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International Arbitration 2022

Uganda: Law & Practice and Trends & Developments

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UGANDA

Law and Practice

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1. GENERAL

1.1 Prevalence of Arbitration

International arbitration is an established method of resolving disputes in Uganda. The prevalence of international commercial transactions involving domestic parties has significantly contributed to positive attitudes towards the use of international arbitration to resolve commercial disputes.

National Llaw

The existing legal framework supports international arbitration. For example, the Arbitration and Conciliation Act (ACA) Chapter 4 is modelled on the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Rules of Arbitration.

The High Court in Dr. Alfred Otieno Odhiambo v Meduprof-S BV Miscellaneous Application No. 665 of 2020 endorsed the application of the UNCITRAL Model Law as to the intent of arbitration under the ACA by emphasising the finality and binding nature of international arbitration as a method of dispute resolution.

International Law

The ACA specifically provides for the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.

Parts III and IV of the ACA incorporate the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

These international law instruments underpin the prevalence of international arbitration in Uganda by creating a stable and predictable environment for international commerce to thrive in Uganda.

Uganda is also a party to several bilateral and multilateral treaties which provide for dispute resolution by international arbitration. For example, the Treaty for the Establishment of the East African Community ("EAC Treaty") establishes the East African Court of Justice (EACJ).

The EAC Treaty incorporates an arbitration regime pursuant to which the EACJ has arbitral jurisdiction to hear and determine any matter arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the court. The arbitral proceedings are usually governed by the Arbitration Rules of the EACJ.

The Judicial System

International arbitration is also supported by the judicial system in Uganda. Section 9 of the ACA expressly limits the extent to which the courts can intervene in matters subject to arbitration. This provision has been interpreted in several decisions of the courts as an "ouster clause".

The Court of Appeal in Babcon Uganda Limited v Mbale Resort Hotel Limited, Civil Appeal No. 06 of 2016 stressed that the law has chosen to reinforce freedom of contract and allow the parties or one of the parties to enforce an existing arbitration agreement as the only mode available to the parties to solve their dispute, and to that extent oust the jurisdiction of the courts to entertain such a dispute.

In an earlier case of the Supreme Court, Fulgensius Mungereza v Price Water House Coopers Africa Central Civil Appeal No. 18 of 2002, an appellant party attempted to resist international arbitration, arguing that the arbitration clause in the contract was inoperative and incapable of being performed on account of his inability to afford arbitration in London under the Rules of the London Court of Arbitration.

The Court, holding the appellant party to his contractual bargain, held that the party's inability to afford arbitration abroad did not fall within the exceptions to justify a refusal to refer the matter for resolution by international arbitration.

Arbitral Institutions

The ACA predominantly establishes the Centre for Arbitration and Dispute Resolution (CADER) as a domestic and international arbitral institution. CADER has been in existence since the enactment of the ACA in 2000 and generally supports international arbitrations.

More recently, the International Centre for Arbitration and Mediation in Kampala (ICAMEK), a new international arbitral institution, has emerged. ICAMEK is making positive impact towards the general understanding and use of international arbitration as a dispute settlement mechanism.

Several domestic and international parties continue to make references to arbitration under the ICAMEK Rules of Arbitration.

Although international arbitration is prevalent in Uganda, the arbitral seats chosen have traditionally been outside Uganda. The general perception is that Uganda is not a sufficiently developed seat of arbitration to support international arbitration.

The Existence of Other Dispute Settlement Mechanisms

Despite the prevalence of international arbitration, domestic parties still generally resort to traditional litigation as the more favoured dispute settlement method. The prevailing corporate attitudes are that international arbitration is costly, complex and too sophisticated.

Other alternative dispute settlement methods such as mediation and conciliation are increasingly being used by domestic parties for dispute settlement. For example, some of the leading financial services providers have aggressively embarked on the use of negotiations, mediation, and commercial conciliation to resolve their disputes.

The growing use of commercial contracts usually involving cross border transactions or where a party is a foreign entity contracting with a domestic party are the most common bases for the prevalence of international arbitration.

