# CHALLENGES IN THE IMPLEMENTATION OF ARBITRATION IN RESOLUTION OF COMMERCIAL DISPUTES IN UGANDA

BY

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## DECLARATION

I **Christine Nzambi Mulatya**, declare that this dissertation is my original work. It has never been used in any institution of learning for the award of a degree.

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## APPROVAL

I declare that this work has been done by **Christine Nzambi Mulatya** under my supervision and is submitted with my approval.

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Date: 13th DEC 2010

## DEDICATION

To my parents Mr. Benjamin and Mrs. Josephine Mulatya who instilled in me the values of honesty and hard work and for your financial contribution towards my academic undertakings. To my family The Mulatyas', for their financial and emotional support throughout my studies.

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To my friends Nudi, Tanui, Susan, Chepkemboi, Tayo, Nyale Accram and to all my classmates, thank you for impacting my life in one way or another may God be with you in your endeavors.

## LIST OF CASES

FULGENCIUS MUNGEREZA VS. PRICE WATER HOUSE COOPERS C.A. NO.

18/2002

ATTORNEY GENERAL AND UCB VS. WESTMONT LAND (ASIA) & OTHERS

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ROKO CONSTRUCTION LTD VS. AYA BAKERY (U) LTD ARBITRATION CAUSE NO. 10 OF 2007

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ROKO CONSTRUCTION LTD VS. MOHAMED HAMID ARBITRATION CAUSE NO. 11 OF 2007

NIC INSURANCE CO. VS UGANDA RAILWAYS ARBITRATION CAUSE NO.16 OF 2006

WESTERN CONSTRUCTION COMPANY LTD VS. UCB (1997-2000) UCLR459

U.P.BAN NIGAM VS BISHAM AIR (1985) ALLER 351

ARAB AFRICAN ENERGY CORP VS. OLIOPRODDUKTEN NEDERLAND BV (1983) 2 LLOYDS REP 417

S.S. ENTERPRISES LTD AND ANOTHER VS. UGANDA REVENUE AUTHORITY,

## ABBREVIATIONS

| | |
|---|---|
| **A.D.R** | **Alternative Dispute Resolution** |
| **CADER** | **Center for Arbitration and Disputer Resolution** |
| **UNCITRAL** | **United Nations Commission on International Trade Law** |
| **A.C.A** | **Arbitration and Conciliation Act Cap 4** |

## ABSTRACT

Disputes are inevitable in human affairs and activities. This is a common phenomenon particularly in modern societies. In as much as disputes are part and parcel of people's daily lives, they need to be resolved in an orderly manner. The orderly mechanism of resolving disputes creates social harmony on one hand and economic development on the other hand. Because of this reason, societies need proper and effective means of resolving disputes. Courts litigation is the most common way of resolving disputes. Courts of law are vested with powers to determine cases, brought before them according to the rules and procedures established by the law. Another way of resolving disputes is by resort to alternative dispute resolutions which have been devised and incorporated in civil laws. These methods include negotiation, mediation and arbitration. Arbitration is not a new phenomenon as it antedates legal system and courts of law. Arbitration has been preferred in the settlement of commercial disputes.

The aim of this paper is to analyse the challenges in the implementation of arbitration as an alternative dispute resolution (ADR) process in the resolution of commercial disputes in Uganda and to propose viable recommendations for the effective operation of arbitration.

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# CHAPTER ONE

## 1.0 Introduction

Disputes are as old as the human race. They are a common feature of social and legal relations between individuals, corporate and state parties both at domestic and international level. Their continued escalation calls for the establishment of elaborate systems of conflict management, dispute resolution or determination to accommodate the increasing need for expediency and the desire to resolve them at minimal cost particularly in commercial transactions, in the interest of parties. To achieve this objective, there are innovative international protocols, treaties and domestic legislation designed to offer invaluable alternatives to conventional judicial systems whose adversarial scales of justice often do not tip to the advantage of the litigants taking account of the expense in time and money weighed against the limited benefit.

Save in non- arbitral disputes or disputes in which either one or more parties anticipates legal aid, parties in differences can choose whether to litigate or to adopt any of the alternative dispute resolution among them being arbitration.

Arbitration though, has not yet quite reached its full potential in Uganda; its use has grown tremendously since the promulgation of the new Arbitration and Conciliation Act 2000[1]. The new Act also established the Center for Arbitration and Dispute Resolution (CADER), a body corporate with perpetual succession and a common seal capable of suing or being sued, in its corporate name[2]. The Center's functions in regard to arbitration

[1] Cap 4 Laws of Uganda
[2] Cap 4 Laws of Uganda

and conciliation under the Act[3] shall include making appropriate rules administrative procedures for effective performance of alternative dispute resolution as well as functions referred to in sections 11, 12, 13, 14, 15 and 51 of the Act.[4]

Arbitration has been gaining wider acceptance in Uganda. Lawyers' business people, judges and academicians are increasingly taking serious interest provided through CADER and its potentials for resolving disputes faster and at relatively lower costs than conventional court litigation systems. With increasing usage, the popularity of arbitration process will no doubt also continue to grow as more and more business people, legal practitioners and the general public continue to experience the advantages and value it contributes in helping to resolve many different types of disputes. The informality and flexibility of the process allows for extensive control and increased direct party participation. In that respect, arbitration offers a highly accessible system of dispute resolution that can help increase access to justice for disadvantaged groups, increased popular satisfaction with the judicial system and help manage conflicts and disputes more appropriately.

This research therefore is carried out to examine the contribution of arbitration in the resolution of commercial disputes and at the same time examine the challenges in the implementation of ADR in Uganda.

### 1.1 Statement of the problem

[3] Arbitration and conciliation Act, 2000
[4] Supra 3

The fact that prolonged unresolved disputes have transformed litigation into an unbearable burden can not be overemphasized. For this reason there has been a need, increasing one indeed, for an appropriate and expedient dispute resolution mechanism. As a result of the reports on the drawbacks in the traditional courts system like heavy back logs of cases, delays in the disposal of cases among others, parliament enacted a comprehensive law on arbitration and conciliation to encourage parties to settle their disputes through arbitration and conciliation methods. However, the use of arbitration by litigants is still very minimal.

Thus, this research seeks to address this problem by finding out the challenges in the implementation of arbitration and give recommendations for the increased use of this method by litigants.

## 1.2 Objective of the study

The general objective of this study is to examine the evolution of arbitration and the law governing arbitration in Uganda.

### The specific objectives

1. To examine the development of the law and practice arbitration in Uganda.
2. To analyse the challenges in the implementation of arbitration as an alternative dispute resolution (ADR) process in the resolution of commercial disputes in Uganda
3. To propose viable recommendations for the effective operation of arbitration.

## 1.3 Significance of the study

The significance of the study is to find ways in which parties to a dispute are provided with choices for effective and efficient resolution of disputes. To appreciate the benefits of arbitration the research reveals that in most cases court room litigation is time consuming, frustrating, extremely stressful, and expensive and does not always provide the best results. The research therefore provides answers to all these by offering for the settlement of disputes in a much more flexible and convenient forum.

