses in order to testify on the points at issue. Unless the parties agree otherwise, the expert shall, upon the request of a party, make available to that party for examination all documents, goods or other property in the expert's possession which was provided to him or her in order to prepare his or her report.[112]

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[112] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 26

- In this step, both arbitration rules are in compliance with the Model Law, but the one for Uganda is more detailed than that of Uganda. Under Uganda, there is possibility to any party to request examination for all documents in the expert's possession. Whereas in Comoros, no possibility of such request.

3.4 Termination of the Arbitral Proceedings

Generally, in international commercial arbitration, arbitrators terminate the arbitral proceedings by delivering a final award from the dispute that was submitted to them. Arbitrators become functus officio, meaning that they have discharged their duty. The UNCITRAL model law stipulates that the arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when: the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute; the parties agree on the termination of the proceedings; the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.[113]

3.4.1 Form and Content of the Award

The term arbitral award is defined as any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes an interim, interlocutory, or partial arbitral award. The UNCITRAL model law requires the award to be in writing form, and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms. The award shall state its date and the place of arbitration as determined. The award shall be deemed

[113] United Nations Commission on International Trade Law, 1985. Section 32

to have been made at that place. After the award is made, a copy signed by the arbitrators shall be delivered to each party.[114]

3.4.1.1 Under Comoros Legal Systems.

In Comoros, the rule provides that, unless otherwise agreed by the parties, and provided that such an agreement is in conformity with the applicable law, all awards shall state the reasons upon which they are based. They shall be deemed to be made at the seat of the arbitration and on the date of their signature after scrutiny by the Court. They shall be signed by the arbitrator having regards. If three arbitrators were appointed, the award shall be made by a majority decision. Failing a majority decision, the Chairperson of the arbitral tribunal shall decide alone. The arbitral award shall be signed, as the case may be, by the three members of the arbitral tribunal, or by the Chairperson alone. Where the arbitral award is made by a majority decision, refusal by the dissenting arbitrator to sign same shall not affect the validity of the award. Any member of the arbitral tribunal may hand his personal opinion to the Chairman for the purpose of being attached to the award, the award shall also contain the full name of companies as well as their residence or registered office, where applicable the full names of counsels or any persons who represented or assisted the parties, and lastly the arbitral award shall contain a summary of the respective claims and defenses, their submission as well as the stage of the proceedings.[115] For instance, in the case of ***Hemadari Cements Pvt, Ltd. vs. Walchandnagar Industries Ltd***, the Division Bench of Andhra Pradesh High Court of India held that an award even if it is valid is liable to be set aside, if the award in question does not contain any reasons.

3.4.1.2 Under Uganda Arbitration Rules

In Uganda, the Act provides the same rule to that of the Model Law. The Act emphasized that an arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reason for any omitted signature is stated. The arbitral award shall state the reasons upon which it is based unless, the parties have agreed that

[114] United Nations Commission on International Trade Law, 1985. Section 31
[115] Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa, 1999. Section 22

no reasons are to be given; or the award is an arbitral award on agreed terms. The arbitral award shall state the date of the award and the place of arbitration, and shall be deemed to have been made at that place. After the arbitral award is made, a signed copy shall be delivered to each party. Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section; or in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.[116]

- Thus both arbitration rules are in conformity with the Model Law, but the one of Comoros offered best conditions than that of Uganda. The rule of Comoros went further to add on the content of the award the name of counsels, representatives, companies and summary of the respective claims and defence; whereas under the rule of Uganda there is no such aspects, it only focus on those aspects provided under the model law.

3.4.2. Correction and Interpretation of Arbitral Award

An arbitral award is final and once the arbitral tribunal has signed it and the parties have received it, the arbitral tribunal's mission with respect to the issues decided in the award comes to an end. However, the arbitral tribunal may still have to deal with an application to correct or interpret the award, or may need to render an additional award. These are the only instances of review of the award which are in the hands of the arbitral tribunal.[117] The UNCITRAL model law requires within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties: a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar

[116] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 31
[117] .M. Houser, 2011. Correction and Interpretation of Arbitral Award and Additional Award, P.12

nature; if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award. The arbitral tribunal may correct any error of this article on its own initiative within thirty days of the date of the award. Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.[118]