Its prevalence is also generally influenced by the different commercial and legal expectations of parties, the parties' cultural approaches, political ramifications and geographic situations, all of which too often dictate the parties' desires to go to international arbitration.

1.2 Impact of COVID-19

The COVID-19 pandemic has influenced the administration of justice in Uganda in many ways, particularly in the conduct of arbitral proceedings. At the peak of the pandemic, there was generally a reduction in arbitration activity.

Challenges arising from COVID-19

Contact-sensitive businesses in tourism, hotels and travel were generally the most affected sectors due to social distancing rules and travel restrictions on people travelling to and from Uganda. A full lockdown was imposed on the country for an aggregate period of approximately four months.

For parties who had already scheduled hearings abroad or in Uganda at the peak of the pandemic, it was impossible to physically attend those proceedings. Arbitral tribunals were forced to adjust their procedural orders and timetables or engage with the parties to agree fresh timetables.

Merits hearings which had already been scheduled were suspended in cases where parties were unable to quickly access suitable technology to attend hearings.

Challenges relating to access to evidence, key witnesses and suitable technology have continued to occur. There has therefore been an increased demand by domestic parties for amicable settlements or partial settlements of claims using a combination of different dispute resolution mechanisms such as mediation, conciliation, and negotiations. In many cases, these have been successful.

The negative economic impact of the pandemic has led to the inability of parties to afford the use of international arbitration. For example, in one case filed with the LCIA just before the pandemic, the tribunal was forced to treat the claims as withdrawn from the tribunal's jurisdiction because of the failure of a claiming party to pay advance deposits to the LCIA.

There was an increase in the number of security for costs applications, as well as requests for extension of time within which to lodge advance deposits. Tribunals therefore had to balance between the right to access to justice and due process.

Use of Technology

The impact of the pandemic has also led to the increased use of technology in virtual hearings for procedural efficiency. This has, in turn, resulted in the incorporation of provisions for the use of virtual hearings in parties' arbitration agreements, influenced partly by the Africa Arbitration Academy Protocol on Virtual Hearings in Africa.

Arbitrations in Kampala have been innovative in overcoming the pandemic's challenges by constantly adapting to the use of technology. Section 3(3)(b) of the ACA stipulates the form of an arbitration agreement and therefore provides a basis for parties to agree to conduct proceedings virtually through a separate agreement prior to the commencement of proceedings.

Most arbitrations seated in Uganda have now adopted the new normal format for conducting proceedings and this will continue for the foreseeable future.

1.3 Key Industries

The construction industry has experienced significant international arbitration activity between 2021-22 due to the rise in claims. This is because public health restrictions enacted into law resulted in disruptions and delays in the delivery of construction projects.

Although construction sites continued with work at the peak of the pandemic, there were evident disruptions in construction work and barriers to achieving programme activities. These resulted in claims for extension of time, prolongation costs, delay claims and liquidated damages.

Many of these claims failed at adjudication stage but were quickly advanced to international arbitration under various contractual provisions.

The energy and electricity industries have also seen a minimal rise in international arbitration activity in 2021-22 because they were generally stable due to the essential nature of the services provided. However, disputes in these industries are likely to arise because of recent debates regarding the viability of concession agreements.

1.4 Arbitral Institutions

There are two main arbitral institutions in Uganda. These are, CADER and ICAMEK, both of which are briefly discussed in **1.1 Prevalence of Arbitration**.

CADER

CADER is established by law under the ACA. CADER was set up with the support of the government, and it was expected that funding from the government would continue. However, over the years, the institution has suffered from chronic underfunding.

For example, for many years, CADER did not have a governing council in place mandated to perform the functions established under the ACA.

In one recent case, International Development Consultants Limited v Jimmy Muyanja & 2 others Miscellaneous Cause No. 133 of 2018, the High Court found that the powers of appointment of arbitrators cannot be exercised by the Executive Director of CADER, but by its governing council.

This decision has led to the uncertainty and unpredictability of the activities of CADER. As a result of this, there has been a declining trend in the use of CADER as an arbitral institution.