### 1.4 Scope of the study

Alternative methods of dispute resolution are quite a number, but for purposes of this study, the research is limited to Arbitration, and in particular Commercial arbitration, where by it analyses the different national and international legislative measures put in place to ensure arbitration as an alternative dispute resolution. The study therefore refers to situations in Uganda as well as other countries, related cases in the field, and as away of enriching this research reference is also be made to decide cases, internationally and locally with a direct bearing on the study.

### 1.5 Hypothesis

1. Scholars worry that arbitration allows business managers to evade statutory norms, winning claimants grumble that judicial review of awards impairs neutrality and finality, losing litigants lament that arbitrators apply the law either too strictly or not too strictly enough, with insufficient court supervision. Discontent aims principally at the abuse of otherwise legitimate procedures, whether in arbitration or in related court actions.

2. Arbitrators and judges are increasingly aware of the need to discourage litigants from frustrating the basic aims of arbitration that is both relatively efficient and reasonably free from excessive judicial intervention. Although these aspirations do not lend themselves to facile analysis they can help frame a dialogue that promotes reasonable choice about acceptable tactics, with sensitivity to the inevitable cultural predispositions existing in today's international commercial community.
3. The study addresses the challenges facing commercial arbitration in Uganda and answers the question of how best to curb the setbacks for effective operation of arbitration procedures in settling commercial disputes.

### 1.6 Methodology

The method used is qualitative research method. Extensive library research was conducted through reading text books, extracts and journals, cases, news papers and previous research with a direct bearing on this study. The internet was also a major source of information as there was very little published literature. Hence the research was based on analyzed secondary data.

### 1.7 Literature Review

The importance of the subject in the resolution of commercial disputes in Uganda and the world at a large has made many people say and write about the subject. The diversification and contradiction of the existing literature creates a need to enlighten such differences to which this research aims at doing:

**Hon Justice Geoffrey W.M Kiryabwire,** in his paper, ***ADR- a catalyst in commercial development***[5] said, "Vibrant commercial sector is critical to the overall development of a nation. He continues to say that in order for the sector to control life to development there is a need for an efficient and effective commercial legal system where enforcement of contracts and collection of debts is guaranteed and effected in a speedy and cost effective manner. He notes that the Uganda commercial justice sector has to some extent registered some progress towards creating a conducive environment that supports the growth of the private sector by conducting business transactions.

In his article, he notes the obstacles to economic growth to include few judicial offices to handle disputes, bureaucratic judicial procedures, delays in enforcement of contracts among others. Further he states that the effect of an inefficient dispute resolution system leads to fewer investment and business transactions. He advises that in order to encourage investors to do business in Uganda there is a need, in addition to court systems, to evolve other dispute resolution mechanisms that are efficient and accessible, faster and cheaper, to which ADR is the first possible solution like arbitration.

In his paper ***"The Experience of the commercial court***[6]***, Hon Mr. Justice Ogoola*** began by defining ADR and giving examples of ADR as to include arbitration. He gave the history of arbitration right from the human creation of Adam and Eve as reported in

[5] The Uganda Living Law Journal Vol. No.2 December 2005
[6] A paper delivered to the Bar course students at the LDC Kampala 29 July 2004

Genesis 3:1-24[7]. He further explained how court initiated ADR was given a pivotal boost by the 1998 Amendments to the Civil Procedure Rules O.XII[8] which order has revolutionized the case of adjudicatory system of this country. Once again, the commercial court has been in the fore front of this judicial revolution, as it has trailed examples for other courts to follow.

**Samson Sempasa** in his paper "***Center for Arbitration and Dispute Resolution and the new legislative Formulation and Alternative Disputes Resolution***"[9] began by saying that although ADR has not yet reached its full potential in Uganda, its use has grown tremendously since the promulgation of the new Act[10], the new Act also establishes the CADER with the aim of disseminating information about the advantages of the ADR processes and popularizing their use in resolving many ordinary commercial disputes. He points out draw backs to conventional methods of resolving disputes which rely upon the court litigation process. The paper also gives advantages of ADR and gives conclusion and a way forward to more need to be done to create a comprehensive and self-sustaining ADR system in Uganda. He also advises parties with commercial disputes to deepen their commitment to collaborative approach dispute resolutions.

***"Alternative Dispute Resolution and Judicial discretion"***,[11] a paper by **Scot Peterson** affirms that the ADR process would not replace the court system in any jurisdiction since there are reasons why some matters should go to court and not ADR processes. These

[7] Good News bible
[8] Statutory Instrument 71-1 Laws of Uganda
[9] Pg 81. The Uganda Law Living Journal Vol. 1; 2003
[10] Cap 4 Laws of Uganda
[11] The Uganda Living Law Journal Vol. No. 2 of December 2005 by Uganda Law reform

include complex legal matters and matters of public policy. At the same time, the paper also points out that ADR processes are quick, confidential, allow options for resolution outside the power of a court and are costs effective. The paper also states the attributes of an ADR institution which include neutrality, accreditation, complaints handling, process training, it also provides observations and recommendations of advising countries with commercial matters to refer to ADR and recommends the need of sensitization of the public on the use of ADR.[12]

**Kibaya Immana Laibuta,** in his book ***"Principles of Commercial Law"***[13] gives the history of ADR as being in existence since the start of the human race and as regards arbitration, he states that fair resolution is now attainable without undue delay and expense due to the enabling environment directly attributable to supportive legislation and institutional rules which govern procedure, in domestic and international arbitration. He also defines arbitration as to include on informal process of dispute resolution pursuant either to an arbitration agreement or specific rules of procedure under which their dispute may be referred for settlement. Further, he gives the advantages for and the disadvantages of arbitration and emphasizes the need to sensitize the public on the usefulness of arbitration.

**Commercial court mediation pilot project:** Perhaps one of the most exciting initiatives that the course has embarked upon and which is anticipated to assist greatly in the administration of justice as well as in the expansion of frontiers of business law is the

[12] Supra (11)
[13] Law Africa Library

commercial court mediation pilot project. Under procedures and rules promulgated in September 2003 (Legal Notice No. 7 2003) all cases filed in commercial court referred to mandatory mediation at no extra cost to the parties in order to facilitate an earlier statement of dispute. The mediation process is extremely informal, is done by trained experts in the particular field of a dispute (Including non- lawyers) and lasts a maximum of two days only. The agreement reached between the parties at the mediation session is filed as consent judgment of the court in that particular case. Where such projects have been tried in other jurisdictions, they have proved to be very successful in reducing the overall time taken to deal with cases increasing early settlements and reducing court back to our indigenous African jurisprudence.

To the Africans, the concepts of mediation is neither new or unknown as initially contended by some, on the contrary, arbitration is the one true primary and fundamental method by which Africans resolve or dispute. Indeed, **Article 126 (2) (d) of the Constitution**[14] mandates the courts to promote principles of "reconciliation between parties."

No matter what the nature of the dispute is that is, be it commercial or family, and no matter how intense and complex the conflict is, no matter how desperate the disputants are, the first line of the elders and neighbors and other persons of trust in the community for mediation and mutual reconciliation. Thus to the Africans the great unknown is the mysterious as judicial system that has been inherited largely from the western world that is, the adversarial system of judicial proceedings.