3.4.2.1 Under Comoros Legal Systems

In Comoros, the law requires to any application for the correction of clerical errors in the arbitral award, or for its interpretation, or for an additional award as to claims presented in the arbitration but not determined in any award, shall be submitted to the Secretary General of the Court within 45days of notification of the arbitral award. The Secretary General shall upon receipt of the application forward same to the arbitrator and to the opposite party while giving the latter a time limit of 30 days within which to serve his comments on the applicant and on the arbitrator. Where, for whatever reason, the Secretary General is unable to forward the application to the arbitrator who had ruled on it, the Court shall after consultation with the parties appoint another arbitrator. After examining the arguments and documents submitted by both parties in an adversary proceeding, the draft arbitral award shall within 60 days of the arbitrator being seized, be forwarded for the prior scrutiny. Except in the case, the preceding procedure shall attract no fees. Costs, if any, shall be borne by the party who made the application, if the said application is dismissed in its entirety. Otherwise, costs shall be shared between the parties in the proportions fixed for the costs of the arbitration in the arbitral award, in respect of which the application is made[119]. In a recent case, ***In Gautam Construction & Fisherie Ltd vs. National Bank for***

[118] United Nations Commission on International Trade Law, 1985. Section 33
[119] Common Court of Justice and Arbitration rule of the Organization for the Harmonization of Business Law in Africa, 1999. Section 26

Agriculture and Rural Development, the Supreme Court modified the award to the extent that the rate of construction meant for ground floor could not be applied to the construction of the basement area.

3.4.2.2 Under Uganda Arbitration Rules

In Uganda, the Act precise that, within fourteen days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties: a party may request the arbitral tribunal to correct in the arbitral award any computational errors, any clerical or typographical errors or any other errors of a similar nature; and a party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within fourteen days after receipt of the request, and the interpretation shall form part of the arbitral award. The arbitral tribunal may correct any error of the type referred on its own initiative within thirty days after the date of the arbitral award. A party may, within thirty days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. If the arbitral tribunal considers the request made to be justified, it shall make the additional arbitral award within thirty days.[120]

- In this step, both Arbitration rules of Comoros and Uganda are in principle in compliance with the Model Law. But the only difference is regarding the deadline of correcting or interpreting an arbitral award. The deadline of Uganda is more reasonable and avoids delay contrary to Comoros rules.

3.4.3 Recourse against an Arbitral Award

In international arbitration, once an award is rendered by the panel of arbitrators, each party is entitled to file an application for sitting aside. The UNCITRAL model law provides that recourse to a court against an arbitral award may be made only by an application for setting aside. An arbitral award may be set aside by the court only if, the party making the application furnishes

[120] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 33

proof that: a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it; or the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.[121]

3.4.3.1 Under Comoros Legal Systems

In Comoros, the rule emphasize that, challenge of the validity of the award shall only be admissible if the parties have not waived this possibility in their arbitration agreement. It may only be based on one or several of the grounds enumerated for the challenge of an exequatur. The application shall be filed as soon as the award is rendered. It shall no longer be admissible if it is not filed within two months of notification of the award[122]. An exequatur may not be refused and the application to set aside shall be admissible only in the following cases: if the arbitrator has ruled without an arbitration agreement or on the basis of an arbitration agreement which is null and void or has expired; if the arbitrator has not ruled within the scope and terms of his mission; where the principle of adversary proceeding has not been respected; if the award is contrary to international public policy.[123] For example, ***in Venture Global Engineering vs. Satyam Computer Service Ltd***, it was held that an award could be set aside if it is contrary to fundamental policy of Indian law, or the interest of India, or justice or morality, or it is patently

[121] United Nations Commission on International Trade Law, 1985. Section 34
[122] Common Court of Justice and Arbitration of the Organization for Harmonization of Business Law in Africa, 1999. Section 29
[123] Common Court of Justice and Arbitration of the Organization of the Harmonization of Business Law in Africa, 1999. Section 30

illegal. In another case, involving ***State of U.P. vs. Allied Constructions***, the court held that the validity of an agreement has to be tested on the basis of law to which the parties have subjected it. Where there is no such indication, the validity would be examined according to the law which is in force. Also, ***In Dulal Podda vs. Executive Engineer, Dona Canal Division***, the court held that appointment of an arbitrator at the behest of the appellant without sending notice to the respondent, ex parte award given by the arbitrator was illegal and liable to be set aside.