ICAMEK

ICAMEK is a relatively new arbitral institution established in 2018. Its establishment was championed by the financial services sector and the Uganda Law Society. In 2020, the Minister of Justice officially established ICAMEK as an appointing authority under Section 2(1)(a) of the ACA.

The Minister issued an official notice of this appointment under the Arbitration and Conciliation (Appointment of International Centre for Arbitration and Mediation in Kampala as an Appointing Authority) Notice 2020, Legal Notice No. 4 of 2020.

There has been a significant number of claims filed by both domestic and international parties with ICAMEK. There is also an increased number of foreign international arbitrators on the ICAMEK panel. Given its growing reputation in the region, there is an increased number of international arbitrations being filed with ICAMEK.

It remains to be seen whether more private international arbitral institutions will be established with the increased international arbitration activity in Uganda.

1.5 National Courts

Section 2(1)(f) of the ACA designates the High Court as the court empowered to hear disputes related to international arbitrations and/or domestic arbitrations.

In practice, Rule 8 of the Commercial Court guidelines of 2005 provides for the divisional jurisdiction of the High Court (Commercial Division) to determine commercial questions arising out of arbitration.

2. GOVERNING LEGISLATION

2.1 Governing Law

The ACA governs international arbitration in Uganda. The ACA is, to a great extent, based on the UNCITRAL Model Law, in so far as it emphasises the overarching principles of international arbitration, notably party autonomy, the finality and binding nature of arbitral awards, minimal court intervention in arbitrations and foreign award enforcement. These tenets were absent in the Arbitration Act.

To the extent above, the ACA does not diverge significantly from the Model Law.

2.2 Changes to National Law

There have been no significant changes to the national arbitration law in the past year. The last amendment to the ACA was in 2010. However,

in June 2021, a study report was issued by the Uganda Law Reform Commission.

The study was undertaken to review and examine the adequacy of the ACA to ensure effective, efficient arbitration and conciliation procedures and promote Uganda as a leading choice for international commercial arbitration.

The Uganda Law Reform survey resulted in some recommendations to clarify certain aspects of the law. For example, key recommendations include a comprehensive definition and form of an arbitration agreement, provision on immunity of arbitrators and the power of an arbitral tribunal to grant and enforce interim and preliminary measures.

It remains to be seen whether the Parliament of Uganda will amend the law to include the recommendations of the Uganda Law Reform Commission.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

An enforceable arbitration agreement should be in writing, according to Section 3 of the ACA. This is the case regardless of whether the agreement is contained in a contract as an arbitration clause or whether it is a submission agreement separate from the main contract from which a dispute has arisen.

The law further provides that an arbitration agreement should be signed by the parties regardless of whether it is contained in a parent contract as an arbitration clause or a submission agreement.

Notwithstanding the above formal requirements, an enforceable agreement to arbitrate can be deduced from correspondences between the parties that indicate its existence, like letters, telegrams, emails or other means of telecommunication, provided that the substantive requirements for establishing a contract are made out.

It remains to be seen whether the formal requirements above will be definitively required in light of the international debate on the validity and enforceability of oral arbitration agreements.

3.2 Arbitrability

A dispute is non-arbitrable where it offends the public policy of Uganda or where a particular law provides a specific mechanism for dispute resolution.

Section 34(2)(b) of the ACA empowers the court to set aside arbitral awards where the subject matter is not capable of settlement by arbitration under the law of Uganda or where the award is in conflict with the public policy of Uganda.

The list of non-arbitrable matters is not exhaustive. However, in practice, non-arbitrable matters include tax disputes, criminal matters, land disputes regarding fraud, family and divorce matters, constitutional disputes and matters where a statute specifically provides for a dispute resolution mechanism other than arbitration.

Tax Disputes

Article 152(3) of the Constitution of Uganda provides that Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes. In Heritage Oil & Gas Ltd v Uganda Revenue Authority Civil Appeal 14 of 2011, the Court held that the reference of a tax dispute to international arbitration would be improper.

The same issue arose before a London-seated UNCITRAL arbitral tribunal under the auspices of the Permanent Court of Arbitration in Heritage Oil & Gas Ltd v Government of Uganda PCA Case No. 2011-12 and 2011-13. The tribunal

declined jurisdiction and dismissed the claimant's tax claims for lack of jurisdiction based on public policy grounds expressed by reference to the provisions of the Income Tax Act.