[14] 1995 Uganda Constitution

This adversarial system is taught in law schools and colleges and remains an enigma for the overwhelming majority of our people is too time consuming to leave and leaves bad blood among the between litigants, who live their life forever thereafter the bitter of confirmed enemies.

### 1.8 Chapterization

Chapter one shall contain an introduction of the topic, statement of the problem, objective of the study, its significance, scope, hypothesis, methodology and literature review, chapter two shall contain a brief history of arbitration generally and narrowing it down to Uganda and how it has been applied. Chapter three shall contain the legal framework of arbitration in Uganda; chapter four shall contain the proceedings in an arbitration tribunal, and the advantages and disadvantages of arbitration. Chapter five shall contain the challenges faced in arbitration in Uganda giving recommendations and conclusion therein.

## CHAPTER TWO

### 2.0 The Evolution and Development of the Law and Practice of Arbitration.

### 2.1 Introduction

At the dawn of human creation, God placed man, woman and a snake in the Garden of Eden. He subjected the residents of Eden to a certain constitutional edict namely not to eat of a particular fruit in that garden. The penalty for disobedience of the edict was properly and specifically and sufficiently known to the residents of Eden and apparently to the snake as well[15]. The cost of disobedience was capital penalty. As every lawyer knows only too well, a cost follows the event. Therefore, when the edict of Eden was flagrantly disobeyed upon the devours instigation of the snake, a dispute arose between the man and women. The man accused the woman, the woman accused the snake, and God the Judge, passed sentence, swift and severe for its trickery, the snake was condemned to the curse of crawling on its belly eating dust, and having its head crushed by man's progeny. For mischievously luring the man the woman was punished by an increase of troublesome pregnancy and aggravated pangs of child labor and for listening glibly to his wife, the man was condemned to hard labor life.

In the above example of ***Adam and Eve (Reported In Genesis* 3:1_24)**[16] one finds a method of ADR which must be called Divine Dispute Resolution whose singular advantages are seen to be expeditious punishment following a brief opportunity for fulfillment of certain elements of natural justice, namely the accused were permitted

[15] Good News Bible.(Genesis 3:1-24)
[16] Supra

To defend themselves by answering the few robust questions put to them. There upon God pronounced the above judgment on the trio, that is what one model of dispute resolutions.

## 2.2 Evolution of Arbitration

Arbitration is a term derived from the nomenclature of the Roman law. It is a system applied to an arrangement for submitting and abiding by their decision of a selected person in some disputed matter instead of referring it to a court of law.

S.2 (1) (d) ACA[17] defines arbitration as to mean any arbitration whether or not administered by a domestic or international institution where there is an arbitration agreement. S2(1) (e)[18] defines arbitration agreement to mean 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.

The definition is quite vague but a further look at definitions by scholars and texts, a clearer definition can be derived from them. The word arbiter was originally used to signify a person to whom controversies were referred for decision, irrespective of any municipal law.Gradually; it has been attached to a person selected with reference to an established system for friendly determination of disputes.

[17]The Arbitration and Conciliation Act Cap 4 Laws of Uganda
[18] ibid

In Halsbury Laws of England[19] arbitration is defined as the reference of disputes or difference between not less than two parties, for determination, after hearing both sides in a judicial manner, by a person or persons other than a court of competent jurisdiction.

Broadly speaking, arbitration is an alternative to litigation. It does not however, replace the ordinary judicial machinery in all aspects. It rather exists with the existing established judicial process. Thus arbitration is a field of jurisprudence that antedates legal systems and court. It was in existence well prior to the coming into existence of courts of law and the legal system as a whole. Human beings in a state of nature were governed by natural law based on reason, customs, traditions and common sense. Law of morals then resolved all human problems, differences and disputes. Existence of an organized presupposes the existence of law with transformation of natural State into a political State. Law was applied in a loose sense to solve many problems.

Both natural State and organized political State had one thing min common, that is, that the determination of disputes between persons was placed in the hands of a person or persons in whom disputants had confidence and trust through mediation and concilliation.Cicero[20]commenting on the confidence and trust required in arbitration once said,

> *"Nor would our ancestors permit to be judex even in the most trifling matters, not to speak of offers concerning the dignity a man unless the offering parties were agreed upon him."*

[19] Laws of England,4th Edition Vol. 2 par 501
[20] www.tonybirigham.co.uk/

The law of arbitration stems from this idea of mediation and conciliation by an impartial tribunal. In Roman times for instance, litigation was no more than a private arbitration purpose.

The origin of arbitration is obscure. China, India, Italy, England are among those countries that claim to be the first to introduce arbitration as an independent system of settling disputes from that of ordinary litigation. As far as there has been a reference of settlement of early international and private disputes.However, the fact remains that arbitration is of a very early origin and has been developing over time.

The modern arbitration between States starts with the Jay Treaty of 1974 before United States of America and United Kingdom, which provided for the settlement of various disputes by mixed arbitral tribunal. To date it has become a highly regarded means of resolving disputes in international, national and commercial domains. It is, nonetheless, still a progressive area of jurisprudence in dispensing justice.

### 2.3 History of Arbitration in Uganda

Alternative dispute resolution processes were in use long before the Anglo Saxon adversarial system of litigation that we have today. In pre colonial Uganda, the societies used ADR method of conciliation and mediation to solve disputes. The traditional elders, chiefs and kings usually played the role of conciliator or mediator[21].

[21] Pg 3 Practical Usage of ADR skills. A focus on institutional Architect and Mediation in Uganda by Ms. Catherine Mugaga Registrar CADER to LDC students on 5th July 2006

In colonial period[22], Uganda first adopted United Kingdom *Arbitration Acts of 1934 and 1950* respectively. The latter Act was retained after independence as Cap 55Laws of Uganda. There is limited information as to the effect of the Arbitration Act of 1950 on the legal regime in Uganda. This can mainly be attributed to the lack of a central body or institution to oversee the development of alternative dispute resolution in Uganda. The effects of this lacuna are axiomatic. The stagnation of the development of Alternative dispute resolution in Uganda has been due to the creation of litigious culture among the legal profession and the public in general hence the negative impact on the development of alternative dispute resolution.

It can therefore be said that the history of arbitration in Uganda derives from received law. One of the salient features of the Act is the creature of a statutory body to oversee alternative dispute resolution practice in Uganda thus marking the beginning of institutional alternative dispute resolution practice.

**2.4 Importance of Arbitration vis- a- vis litigation**

About one hundred and fifty years ago, Abraham Lincoln advising people to embrace alternative dispute resolution practice he said

> *"discourage litigation; persuade your neighbor to compromise. Whenever you can point out to him how the normal winner is often the looser in fees, expenses and waste of time."*

This device sums up the theory of Alternative Dispute Resolution.

[22] Pg 98 ADR C.W. Magistrates and Judicial Association Conference.

ADR recognizes the fact that disputes are a regular part of doing business, in that recognition in place, ADR seeks to offer an opportunity to the parties to conduct their business privately and confidentially. Thus in considering the importance of arbitration, the first question to consider is –why and how far do the businessmen prefers arbitration to litigation? What reason is there for business community, with a good and trusted bench of judges and bar made up of men who are of high intelligence and undoubted personal integrity, to look for any alternative bench of judges and bar of advocates in having their commercial disputes settled?