3.4.3.2 Under Uganda Arbitration Rules

In Uganda, the Act requires party who wish recourse to the court against an arbitral award to file an application for setting aside the award. An arbitral award may be set aside by the court only if, the party making the application furnishes proof that: a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators. 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 that application had received the arbitral award, or if a request had been made, from the date on which that request had been disposed of by the arbitral award.[124] For instance, The Delhi High Court, held ***in PNB Finance Ltd vs. Shital Prasad Jain***, that specific performance of an act cannot be granted in an arbitration proceeding. The Supreme Court did not approve the view point of the Delhi High Court. The Court held that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree to refer the issue relating to specific performance to arbitration. In another case, ***Vijay Kumar vs. Bathinda Central Co-operative Bank***, the court observed "it is a typical case where the arbitrator misconducted the

[124] Article 24 of the Arbitration and Conciliation Act; Cap 4, 2000.

proceedings and also misconducted himself. Arbitrator held the first and only hearing on May 17, 2010. No points for settlement or issues were framed. The bank filed affidavits of four employees. Appellant was not given opportunity to cross examine them. He was denied the opportunity to produce evidence. A complete go bye was given to the provisions of law, procedure and rules of justice. It would thus be seen that appellant was unable to present his case.

- In this step, both arbitration rules of Comoros and Ugandan are in conformity with the Model Law. But the one of Ugandan is more effective than that of Comoros. The Uganda rules add others grounds that even the Model Law did not provide, such as corruption, fraud or undue means, or evident partiality in one or more of the arbitrators. Whereas the rule of Comoros did not provides such grounds of setting aside an arbitral award.

CHAPTER FOUR

RECOGNITION AND ENFORCEMENT OF INTERNATIONAL AND DOMESTIC ARBITRAL AWARD

4.1 Introduction

This chapter analyzes how both Countries recognize and enforce an Arbitration Award; then the grounds for refusal recognition and enforcement.

4.2 Recognition and Enforcement of an Arbitral Award

Recognizing the growing importance of international arbitration as a means of settling international commercial disputes, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards. The term non-domestic appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings.[125] The New York Convention argues that: each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[126] To obtain recognition and enforcement, the party applying for recognition and enforcement shall, at the time of the application, supply: The duly authenticated original award or a duly certified copy thereof; the original agreement or a duly certified copy thereof. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these

[125] A. Sam, 2010. Recognition and enforcement of International Arbitral Award, p.52.
[126] New York convention on the Recognition and Enforcement of Arbitral Award, 1958. Section 3

documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.[127]

4.2.1 Under Comoros Legal Systems

In 17 member countries of OHADA treaty, 15 of them have signed and ratified the New York Convention. They enact their Arbitration rules to better serve international commercial arbitration in matter concerning recognition and enforcement of an award. An award properly made in a state party to the convention is enforceable by the OHADA member national courts. The OHADA Uniform Act on Arbitration provides that an arbitral awards rendered on the basis of rules other than those of the present Uniform Act shall be recognized in the States Parties in accordance with any international conventions that may be applicable and, failing any such conventions, in accordance with the provisions of this Uniform Act.[128]

In Comoros, once an arbitral awards rendered in compliance with the provisions of OHADA rules shall have res judicata effect on the territory of each member state, in the same way as decisions given by national courts. They may be subject to compulsory enforcement measures on the territory of any of the member Parties.[129] The exequatur shall be requested for by application filed ex parte before the Court. The exequatur is granted by a ruling of the President of the Court or the judge designated for this purpose and shall render the arbitral award enforceable in all OHADA Member States. This procedure shall be non-contentious. The exequatur shall not be granted if an ex parte application has already been filed to the Court, on the basis of the same award. In such case, the Court shall order a joinder of the two proceedings. Where the exequatur is refused for some other reason, the applicant may apply to the Court within fifteen days of the refusal. Where the ruling of the President of the Court or the judge designated for that purpose has granted the exequatur, the applicant shall serve same on the other party.[130] The Secretary General of the Court shall deliver to the party who applies a certified true copy of the original of the award and which shall bear on it the attestation of exequatur. In order to be recognized and