In Rabbo Enterprises (U) Ltd v Uganda Revenue Authority Civil Appeal No. 12 of 2004, the Supreme Court confirmed the supremacy of the Tax Appeals Tribunal as the forum with original jurisdiction to hear tax disputes, in line with Article 152(3) of the Constitution of Uganda.

Other Limits on Arbitration

Under Sections 4 and 5 of the Penal Code Act, only Ugandan courts have the jurisdiction to try offences within Uganda, as well as some offences committed by Ugandans outside Uganda, like treason and misprision of treason.

Similar provisions exist for protection of minority shareholders' rights under Section 248 of the Companies Act, 2012. The provision suggests that an aggrieved minority shareholder may petition the court for an order that the company's affairs are being conducted in a manner which is prejudicial to its members' interests.

Courts' Assessment of Arbitrability

In determining the approach to whether a dispute is arbitrable, the court will look at the nature of dispute. Generally, commercial and contractual disputes are arbitrable in Uganda. The court will normally focus its analysis on the validity of the arbitration agreement to establish that an arbitral tribunal has jurisdiction to determine the dispute.

The courts also consider the law applicable to questions of arbitrability of the subject matter of arbitration. For example, a dispute may be arbitrable under the law of a particular country but may not be arbitrable in Uganda.

The courts therefore will often consider the restrictions or limitations imposed by the law to determine whether a dispute can be referred to and resolved by arbitration.

3.3 National Courts' Approach

The approach of national courts with respect to determining the law governing the arbitration agreement will be to look firstly to the parties' agreement as to the choice of law governing the arbitration agreement.

In the absence of an express agreement on the choice of law, the prevailing position is that the court will resort to the system of law most closely connected to the arbitration agreement. This approach has been recently confirmed in the decision of Lakeside Dairy Ltd v International Centre for Arbitration & Mediation Kampala and Midland Emporium Ltd MA No. 0021 of 2021.

With respect to the enforcement of arbitration agreements, the courts will look at both the formal and substantive validity of the arbitration agreement based on the test laid out in Section 5(1) of the ACA. A valid arbitration agreement will be enforced provided it is not null and void, inoperative or incapable of being performed.

In British American Tobacco Uganda Ltd v Lira Tobacco Stores HCMA No. 924 of 2013, the Court held that its only consideration in determining a reference to arbitration is whether the arbitration agreement is null and void, inoperative or incapable of being performed, or whether there is a dispute to be referred to arbitration.

In the line of decisions available, the courts in Uganda always refer disputes to arbitration provided there is a dispute within the terms of a valid arbitration agreement.

3.4 Validity

An arbitration clause may be considered valid even if the rest of the contract in which it is contained is invalid. Section 16(1) of the ACA not only recognises that an arbitration clause is independent of the contract, but it also provides that an arbitration clause is not invalidated by a contract that is null and void.

In effect, the principle of separability of arbitration clauses applies even where the agreement is invalid.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

The parties' autonomy to select arbitrators may be limited by the following factors:

- where the parties fail to agree on the choice of arbitrators, Section 11 of the ACA provides for a mechanism for intervention by an appointing authority established under the ACA;
- where the appointing authority fails to discharge its duty to appoint, the courts will normally intervene to aid the process based on an application by one of the parties;
- where there is a challenge by a party to an arbitrator, the appointing authority will determine the challenge in the absence of a challenge procedure agreed by the parties; and
- where there is a failure or impossibility of a selected arbitrator to act in the discharge of their mandate to act as an arbitrator, Section 14 of the ACA mandates the appointing authority to terminate the appointment.

4.2 Default Procedures

If the parties' chosen method for selecting arbitrators fails, the default procedure for selection is set out in Section 11 of the ACA. Here, the appointing authority is empowered to appoint an arbitrator where the parties fail to agree.

In the case of multiparty arbitrations, the ACA does not provide a specific procedure. However, under Rule 18 of the ICAMEK (Arbitration) Rules, 2018, ICAMEK is empowered to appoint a tribunal within 28 days (or such period of time provided for in the arbitration agreement) from the date of the request to arbitrate.