Any attempt to answer these pertinent questions necessitates consideration of the nature of commercial disputes settlement vis- a- vis other forms of disputes.

Law is a professional suffering from the stigma of being a mystery .It uses a stranger language, it dresses up and it lives and works for dispute settling purposes in places where criminals are tried, convicted and sentenced, and all other unpleasant things happen, and as such businessmen are shy of such places. The idea of having a mechanism in which disputes are settled by a less terrifying procedures and environment does appeal to a business community.

It can therefore be argued that there was a traditional perception that alternative dispute mechanisms/procedures like Arbitration were somewhat inferior to litigation and therefore they could only be allowed after due inquiry as to the state of mind of the parties.

Secondly, there was a traditional perception under common law system that disputes had to be resolved through adversarial method to lawyers and judicial officers[23]. The training is such that a dispute is resolved on a win/lose formula and any sign of concession is evidence of weakness. This may not always work when parties seek dispute resolution through arbitration.

Nevertheless, over the last years and in particular in the past decade, there has been a harmonization of arbitration rules and procedures applied in international commercial arbitration. These procedures have been developed by practical compromises reflecting the essentials of national laws and the absolute of the due process. The Arbitration and Conciliation Act together with the UNCITRAL Arbitration Rules[24] have all directly influenced the way arbitrations are conducted.

Institutional rules are increasingly close in their fundamental procedure and requirements. The parties' positions are often polarized. The reasons for positions of the parties have taken may be pragmatic or tactical. The objects of the parties intention varies. Justice and the enforcement of rights in many cases became confused with the parties' ulterior motives and wider interests.

It can be said that the courts of Uganda should not be the place where the resolution of disputes begins. They should be places where disputes end after alternative methods of resolving having been considered and tried. The courts of our various jurisdictions have been called the courts of last resort.

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[23] Pg 98 ibid 5
[24] United Nations Convention on Recognition and Enforcement of Arbitral Wards

**2.5 How Arbitration (ADR) is becoming a credible method of dispute resolution even for common law countries.**

The first driving factor in changing the traditional perceptions was international trade, which sought to create a dispute resolution mechanism that was universal yet at the same time insulated from national courts, which could be biased against foreign business concerns. In this regard the United Nations Commission on International Trade Law (UNCITRAL) came up with the following codes.

- The UNICTRAL arbitration rules 1979
- The UNICTRAL conciliation rules 1979

The UNCITRAL model law on internal commercial arbitration 1985 (herein after called model law).

These UNICITRAL model law or documents, coupled with the convention on the recognition and enforcement of foreign arbitral awards (the New York Convention 1958) are the main instruments that influenced the drafting of the new Arbitration and Conciliation Act (Cap 4) of Uganda.

As a result of this International Trade angle there has been a push by donor countries to modernize the Ugandan Commercial Laws and Court Procedures along the lines that actively promote Arbitration and by so doing promote trade and investment in Uganda, this led to the enactment of the Investment Code Act 1991 (Cap 92)[25], under section 28,

[25] Pg 100 Journal of Uganda Judicial Officers Association

talks of settlement of investment disputes amicably or through arbitration for the settlement of disputes.

## CHAPTER THREE

### 3.0 The Current Legal Frame work Relating to Arbitration.

### 3.1 Arbitration under the Arbitration is contained in the Arbitration and Conciliation Act CAP 4 2000

The law relating to Arbitration is contained in the Arbitration and Conciliation Act [26][herein after referred ACA]. Section 2(f)[27] defines Arbitration to mean any Arbitration whether or not administered by a domestic or international institution where there is an Arbitration agreement.

Arbitration is also defined, as the settlement of disputes and differences relating to civil matters between one party and another in a quasi judicial manner, by the decision of one or more persons. Called arbitrators, appointed by the contending parties, without having recourse to a court of law[28].

### 3.2 Arbitration Agreement

Section 2 (e) of the Act defines an Arbitration agreement as a written agreement to refer present or future differences to Arbitration whether an Arbitrator is named in it. This was best illustrated in the case ***Fulgencius Mungereza vs. Price Water House Coopers***[29]**.** The appellant filed a suit in the High Court of Uganda against the respondents for wrongful expulsion. The respondent filed an application for stay of proceedings

[26] Cap 4 Laws of Uganda
[27] Cap 4 Laws of Uganda
[28] Professor Clive Schmitthoff, visiting professor Centre for Commercial Law Studies Queens Mary University
[29] C.A. no. 18/2002

against them, and reference of the matter for Arbitration. The application was made under S.40 and 41 of the ACA 2000. The appellant opposed the application, stating that because the applicant had dismissed the respondent, he could not afford to go to London and or pay his lawyers to represent him at Arbitration. The issue for court to decide was whether the respondent inability to attend the arbitration made the arbitration agreement incapable of being performed, and whether respondent's grounds were within the exceptions envisaged by Sect. 41[30], the Supreme Court held that the appellant's inability to afford the legal and travel expenses of attending the Arbitration proceedings in London did not render the agreement incapable of being performed. It can therefore be said that a party's poverty does not bring him within the exceptions of S 41 of the Act to justify the exercise of discretion to refuse the order for stay of proceedings. That poverty in itself is not a sufficient reason for exercising this discretion, to the extent that the agreement has been rendered incapable of being performed.

However, court failed to refer the suit to Arbitration despite the clause of arbitration in the case of ***Attorney General and UCB vs. Westmont Land (Asia) & others***[31]. The applicant filed application seeking order that the suit be stayed pending arbitration proceedings the application were based on grounds that there was a binding agreement between parties to submit any disputes to Arbitration. The respondents challenged the applications for being on misconceived stating that the application had no audience before court having failed to file a defense it was held an application to stay proceedings pending Arbitration cannot be enforced under the rules which specifically govern

[30]Cap 4 Laws of Uganda.
[31] Uganda Commercial Law Reports(1997-2001)191

challenges of jurisdiction of court in relation to irregularity in summons, service of summons or other elements of impropriety of summons in this case Arbitration was not possible because of failure to file a defense which placed the applicant out of the jurisdiction of the Court. He had no basis to file the application to stay the proceedings in the main suit. The application was struck out and default judgment entered in favor of the respondent. This case illustrates how court's exercise of its discretion is subject to the clauses in the arbitration agreement.