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[127] New York convention on the Recognition and enforcement of Arbitral Award, 1958. Section 4
[128] Article 34 of Uniform Act on Arbitration, 1999
[129] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 27
[130] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 30

enforced, the attestation shall state that exequatur has been granted to the arbitral award, either by a ruling of the President of the Court, which has been duly served and has become final, in the absence of an application to set aside filed within 15 days as provided herein above, or by a ruling of the Court annulling a decision whereby exequatur was refused. On the basis of the certified true copy of the arbitral award bearing the attestation of the Secretary General of the Court, the national authority designated by the state for which the exequatur is destined, shall affix the executory formula as is customary in the said state.[131]

4.2.2 Recognition and Enforcement under Uganda Arbitration Rules

The legal framework governing the enforcement of foreign judgments in Uganda is enshrined in various laws governing enforcement of foreign judgements. The Arbitration and Conciliation Act provides for domestic arbitration, International Commercial Arbitration and enforcement of foreign arbitral awards among others. Where parties have agreed to submit to arbitration all or certain disputes, which have arisen between them and have obtained an award as a result; or it is a foreign arbitral award, such an award is enforceable in Uganda. The Act provides that an arbitral award shall be recognized as binding and upon application in writing to the court shall be enforced. Unless the court otherwise orders, the party relying on an arbitral award or applying for its enforcement shall furnish: the duly authenticated original arbitral award or a duly certified copy of it; and the original arbitration agreement or a duly certified copy of it. If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.[132] The Act recognizes and gives effect to the New York Convention Awards. Under the Act, arbitral awards made in pursuance of an arbitration agreement in the territory of a state which is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958, is enforceable in Uganda. A New York Convention Award shall be binding for all purposes on the persons as between whom it was made. It shall be recognized and deemed binding and enforced upon

[131] Common Court of Justice and Arbitration rules of the Organization for the Harmonization of Business Law in Africa, 1999. Section 31
[132] Arbitration and Conciliation Act of Uganda; Cap 4, 2000. Section 35

application in writing to the court where it is sought to be enforced.[133] For instance, in the case of ***Christopher Sales and Carol Sales vs. Attorney General***, the applicants obtained a judgment against the respondent from USA and could not enforce the same against the respondent and thus applied to have it recognized and enforced under the Ugandan Legal rule. There being no reciprocal arrangement between USA and Uganda, Justice Eldard Mwangutsya departed from the cardinal principles espoused in the Act premised on the principle of reciprocity and went ahead to grant the recognition and enforcement of the USA judgment despite the lack of reciprocal arrangement. He noted that: A judgment creditor armed with such a judgment should be allowed to realize the fruits of his judgment which should be afforded recognition by our courts in absence of a reciprocal arrangement.

- Therefore, both Countries Arbitration Rules are in compliance with the New York Convention. Each country made provision for recognition and enforcement of foreign judgement. But the one for Uganda is so effective and more in conformity than that of Comoros. The Act of Uganda inserts provisions of the New York Convention in order to be applied in matter concerning recognition and enforcement of foreign arbitral award. Whereas in Comoros, it was just stipulated in a provision that foreign arbitral award shall be recognized and enforced under the territory of the Organization for the Harmonization of Business Law in Africa.

4.3 Grounds for Refusing Enforcement or Recognition

The grounds for resisting the recognition and enforcement of arbitration awards under the New York Convention are often poorly explained. The New York Convention, which governs the recognition of foreign arbitration awards in 150 countries, imposes a mandatory rule that obliges States that are Parties to the New York Convention to recognize and enforce foreign arbitral award. It is indicating in article III of the Convention that each Contracting State shall recognize arbitral awards as binding. There are thus no appeals of arbitral awards. There are nevertheless eight grounds for resisting the recognition and enforcement of an arbitral award under the New York Convention.[134] Under Article V, it is stipulated that recognition and enforcement of the

[133] Article 39 of the Arbitration and Conciliation Act, Cap 4, 2000.
[134] Bouzarjomehri, 2016. Public policy as a ground for refusal of international arbitral award, p.10

award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: The parties to the agreement were under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. Recognition and enforcement of an arbitral award may also be refused, if the competent authority in the country where recognition and enforcement is sought finds that: The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or The recognition or enforcement of the award would be contrary to the public policy of that country.