4.3 Court Intervention

As referenced in **4.1 Limits on Selection**, a court may intervene in the selection of arbitrators where the appointing authority fails to discharge its duty to appoint. This function of the court is in line with its mandate to facilitate arbitration.

However, a court's power to intervene in the selection of arbitrators may be limited by the agreement of the parties as to any qualifications of an arbitrator and to such other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

In East African Development Bank v Ziwa Horticultural Exporters Ltd High Court Misc Cause No. 1048 of 2000, although the Court recognised its limited jurisdiction under Section 10 of the ACA (now Section 9, ACA), it observed that there may be circumstances in which the appointing authority (CADER in this case) may not be able to perform its functions under the ACA.

A few years later, this premonition of the court came to pass in the case of International Development Consultants Ltd v Jimmy Muyanja & 2 Others (supra) when the Court ruled that the Executive Director of CADER had no mandate to exercise the functions of an appointing authority under Section 70 of the ACA.

Similarly, in Lakeside Dairy Limited v ICAMEK and another (supra), the Court observed that, in

meeting its obligation to give effect to parties' intention to arbitrate disputes, it can step in to appoint arbitrators for the parties where there is a deadlock.

4.4 Challenge and Removal of Arbitrators

Under Section 12 of the ACA, arbitrators can be challenged if there are circumstances likely to give rise to justifiable doubts as to their impartiality or independence or as to whether they actually possess the qualifications agreed upon by the parties.

The courts have had the opportunity to comment on what constitutes impartiality in the decision of Total (Uganda) Ltd v Buramba General Agencies (1997-2001) UCLR 412 at page 419. In that case, impartiality was said to denote acting honestly, in good faith or without fraud or collusion.

The court further held that a party is deemed to have acquiesced in the appointment of an arbitrator whom it suspected of having a bias against it before such appointment. This position of the law is also evidenced in Section 12(3) of the ACA.

Furthermore, an arbitrator's mandate may be terminated under Section 14(1)(a) of the ACA by reason of inability to perform the functions of their office.

4.5 Arbitrator Requirements

There is no prescriptive definition in the ACA of independence, impartiality or disclosure of potential conflict of interest, apart from the reference to circumstances likely to give rise to justifiable doubts as to independence or impartiality.

However, existing institutional rules such as the CADER (Arbitration) Rules require arbitrators to provide a statement of impartiality.

The arbitrator is required to state that they are able to serve as an independent arbitrator and that they have no past or present direct relationship with any parties or their counsel, whether financial, professional or any other kind of relationship in relation to which disclosure would be called for.

The arbitrator is also required to declare in writing their impartiality as to all the parties.

Similarly, the ICAMEK (Arbitration) Rules 2018 require an arbitrator to sign a statement of acceptance, availability, impartiality and independence, in addition to disclosing to the Registrar any facts or circumstances known to them that may give rise to justifiable doubts as to their impartiality or independence.

5. JURISDICTION

5.1 Matters Excluded From Arbitration

Please see **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence applies in Uganda. Under Section 16(1) of the ACA, the arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

This position is confirmed in the Lakeside Dairy v ICAMEK and another (supra).

5.3 Circumstances for Court Intervention

Under Section 16(6) of the ACA, the court can address issues of jurisdiction of an arbitral tribunal where the arbitral tribunal rules as a preliminary question that it has jurisdiction. In that regard, a party aggrieved by the ruling may apply

to the court, within 30 days after having received notice of that ruling, to decide the matter.

The courts will normally intervene in issues of jurisdiction to the extent permissible under the ACA. For example, the Court intervened in a jurisdiction challenge in MTN Uganda Limited v VAS Garage Limited Miscellaneous Cause No. 44 of 2018.

The Court held that the tribunal lacked jurisdiction because the arbitration clause was inoperative and incapable of being performed, the dispute having been already determined in another forum.

The courts do not review negative rulings on jurisdiction by arbitral tribunals.