In ***Roko Construction Ltd vs. Aya Bakery (U) Ltd***[32], this application was lodged by Roko Construction Ltd against Aya Bakery **(U)** Ltd, for the compulsory appointment of an arbitrator under Sec. 11(4) of the Arbitration and Conciliation Act. At the hearing, the defendant was not represented. This application emanates from the building contract between Roko Construction Ltd and Aya Bakery (U) Ltd for construction of a biscuit factory. This was terminated; the applicant served the respondent with a notice for the appointment of an Arbitration which the respondent refuted to reply to upon failure, the applicant filed the application with CADER for the compulsory appointment of an arbitrator. It was noted that the respondent's failure to cooperate in the appointment of the arbitrator was not proper, in light of the dual obligation imposed upon all parties, under the Arbitration clause, which was wisely expounded by Lord Macmillan in **Heyman vs. Darwin's**[33]

> *"Venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It's quite*

[32] Arbitration Cause No. 10 of 2007
[33] [1942]ALLER 337

*distinct - from the other clauses hut the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties, that, if any dispute arises, with regard to the obligation which one the one party has under taken to the other, such dispute shall be settled by a tribunal of their own constitution".*

Thus the respondent's silence or failure to cooperate in the appointment of an arbitrator amounts to forfeiture of the right to participate in constituting the arbitral tribunal. The centre found merit in the applicant's prayer that an arbitrator be appointed by CADER, in light of the failure of the procedural measures agreed upon by the parties. A similar decision was also decided in ***Roko Construction Ltd*** *vs.* ***Mohamed Hamid***[34]where the applicant lodged an application for compulsory appointment of an arbitrator under S.11 (4) C of the ACA, it emanates from the building contract, between the applicant and respondent for construction of a residential house, where the respondent failed to pay for works carried out, worth 552,050,000/=. The agreement had an arbitration clause set out in clause 36 (1). Thus the respondent's silence in the appointment of an arbitrator amounts to forfeiture of the right to participate constituting the arbitral tribunal. The tribunal found merit in the applicant's prayer that an arbitrator be appointed by CADER, and a result it appointed Justice Karokora as arbitrator in this matter.

In ***NIC Insurance Co. vs. Uganda Railways***[35] a Ugandan Railways train rammed into a factory causing serious chemical spillage from custom built tanks which were thankfully

[34] Arbitration Cause no. 11 of 2007
[35] Arbitration Cause No.16 of 2006

well insured. The prospect of wanting for a court to adjudicate on fact and award of damages was unacceptable to all sides as regardless of fault, both corporations stood to collapse financially as a result of the incident. Uganda Railways could in no way meet the cost of all repairs and damages for loss of business to the factory. The factory would have to close down if it could not have repairs and damages for loss of business to the factory. The factory would have to close down if it could not have repairs carried out without delay and get back into business. The factory's insurers recognized the risk to both parties and the need to get the factory running as quickly as possible. The case was in fact filed in court but there was not any intention of commencing proceedings. A settlement was reached through ADR whereby Uganda Railways was committed to a schedule of payments to cover the cost of damage to the factory and both companies remained in business.

With respect to Arbitration, as a distinct Alternative Dispute Resolution process, its substantive and procedural regulatory rules have been on our statute books from as far back as the 1930s yet until the new Act, its usage was very limited. One reason for this, as the parliament report noted, was limitless control that had previously been exercised over the arbitral process in ways that unfortunately turned it into a fertile ground for delay and abuse. This was combined with absence of an appropriate control system and over sight over arbitrators especially with respect to the fees charged.

It was necessary, in order to afford guidance to the court and parties, firstly, to ensure fulfillment of the goal of increased party autonomy and to lay down appropriate and user friendly rules of procedure to guide parties. Secondly to establish a flexible framework

for the arbitration tribunals to operate under and other default methods and thirdly, to promote equality and fairness in the process, parliament decided that the best way to achieve those goals was through a fully fledged institutional of ADR center, hence the establishment of the CADER[36]

The new statutory formulation sought to bring about a seismic shift in both the practitioners and judicial approach to arbitration. In addition to granting increased powers to arbitral tribunal, the Act also sets out new areas in which the courts are expected to intervene and supporting the arbitral process with the aim of advancing the development of ADR generally[37].

The Act also introduces new requirements for judicial re-orientation and adjustments in their previous attitudes towards ADR without affecting the well- known constitutional position of the high court having unlimited jurisdiction, the Act nonetheless declared in no uncertain terms in its Section 10 that,

*"except as provided in this Act, no court shall intervene in matters governed by this Act",*

The intention here, was to categorically, stipulate, within the body of the Act itself, certain areas in which courts intervention and assistance was needed and expected as opposed to the broad new area created under this new law in which the concept of party autonomy is expected to predominate without any interference. In those specific areas,

[36] Paper delivered to the postgraduate bar course studies LDC (29th July 2004)
[37] Pg 86 Uganda Law Journal Vol. 1 2003

the court is expected indeed required to yield to the intentions of the parties or the arbitral tribunal. In this sense, the Act has clearly and unambiguously limited the slope of courts intervention to only those areas explicitly invited to intervene[38].

This too, is to be accomplished in a spirit of complimenting and supporting the ADR movement rather than frustrating it. As always courts are still expected to exercise minimum but appropriate oversight to ensure overall integrates propriety and relevancy of ADR process to the overall civil judicial system. This admitted moral provision in section 10 of the Act does not constitute an ouster of the court's jurisdiction as some have unfairly asserted. It simply points to the permissible realign of exercise in the Act requiring court intervention and other left to parties or tribunal's discretion[39].The Act in fact has many sections in which courts are expected to intervene.

A few other changes brought about by the new law as regards to Arbitration, can be illustrated below under the repealed law (Cap 55), a dispute as to whether the contract of which an Arbitration clause forms an integral part is illegal or void, was not one which the arbitrators were competent to decide the rationale there was that the faint of illegality attached every part of the contract and if the whole then a part thereof alone could not stand on its own. The arbitrator could not therefore cloth him or herself with the power to decide the questions of his or her own jurisdictions because of this, the courts would in

[38] Pg 87 Uganda Law Journal Vol. 1 2003
[39] Pg 88 Uganda Law Journal Vol. 1 2003

theory be faced with many applications contesting the jurisdiction of the tribunal by challenging the very existence and validity of the arbitration agreement there was also clearly the possibility for above through frivolous applications contesting jurisdiction and therefore inhibiting the growth of arbitration as an effective dispute resolution mechanism.

Under the new Act of 2000, S.17 makes a radical departure from that previous position. It stipulates that the arbitral tribunal may rule on its own jurisdiction including ruling on the objections with respect to the existence or validity of the arbitration agreement.

By this provision, the Act brought into the domain of Ugandan law the principle of Kompetenz - Kompetenz and the principle autonomy of the Arbitration agreement. The Kompetenz-Kompetenz principle specifically empowers an arbitral tribunal to rule[40] on objections to its jurisdiction. This indeed marked the departure from the traditional rule that an arbitration tribunal being a creature of contact cannot rule on its own very existence.

The new concept, of autonomy of the Arbitration agreement complements the power of the tribunal to determine its own jurisdiction by stipulating that in making a determination concerning legality, the tribunal is permitted to treat the Arbitration clause as an agreement independent of other terms of the court act.[41] Section 6[42], of the Act empowers a judge or magistrate before whom proceedings are being brought in matters

[40] Pg 88 Uganda Law Journal Vol. 1 2003
[41] Cap 171 Laws of Uganda
[42] Cap 4 Laws of Uganda

which are subject of an arbitration agreement, to refer the matter back to arbitration unless he or she finds the Arbitration agreement null and void, imperative or incapable of being performed, or finds that there in fact no dispute between parties with regard to matters agreed to be referred to arbitration[43].