4.3.1 Under Comoros Legal Systems

The OHADA Uniform Act on Arbitration contains grounds for refusal of recognition and enforcement of arbitral awards. Unlike other legislations on arbitration such as the UNCITRAL Model Law on International Commercial Arbitration 1985 or the New York Convention on the recognition and enforcement of an award 1958, the Uniform Act makes no distinction between international and national arbitration. Therefore, the grounds for refusal for recognition and enforcement of arbitral awards contained in the Uniform Act on Arbitration are deemed to regulate the enforcement of arbitral awards whether national or international. Article 26 of the Uniform Act on Arbitration contain the only grounds on which parties in the OHADA zone can rely regarding refusal to enforce an award. The Common Court of Justice and Arbitration also

insist that the only grounds for refusal are those contained in the Uniform Act.[135] A judge shall when a question of refusal in the enforcement procedure arises, verify whether circumstances given either by the Respondent or raised suo moto are justified in accordance with Article 26 of the Uniform Act. As noted earlier, no review on the merits is allowed. A distinction is most of the time made between the grounds that can be invoked by a party and grounds invoked by the court on its own motion. For a more convenient examination of the grounds for refusal of recognition and enforcement of arbitral awards, the Article 26 of the Uniform Act grouped the following heads:

- No or Invalid Arbitration Agreement

Article 26 paragraph 1 of the Uniform Act on Arbitration enunciates two diverse arguments against enforcement of an arbitral award. On the one hand, arbitration being a contractual and private justice system, it is justifiable that an arbitral award is refused on the ground that the arbitral tribunal ruled without an arbitration agreement or on the basis of an agreement which was void or had expired. The possibility of making an award without an arbitration agreement is rare. When this ground for refusal is raised, it often takes the form of an arbitration agreement whose scope is contested, or allegations that negotiations were not completed for the conclusion of an agreement.[136] This point was amplified by the Cameroon's Court of Appeal for Littoral region in the case of ***Complexe Chimique Camerounais vs. Société SAFIC ALCAM SA***. In this case, the Justices of Appeal annulled the arbitral award due to the fact that the documents furnished to the Court of Appeal did not reveal that the contract was conclusive. On the other hand, an arbitral award may equally be refused if it is made after the expiry of the arbitration agreement. Indeed, arbitrators are not permanent arbitrators like court judges; their mandate is limited in time by the duration of the validity of the arbitration agreement.

If the arbitration agreement is expired, arbitrators lose their powers to act and an award made post-expiry will be nullified because it lacks legal basis.

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[135] N. Kapdi, 2018. Enforceability of arbitral awards within the Organization for the Harmonization of Business Law in Africa, p. 56

[136] P. pougoue & J. tchatchouwa, 2000. Droit de l'arbitrage dans l'espace de l'Organisation pour Harmonisation du Droit des Affaires en Afrique, p. 16.

- **Irregularity of the arbitral tribunal or the arbitral procedure**

Where the parties have made an agreement regulating the composition of the arbitral tribunal and the arbitral procedure, any alleged irregularity is to be measured against that agreement of the parties. This clearly establishes the supremacy of party autonomy, since the law of the country where the arbitration took place can only be applicable if the agreement of the parties is lacking or does not regulate the specific matters or if that law was chosen by the parties. Therefore, any composition of an arbitral tribunal or arbitral procedure which goes against the tenets of the parties' agreement can render an award null and void.[137] For instance, the Court of Appeal of Abidjan case of ***M. Vuarchex Jacques Pascal vs. La Scierie Nouvelle de Gadouan***, the court held that an arbitral award cannot be annulled on a ground of procedural irregularity which was not raised at the time of the arbitration proceedings. This ground for refusal is rarely relied upon when recognition and enforcement of an award is sought before the courts

- **Access authority**

The scenario concerns on the one hand, awards made by the tribunal outside their jurisdiction which simply means the arbitrators have performed or gone outside of the mandate entrusted by the parties in the arbitration agreement. It is rather the arbitration agreement made by the parties that is in issue when one determines whether the arbitral tribunal or arbitrators have exceeded their mandate.[138] In the arbitration proceedings of ***SAFIC ALCAM vs. Complexe Chimique Camerounaise***, the arbitral tribunal ruled on its competence as per the *Kompetenz-Kompetenz* theory and assumed jurisdiction. However, the Littoral Court of Appeal ruled that the arbitral tribunal had no competence to adjudicate on the matter.

- **Violation of Due process**

Violation of due process is the second ground for refusal of recognition and enforcement under the Uniform Act on Arbitration. Fair hearing and adversary proceedings is a fundamental requirement of any judicial process be it litigation, mediation or arbitration. For example,

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[137] D. Di Pierto & M. Platte, 2001. *Enforcement of International Arbitration Awards: the New York Convention of 1958,* London, Cameron., p. 163

[138] 1982 VII Yearbook Commercial Arbitration, p. 382

improper notice of the proceedings, inability to present a case and a denial of the right to be heard. This provision ensures that the arbitral tribunal observes certain standards of fairness. Violation of due process is probably the most important ground for refusal and is necessary for ensuring the future of arbitration.[139] In the case of ***Minmetals Germany vs. Ferco Steel***, the losing Respondent of an arbitration proceeding in China opposed enforcement in England on the grounds that the award was founded on evidence that the arbitral tribunal had obtained through its own investigations. An English court rejected this defence on the basis that the Respondent was eventually given the opportunity to ask for the disclosure of evidence in issue and to comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it.

- **No Reason for the Award**

The requirement of giving the reasons on which awards are based is so fundamental in OHADA member States to the extent that failure to comply with it may be enough for an award to be refused enforcement. However, it is not fair to expect that reasons for arbitral awards to be presented in a similar form with that of a judgment or ruling of the enforcing State. In the case of ***Bremer Handelegesellschaft GmbH vs. Westzucker GmbH***, it was held by the UK court that "All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. This is all that is meant by a reasoned award."

- **Public policy**

The concept of public policy may have effect on most areas of law. Article 2 and Article 26 paragraph 5 of the Uniform Act of Arbitration encompass the public policy defence that the court may raise and sustain *suo moto,* mean even no request has been made by a party. Public policy is an unruly horse and very difficult to define in one or two sentences. It is very unusual to see an

[139] C. Smith, 2007. Application of due process to arbitration awards of punitive damages, p. 45

explanation of it made by a court.[140] In its first decision on the "European public policy", as a ground for refusing arbitral awards, the European Court of Justice **in *Eco Swiss China Time Ltd vs. Benetton International NV case***, confirmed that the national courts of the European Union member States should allow a claim for annulment on the ground of non-compliance with article 81 of the Treaty Establishing the European Community. Accordingly to the European Court of Justice, the article 81 which is a provision against anti-competition, "may be regarded as a matter of public policy within the meaning of the New York Convention" because of its mandatory and fundamental nature.

4.3.2 Under Uganda Arbitration Rules

In relation to Uganda, the Arbitration and Conciliation Act makes provision for enforcement of both domestic and foreign arbitral awards. However, even though the Act outlines the grounds for setting aside an arbitral award, it does not provide the grounds on which the recognition and enforcement of an award may be refused.[141] As Uganda signed and ratified the New York convention, it applies directly the provision of the New York Convention regarding the grounds for refusal of recognition and enforcement of international and local arbitral awards.

- In this last step, the arbitration rules of Comoros are more effective than that of Uganda. The one of Comoros provide best conditions and also it is in details, whereas such conditions are not provided under the arbitration of Uganda.

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[140] J. Collier, 1994. *Conflicts of Laws*, 2nd Edition, Cambridge, Cambridge University Press, p. 359

[141] F. Kariuki, 2015. Challenges facing the recognition and enforcement of international award within the East Africa, p.19

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Findings

This chapter deals with the source of both countries's arbitration rules by the Model Law, and then the Similarity and the difference between Comoros and Uganda Legal Systems, and also the Matters not covered.

5.1.1 Inspired by the UNCITRAL model law and New York Convention

Arbitration as a tool of Dispute Resolution is widely utilized in Comoros and Uganda over twenty years ago. The Comoros and Uganda arbitration rules are both inspired by the United Nations Commission on International Trade Law and others major International Arbitral Institution in general. The Comoros Legal Systems is drawing up from the International Chamber of Commerce of Paris and the Model Law, and the one for Uganda most of the provisions are based on the United Nations Commission on International Trade Law and the New York Convention. Both Comoros and Uganda arbitration rules are in compliance with the standard norms of International Commercial Arbitration. Therefore, adequate for the effective management and conduct of the arbitral proceedings.

5.1.2 More Similarity and Less differ provisions

By analyzing and comparing the arbitration rules of Comoros and Uganda, I find that most of the provisions regulating arbitral proceedings are the same and less of them differ one another. Some of these provisions are strong, others are mediocre that need to be improved in order to better serve international commercial dispute. Doing so, it can attract foreign investors to have their dispute settled locally.