There is no doubt that the new law, recourse to the courts against an arbitral award is quite limited. The grounds on which an award can be challenged under S.35 are deliberately intended to be very narrow in domestic Arbitrations; the occasions for stating a case for the court on question of law have been greatly circurnscribed under the new law. The new law also underscores the parliamentary intention to allow parties greater freedom to substitute courts with private arbitrators courts have been improved to give due deference to the parties choices[44]. Undoubtedly the intent of parliament can only be given effect if the greater autonomy extended to parties and to the arbitral tribunal are properly reinforced and supported by corresponding judicial recognition and deference. This is clearly the spirit of the law.

[43] S.6 (1) (a)&(b) of Cap 4 Laws of Uganda
[44] S.4 (3)and 20 supra

## CHAPTER FOUR

### 4.0 The Practice and Procedure of Arbitration in Uganda.

### 4.1 Introduction

A vibrant commercial sector is critical to the overall development of a nation in order for the sector to contribute to development, there is need for an efficient and effective commercial legal system where enforcement of contracts and collection of debts is guaranteed and effected in a speedy and cost effective manner[45]. The Uganda Commercial Justice sector has to some extent registered some progress towards creating a conducive environment that supports the growth of the private sector conducting business transactions among the things done is reforming some of the commercial laws and judicial processes. Economic growth is expected to raise where the investors and the business community in a country have an enforceable dispute resolution mechanism to deal with contracts that have faulted or gone bad.

In order to encourage investors to do business in Uganda, there is a need, in addition to account system to evolve other dispute resolution mechanisms that are efficient and accessible, faster and cheaper. Arbitration is the first solution.

### 4.3 Arbitration proceedings.

The whole jurisprudence of arbitration is founded on the following principles namely that, the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expenses, the parties should be free to agree on

[45]Pg143 Uganda Living Law Journal Vol.2 No.2 2005

how their disputes are resolved subject to such safeguards and laws as are necessary in the interest of the public and there should be minimal interference by the courts of law for the smooth conduct of arbitration.[46]

**4.4 Commencement of Arbitral Proceedings.**

Arbitration proceedings are usually commenced by one party to the arbitration agreement serving on the other party a notice of dispute requiring the latter to appoint an arbitrator or to agree to the appointment of an arbitrator. Sometimes an arbitration agreement stipulates a time within which a party who wishes to commence arbitration proceedings should act.

Where the prescribed time has lapsed a party who wishes to commence proceedings may apply to court for an extension of time in accordance with the provisions of the law of limitation as applies to matters relating to arbitration proceedings. Section 6 of the Law of Limitation Act 1971 provides for an extension of time. This provision was applied in to practice in ***Western Construction Company Ltd vs. UCB***[47],the parties in this case entered into a contract for construction of a proposed bank premises for the respondent in 1975.The contract was suspended in 1979 and the applicant made a claim for payment for work done, which the respondent disputed. The time prescribed for arbitration expired before the arbitration process was complete, leading to the present application for time for the proceedings. It was held that the applicant failed to prove that an arbitration agreement existed between the parties. That therefore there was no basis or jurisdiction for the extension of time to be granted. That once a time within which arbitration

[46] Merkin.R.
[47] (1997-2000)UCLR459

proceedings have been set, but the same is not adhered to, the parties may apply to court for the extension of the same. The court has discretion to allow or disallow the same but where reasons for the delay are justifiable; the court will not hesitate to honor the application.

### 4.5 The Arbitral Tribunal

Arbitral tribunal means a sole arbitrator or a panel of arbitrators and an umpire[48].The role and function of the arbitral tribunal is to determine a dispute before it on the basis of the evidence and facts supplied to it by the parties, in a judicial, fair and impartial manner. To that extent its function are similar to those of a judge, in other respects, however, its role differs considerably from that of a judge particularly, on matters of jurisdiction and power.

Under the ACA, the composition of the arbitral tribunal is provided for under S.10 read together with paragraph 13 of the First Schedule of the Act.

### 4.6 The Seat of Arbitration

The seat of arbitration is the place expressly or impliedly designated as such. It is a juridical seat of the arbitration designated by the parties or by arbitral tribunal or other institution or person so authorized by the parties, or by the arbitral tribunal in absence of any such designation having regard to the parties' agreement and circumstances of the case.

[48] S.2 (1)(c) of ACA

The seat of arbitration is important for several reasons.Firstly,it the parties and the arbitral tribunal to consider matters relating to the national law.Secondly,an is award deemed to be made in the place of the seat of the tribunal and as such enables the parties concerned to determine whether the award is foreign or not and finally, the seat of arbitration will determine whether the agreement is domestic or non-domestic which has implications on the matter of stay of proceedings, enforcement of the award and challenge of the award.

In ***U.P.Ban Nigam vs Bisham AIR***[49] it was stated that the seat of arbitration is also known as the venue, or place of arbitration and that in fixing the seat of arbitration, the tribunal must take into account all material circumstances including the residence of the parties, their witnesses, the subject matter of the reference and generally, the balance of convenience and advantage.

In Uganda, the practice is that all matters referred to CADER are handled from its premises thus its offices are the seat of arbitration.

### 4.7 Stay of Proceedings

Parties to an arbitration agreement can apply to court to stay proceedings either before the Magistrate Courts or the High Court[50]. The party applying for stay of proceedings must prove to the satisfaction of court that among others that there is an arbitration agreement in force, that that the party applying is a party to the arbitration, that he or she was willing

[49] (1985) ALLER 351
[50] S.5 ACA

and ready to do all things necessary for the proper conduct of the arbitration, that the proceedings are in respect of a matter agreed to be referred and that there is no sufficient reason why the matter should not be referred to in accordance with the arbitration agreement[51].

In ***Concorp International Ltd .vs. East and Southern African Trade & Development Bank***[52] it was stated by Justice Okello that where in arbitration agreements are as a result of a private mutual agreements. That any of the parties to the agreement could under S.5 and S.6[53] apply for stay of proceedings before court to enable them pursue the arbitration course on which they have agreed.

It can be said from the above case that courts uphold the principle of Freedom of Contract between parties and hence their limited powers in arbitration proceedings.

**4.8 The award**

The arbitral proceedings results into an arbitral proceedings into an arbitral award. This is the decision of arbitral tribunal after the conclusion of the proceedings. There is no statutory prescribed form and content of an award and the parties are free to agree on the form of the award. Where there is no such agreement Tweddale[54] sets out the minimum standard that the form of an award should take. He states that the award must:

a) resolve all issues referred to the arbitration

[51] Russell on Arbitration,1997.
[52] Civil Appeal No. 11 of 2009
[53] ACA,Cap 4 laws of Uganda
[54] Tweddale K..,*et al* opp cit p.170

b) avoid extraneous issues going beyond the jurisdiction of the arbitrators

c) be final and unconditional

d) be certain and capable of performance by the parties

e) be capable of enforcement by the parties.

An arbitral award, that does not meet such a criteria can be said to be irregular which can be taken as a ground for misconduct on the part of arbitrators.

An arbitral award is final and binding upon all the parties to the arbitration. In the case of **Arab African Energy Corp vs. Olioproddukten Nederland BV**[55] it was held that subject to the agreement by the parties is final and binding. The parties may however enter into an exclusion agreement to the effect that the award is not subject to any challenge by the parties. Where there is no such agreement the parties have a right to challenge the award.