5.1.3 Matters not Covered

During the course of this work, I discovered some fundamental matters or areas of arbitration not covered by both countries' arbitration rules; even the Model Law does not provides such kind of

important arbitration areas, but this does not mean that both Countries cannot make reform of their arbitration rules to enhance arbitration level in commercial arbitration. The area of arbitration that not covered is: party's consent to be arbitrate, arbitrable matters, multiparty proceedings, liability and immunity of arbitrators. Quite obviously if these omissions occur; courts might be tempted or prompted to intervene in arbitral matters not specifically covered by arbitration rules. Immediate revision of both countries' arbitration rules is therefore needed in order to stop Disputants from shunning local arbitral institution to foreign institution.

5.2 Conclusion

This dissertation is clear that arbitration is an important element of Alternative Dispute Resolution method used in international commercial cases. Arbitration is developed as a result of human necessities and it got further developed according to the new necessities that can arise. The two institutional arbitration rules analyzed in this dissertation are of essential importance for the conducting of international arbitration today and the implementation rules of change would increase their effectiveness. The Comoros Legal Systems and the Uganda Arbitration rules are both inspired by the UNCITRAL model law and others International Arbitral Institution Rules. In practice these two arbitration legislations are in one hand the same rules, and on the other hand differ one another. Most of them need to be improved and be modernized. On this point, I conclude that the Arbitration Rules of Comoros offer best conditions than that of Uganda in matter regarding resolving international dispute. It was not easy task to conclude which arbitration rules of both Countries offers best conditions to resolve International Commercial Dispute. To do so, it required more attention and reflection about the work analyzed above and the number of suggestion of changes below.

5.3 Recommendations

Hence, it would be better for the Arbitral Institutions of Comoros and Uganda to accept the implementation of these proposed changes to their rules in parts. According to the above background, my recommendations are divided into two. Firstly, I will recommend both countries to improve the current rules of Arbitration and secondly to enact and insert matters not covered by their legal framework.

5.3.1 Comoros

5.3.1.1 Commencement of Arbitration

The date of the commencement of arbitration proceedings is very important in arbitration. In Comoros arbitration commence on the date at which the claimant refer the dispute to the arbitral institution. It would be more rational and fair to have the commencement of arbitration on the date at which the respondent will be noticed. This help the defendant to act with realistic time and also avoid a default of party such as fails to appear in a hearing.

5.3.1.2 Number of Arbitrators

The number of arbitrators in arbitration procedure is so important. The arbitration rules of Comoros require parties to appoint either one or three arbitrators. I suggest that three arbitrators should be mandatory to handle with the dispute. If this rule is adopted, three arbitrators can better analyze the case and reach to a better conclusion. This allows each party to be represented and there will be another arbitrator to be neutral. Three arbitrators also will avoid corruption; one arbitrator will be easy to corrupt. This also can be the same suggestion to the arbitration rule of Uganda that the number of arbitrators is unlimited.

5.3.1.3 Confidentiality of Arbitration

As arbitration is a private contract, Confidentiality of the arbitral proceedings is much required in international arbitration. The arbitration rules of Comoros required all the proceedings to be in confidence. My proposed change is to keep the principle of confidentiality and also guarantee the principle of transparency on the same time. It will be better to have more transparence in the arbitral proceedings in order to guarantee that there is no corruption in these procedures, and the best way to ensure this is through transparency. Hence it is necessary to disclose more information, but at the same time continue to preserve the industrial secrets that may be exposed in the arbitral procedure. By implementing this proposed change, it will make the arbitration rule of Comoros even more efficiency and trusted by the international community.

5.3.1.4 Courts Intervention

Courts can exercise authority over arbitration matters, either as a matter of Statutory or Inherent powers. The arbitration rules of Comoros provide Court intervention with unlimited power. I

suggest the arbitral institution to limit such power, because sometimes court goes far beyond and this occur where courts decide that there exists illegality, incapacity or arbitration award against public policy. Courts interference with such powers intimidates foreign investors since they are never sure what reasoning the court may adopt should it be called upon to deliberate on such commercial disputes.

5.3.2 Uganda

5.3.2.1 Immunity of Arbitrators

Protecting arbitrators while performing their duty is an important aspect in arbitration. Immunity from suit is clearly a prerogative reserved to the government. The arbitration rules of Uganda are silent about this aspect. It will be genuine to provide such condition under the Act of arbitration to protect arbitrators during the course of their work. The lack of immunity would cause fear of liability for decision that could have been made out of improper interpretation of the law. Immunity of arbitrators would be efficient and speedy administration of the arbitration.