### 4.9 Powers of Court in relation to Arbitral Proceedings

The whole purpose of opting to arbitration is to get away from court process. One of the principle tenets of arbitration law is that courts intervention in the arbitration should be minimal. The role of court is limited to one of support. This proposition flows from the contents of the UNCITRAL Modal Law. Section 9 of ACA provides "except as provided in this Act, no court shall intervene in matters governed by this Act". Courts intervention

[55] (1983) 2 Lloyds Rep 417

is sought for purposes of setting aside an award[56]and for the recognition and enforcement of awards[57].

Courts powers can also be exercised where the arbitral tribunal does not have the corresponding powers to make such orders or is unable to act efectively.Ineffectiveness of the arbitral tribunals to issue those orders is where the order is required before the arbitral tribunal is constituted[58]and or where employing the arbitral process would lead to undue delay.

### 4.10 Arguments for the use of arbitration in commercial dispute resolution

First and foremost, there has been massive total acceptance of ADR in the commercial court both by the practicing advocates and the litigants. The usual court litigation have been shuttered and ousted by the alternative dispute resolution (ADR). This new culture ADR has taken root of the commercial courts stock of case roughly 1100 case filed every year not to mention a backlog of some 1700 cases, around 80% are resolved through ADR and only about 20% through normal litigation.

Second, thanks to Order 12[59], the commercial court efficiency in case disposal has become self evident. The efficiency of the courts work is measured through the number of cases disposed off per month /year; the average time taken to dispose off a case, the number of adjournrnents granted per case, before the case is finally disposed of e.t.c. The

[56] S.34 of ACA
[57] S.35 of ACA
[58] Channel Tunnel Group Ltd vs. Balfour Beaty Construction Ltd [1193]A.C. 334
[59] Civil Procedure Rules S.I.71-1

commercial court has been diligently tracking these criteria over the last two or three year. Our records reveal the following results:

- On averange of 120-150 cares being disposed of every month;
- On the average approximately 1.69 adjournments for only per case.
- 8.79 months completion time per case (compared to *2-3* years in other courts.)

Arbitration often allows you to resolve disputes, more quickly, and cheaply than by going to court, instead of judges or jurist, arbitrators decide if wrong doing occurred and how to correct or compensate you.

When the Arbitration is over, the decisions of the arbitrators are final and not subject to appeal, if you are unhappy with the result, you cannot go to court to try again. The arbitrators' decisions can only be challenged on very limited circumstances.

Simplified procedures, such as lack of formal pleading rules, the absence of most pretrial motions, and simplified discovery, can substantially reduce the cost of obtaining decision.

In Arbitration, when a panel of arbitrators hears the case, usually those arbitrators are of various professions and as a result it is often easier to prevent case involving industry practices or complex damages model to an arbitration panel than to a judge or jury.

Another advantage of Arbitration is that it has proved to be a truly people oriented system of judicial resolution of disputes. Prior to the introduction of Order 12, there were a few rules of procedure governing mutual settlement of disputes by the parties. In particular

Order 13, rule 6 and order 22, rule 6. However, both rules contained inherent rigidities, which manifest vestiges of the age long adversarial system of litigation. Order 13 required the parties' agreement to be started in writing in the form of an issue, for the court to adjudicate after a trial of these agreed issues order 22 allowed the countries to adjust or compromise their claims in the suit. Nonetheless, there was still a requirement for "proving" such a compromise to the court and for the relevant party to make an application to the court in that behalf before the court could record its satisfaction and pass a decree accordingly.

The benefits of Arbitration as identified above are that it can be cheaper and quicker than court cases, it can expand access to commercial justice while reducing the load on the court system and it can allow for certain cases to be adjudicated over by specialists who are not judicial officers such as accountants for debt disputes or engineers for construction disputes. Arbitration has been praised as being expeditious, this is supported by section 31 (1)[60] that provides that the arbitral tribunal is supposed to give an award into two months from the commencement of the proceedings. The award, which is binding, on the parties should contain the decision of the panel and their reasons for the decision.

Arbitration has also been praised for being a confidential process and the parties some degree of control over the dispute.

There is much to be said also at commercial arbitration as a method of resolving disputes. First it gives each party an opportunity to participate in the selection of

[60] ACA Cap 4 Laws of Uganda

the arbitral tribunal one or more arbitration may be chosen for their special skill and expertise in commercial law. An experienced arbitral tribunal of this kind should be able to grasp quickly the silent issues of law in dispute and to parties as well as offering them the prospect of a sensible award. Secondly a reference to arbitration means that the dispute is likely to be fought on a neutral territory rather than a home ground of one party or the other.

The other advantage of arbitration lies in its flexibility, procedures can be adapted to fit the dispute being rather than the dispute being made to fit available procedures. Arbitration in commercial disputes, unlike court proceedings in court of law is essentially a private proceeding. Dirty linen maybe washed but it will be washed discreetly and not in public.

Finally there is the fact that if no settlement between the parties is reached during the course of the arbitration the arbitral tribunal will come to a decision on the dispute in form of an award. A point needs to be made out of this, that the end result of the arbitral process if carried out to it's conclusion will be a decision and not (as in mediation) a recommendation which parties are free to accept or reject as they please.

**4.11 Arguments against the use of Arbitration in the resolution of commercial-disputes.**

There are also some disadvantages of arbitration as opposed to litigation particularly in terms of summary remedies cost.

Arbitration is not necessarily a cheaper method of resolving disputes than litigation. First the fees for filling and the expenses of arbitrators (unlike the salary of a Judge) must be paid by the parties.

Secondly it may be necessary to pay administrative fees and expenses of an arbitral institution and these too can be substantial particularly when they are assessed by reference to the amount in dispute.

Thirdly there is always necessity to hire rooms for meetings and hearings, rather than making use of public facilities of the courts.

Another disadvantage of an arbitration panel, and in particular the industry members, is that he or she may be more sympathetic to the broker advisor than a jury would be. In court you have the right to conduct depositions and much more extensive documentary discovery than in most Arbitration, you have the case decided in accordance's with the law, and you can appeal a judgment that you think is contrary to law .In Uganda, arbitrators do not have to follow the law, through they often try to in many cases. The right to conduct extensive discovery of the right to appeal an adverse judgment, and the right to a jury trial will outweigh the advantages of arbitration.

Limited powers of Arbitrators, is also another shortcoming of Arbitration .An arbitral tribunal must depend for its full effectiveness upon an underlying nations system of law. The powers accorded to arbitrators, whilst usually adequate for the purpose of resolving the matter in dispute, fall short of those conferred upon a court of

law. Arbitration has also been criticized as being similar to litigation sometimes in form of mini court in most cases the result is a win/lose situation.

Another challenge is a strong traditional perception that litigation is more effective and better that arbitration.

Arbitration may be used as a time wasting fishing expedition.

### 4.12 Conclusion

In conclusion therefore though arbitration has short comings, I think overall it has made significant progress from its modest beginnings. In the words of Dr; Maggie Kigozi Executive Director of the Uganda Investment Authority,

> *"The operations of CADER have positive effect on commerce and promotion of business and investment prospects ,and have made our work of marketing Uganda as an investment destination easier Uganda Investment Authority commands the reforms of the commercial court……*

Mr. Abid Allam the then Chairman of the Uganda Manufacturers Association, further

added.