5.3.2.2 Interim Measures

Interim measure in international arbitration become more important and keeps increasing the need. The arbitration rule of Uganda provides interim measure by courts. My suggestion is to empower the arbitral tribunal with all measures in order to avoid delay in the process. Courts in arbitration should intervene only in enforcement stage by a decision taking by the tribunal. Remember that the spirit is that all proceeding should be carried out in the tribunal for quick relief. Involving court for interim measures during arbitral proceedings may cause unnecessary delays which the party tried to avoid when they choose to arbitrate. An arbitral tribunal should be empowered to grant interim measures and modify, suspend and terminate them.

5.3.2.3 Experts Appointed by the Tribunal

In international commercial arbitration, experts play an important role to help the quick resolution of the dispute. The arbitration rules of Uganda provide experts appointed by the arbitral tribunal. It will be also genuine to give parties the possibility to appoint their own experts for evidence. This will help the court on matters within their expertise and this overrides any obligation to the person from whom the expert has received instructions or by whom he is paid.

Also if; it is the arbitral tribunal which appoint the expert it is so riskier to be corrupted by parties, whereas if it is one party who appoint the expert no corruption will be occurred.

5.3.3 Comoros and Uganda

Here I proposed some areas of arbitration that both countries need to strengthen to ensure that they become competitive arbitral destination for international disputes.

5.3.3.1 Consent in Arbitration

A fundamental requirement of valid arbitration agreement, apart from formal requirement is consent. Therefore if a contract or agreement is held out to be validly concluded it is logical to infer from this that the parties consent to its provisions including the arbitration provision, if any. Yet a party's consent to arbitrate and the arbitration agreement, if bound together in logic and construction, is not the same thing in their practical application and effect. The distinction between them assumes greater prominence when the consent to arbitrate, which by implication is an ingredient of the arbitration agreement, is hotly contested. By adding and implementing the consent to be arbitrating, can help to avoid many issues that each party may arise. For instance, sometimes the disputing party rejects the entire contract with the arbitration agreement, or accepts the contract but not the arbitration agreement, or accepts the contract and the arbitration agreement but still he did not consent to arbitrate the particular dispute that has arisen. This also will help to put away the court from involving before the arbitral tribunal. Remember that courts can involve before the appointment of the tribunal to rescue an arbitration agreement which is in danger. If the consent to arbitrate is implemented courts shall take a rest in this stage of arbitration and no party can escape the arbitration agreement the time he gives an express consent to be bound.

5.3.3.2 Arbitrability

Arbitrability is another source of challenges to the arbitral jurisdiction. The courts apply the doctrine of arbitrability to determine whether the subject matter of a dispute which the parties have by agreement referred to arbitration is indeed capable of resolution outside the court system in the light of the relevant public policy considerations. When the issue of arbitrability arises it involves a determination as to whether the tribunal or the court is the appropriate forum for resolving the subject matter of the dispute. Both Comoros and Uganda's arbitration rules are

silent regarding this issue. I propose both countries to make a reform that is going to highlight all matters susceptible of arbitration. By doing so, it will help to avoid wasting time, because at the end of arbitration, court may not enforce the award for the purpose that the arbitration agreement is not valid or the arbitral award is contrary to the public policy of the country. That what happen to the above case of Tullow oil vs. Uganda Revenue Authority, the high court of Uganda stopped the case for the ground that tax is not susceptible of private contract. So it is genuine that before proceeding, the arbitral tribunal must send the arbitration agreement to court to be scrutinize if it is arbitrable or not. By establishing a list of matters arbitrable, can also help to avoid courts intervention and remember the time court involving it is source of delay.

5.3.3.3 Multiparty in Arbitration

Multiparty in Commercial Arbitration Dispute cease not to increase. Multi-party arbitrations may involve several parties to one contract or several contracts with different parties that have an interest or bearing on the matters in dispute. Both countries' arbitration rules are silent in this issue. In order to offers best international rules and be recognized by international community, it would be better for both countries to add this aspect of arbitration. This may cause investors to run away our local institution due to lack of such provision, and that is why there less caseload in this two arbitral institutions. By implementing it, both arbitral institutions will receive more dispute to handle with them.

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