> *"UMA commends the governments' initiative in setting up the commercial court and CADER. U.M.A views the committee as being*

*instrumental in putting across the views of stakeholders and discussing issues of concern for the private sector. UMA is committed to ensuring that the commercial court achieves the purpose for which it was established."*

# CHAPTER FIVE

## 5.0 Challenges, Recommendations and Conclusions

### 5.1 Emerging challenges in Uganda.

The World Bank has identified obstacles to economic growth to include few judicial officers to handle disputes, bureaucratic judicial procedures, delays in enforcement of contracts, lack of commercial awareness especially of commercial law, and practice as demonstrated by Judges and magistrates. Problem of enforcement of judgments, corruption or corrupt tendencies high costs are in respect of recovery of debts in courts, lawyers' fees and court filing fees[61] Arbitration has its challenges and the following are some of them that have been experienced.

The first is intransigent and unreasonable parties or their legal advisors also are not willing to try arbitration. In the case of ***S.S. Enterprises Ltd and another vs. Uganda Revenue Authority,***[62] Counsel for the Uganda Revenue Authority (URA) argued that only the Board of Director of the Uganda Revenue AuthorRS7 had the power to submit to Arbitration and so it was impossible for Uganda Revenue Authority to submit to Arbitration. It was held that internal institutional processes were not a good reason to avoid Arbitration.

The second challenge is the use of Arbitration to delay justice or to act as a "fishing" expedition to establish what is possible. Here the party at fault is just using ADR as a

[61] Pg 90 Uganda Living Journal Vol.1 2003
[62]

time wasting mechanism even where there's a fine. The enforcement cost has not been very succsessful because of the absence of a clear mechanism to do so.

The third challenge is, when can it be said that ADR is not appropriate and so a hearing in court should go ahead? The practice on the ground has been such that suits bound under O.36 are not suitable expedited mode of dispute settlement. However, in recent times there has been an increase with a view of defeating a referral to arbitration. The courts should be kept to see that ADR is truly appropriate before it hears the case in **Hurst Lemming**[63] , where LightMan J, held that the following illustrates insufficient reasons: Certainty of being right, undue cost and serious allegations.

The fourth challenge is the availability of competent trained personnel to carry out Arbitration. Arbitration being a relatively new method of dispute resolution requires a push to ensure its success in the case of Uganda. Many of these comp1ainants go to form rather than substance as it is not clear whether there should not be a minimum age for an arbitrator nor should he or she be a lawyer. However, the stature and confidence in the arbitrator is important.

Perhaps the biggest challenge to Arbitration is training. It's important to change the attitude that Arbitration is a done best option that should be used purely as an exercise of "good faith". Arbitration should be taught as a first line dispute resolution mechanism.

**Future challenges**

[63] [2003]

a) **Immediate**

i) How to access financial resource to:

a. Improve salaries in order to retain the now experienced and valued Added personnel.

b. Expand CADER office space

c. Extend the pilot scheme this time to all committed districts.

ii. Improve on settlement rate

iii. Reassure lawyers or private sector or investors' confidence in arbitration performance.

a) **Short term**

i. Maintenance of standards of training

ii. Maintenance and improvement of standards at performance

iii. Provision of Arbitration services to other courts.

b) **Medium term**

i. Monitoring and evaluation of arbitrators.

ii. Monitoring "user" Satisfaction

C **Long term**

i. Maintenance of standards of training

ii. Maintenance of performance of arbitrators / judges / legal counsel

iii. Ensure ADR available as first stage in any civil / commercial disputes.

### 5.2 Recommendations

Despite the progress made to date, more needs to be done to create a comprehensive and self sustaining arbitration system in Uganda. There's still a greater need for more intensified public campaigns and information dissemination to increase awareness about arbitration process and to help to instill a culture that seeks to resolve disputes more through arbitration process than through conventional court litigation.

Alot needs to be done to inform and interest a wider number of potential participants and to provide more advanced training, in particular to lawyers, law students, judges, would-be arbitrators, the business community and other court users of these services.

CADER is a nascent institution that still needs a significant level of support in order to meet the nation's needs for institutional support for arbitration. It will require the collective effort of all who are interested in this field to bring about the desired outcomes. With respect to credibility of the process, all involved, including arbitration service users, parties to commercial disputes and their counsel and even government must depend their commitment to a collaborative approach to dispute resolution understanding that yes, humans are a competitive species, but that the best resolutions often come when there is a

striving to find outcomes that acceptably address the needs of all involved. All the involved parties must in turn be prepared to unlearn some of the practices developed over many years of emphasis the traditional dispute resolution approaches. They must likewise be ready to learn and accept the newer arbitration imperative.

To this end, **CADER** has established a comprehensive code of ethics for all its neutrals that lays out internationally recognized standards of conduct and ethical rules to guide its roster members and users within the arbitral process, each arbitrator is required to sign a declaration of neutrality and independence and is required to abide by CADER's strict confidentiality requirements prior assuming office.

Access donor funding to invest in CADER salaries in order to prevent them from leaving for better paid employment elsewhere. After 12 months only CADER's in- house arbitrators have unparalleled knowledge and experience which must not be lost. Need to extend pool of in-house arbitrators' statistics of 40% settlement rate with only 4 arbitrators.

Improve feedback on arbitration to establish, nurture of disputes, any common factors which indicate particular difficulties that would offer guidance as to where arbitrators may need support or guidance or more training and parties' level of satisfaction.

Publish settlements rates, get parties feedback on process and public genuine comments. Be mindful of the vocabulary. The focus is to steer intransigent legal counsel, prticularly

away from treating the arbitral process as they would in litigation. Therefore the use of words is psychologically important.

Introduction of compulsory ADR (arbitration) courses within university curriculum and continuing legal education for lawyers. Once trained, lawyers have no excuse to prevaricate, consider taxation of costs for parties not co-operating in the arbitral process.

Avoid stagnation. Ensure regular workshops for qualified arbitrators to exchange experience learn new techniques, invite visiting trainers to expand knowledge of other arbitration schemes and tools for resolution of disputes.

Maintain links with international training faculties to ensure local training programs in connection with international standards. This will assist lawyers and judicial officers remain in touch with international developments in Arbitration to ensure that practice.

### 5.3 Conclusion

Uganda benefits from rebirth as a nation. She entrusts its officers and has faith in its youth. Her attitude of open mindness to developments in other parts of the continent and in other parts of the world grants her flexibility and dynamism. Among the judiciary, there are truly men and women of vision who inspire those who work under them. The domino effect of enthusiasm, confidence and determination is transparent but very tangible. The success of arbitration can boast unparalleled success in facilitating settlements of a commercial nature.

Although the cost of waiting line with the rest of the disputing public for a case to be called up is a hidden cost that cannot be ascertained until settlement.

Such a success is the overall success of the initiative in the commercial court that the World Bank justice, law and order sector recommends roll out of the reforms to other high court divisions.

It's important that we, in Uganda, grasp opportunities such as to cooperate with and contribute in any way we can to use ADR most especially arbitration for commercial disputes throughout the country.

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