5.4 Timing of Challenge

Parties have the right to challenge the jurisdiction of the arbitral tribunal before a court either at the preliminary stage where the arbitral tribunal has ruled on its jurisdiction, during the course of the arbitration or after an award has been rendered.

In all cases, the applicable time limit for a jurisdictional challenge is 30 days from the date of receipt of the ruling on jurisdiction of the arbitral tribunal or after a final award has been rendered.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

The standard of judicial review for questions of admissibility and jurisdiction is a de novo review in which the court fully revisits the questions afresh.

In Lakeside Dairy Limited v ICAMEK and another (supra), the High Court observed that the standard of judicial review is restricted to the legality orvalidity of the decision and not the merits.

5.6 Breach of Arbitration Agreement

Ugandan courts adopt a pro-arbitration approach. There is, therefore, general willingness among Ugandan courts to stay court proceedings that are commenced in breach of an arbitration agreement, and to refer the matter to arbitration.

The exercise of discretion by the courts under Section 5(1) of the ACA is in favour of referral of the dispute for resolution by arbitration unless the arbitration agreement is shown to be null and void, inoperative or incapable of being performed or it is shown that there is in fact no dispute between the parties regarding the matters agreed to be referred to arbitration.

5.7 Jurisdiction Over Third Parties

The ACA provides no specific guidance on the circumstances in which an arbitral tribunal may assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement.

The question is normally resolved by construing the arbitration agreement or by reference to the applicable arbitration rules governing the arbitration.

The High Court in USAFI Market v Kampala Capital City Authority (KCCA) High Court Miscellaneous Application No. 647 of 2018 held that arbitrators faced with a request for a third party to join or intervene in an arbitration will look first to the arbitration agreement to see what, if anything, the contracting parties contemplated with respect to third parties.

However, in an earlier decision in Daniel Delestre and 5 Others v Hit Telecom Uganda Limited Miscellaneous Application 310 of 2013, the Court held that directors who were non-parties to an

arbitration agreement could be included as parties to the arbitration.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Section 17 of the ACA empowers an arbitral tribunal to grant preliminary or interim reliefs unless the parties agree otherwise. Such preliminary or interim relief is binding on the parties to the arbitration. Orders for preliminary or interim reliefs do not possess coercive force against non-parties to the arbitration.

The ACA provides that an arbitral tribunal has the power to grant interim measures of protection. These may include injunction orders, preservations orders and freezing orders. The tribunal is also empowered to require any party to provide appropriate security in connection with such measures.

6.2 Role of Courts

Under Section 6 of the ACA, the courts have the authority to grant protective measures to a party where the subject matter is under threat of dissipation during or before the arbitration proceedings.

In AC Yafeng Construction Ltd v The Registered Trustees of Living Word Assembly Church & United Bank of Africa, Miscellaneous Civil Application No. 319 and 320 of 2021, the Court clarified that the types of interim measures of protection include, among others, orders for:

- procuring or preserving evidence;
- facilitating the proceedings as the justice of the case might require;
- restraining the assertion of doubtful rights;
- providing for the safety of property either pending arbitration or when it is in the hands of accounting parties or limited owners, where the efficacy or integrity of the arbitrable proceedings is in jeopardy;
- enforcing awards.

Interim Relief in Arbitrations outside Uganda

Ugandan courts also have the jurisdiction to grant interim relief in aid of foreign seated arbitrations. Section 6 of the ACA expansively empowers the court to grant interim measures of protection provided there is a pending or active arbitral proceeding. The mandate of the court under this section is not limited to the seat of arbitration.

This issue was decisively dealt with in the decision of Great Lakes Energy Company NV v MSS Xsabo Power Limited & 4 Others Miscellaneous Cause No.17 of 2021, where the court observed that it had the jurisdiction to grant interim measures of protection in a foreign seated arbitration where it was practical to do so. Practicability in this context means the ability of the court to implement and monitor the orders issued.

The law does not distinguish between reliefs available to international and domestic arbitrations. In the Great Lakes Energy Company NV case for instance, the Court granted interim measures of protection in a foreign seated arbitration based on Section 6 of the ACA.

Emergency Arbitrators

The ACA does not envisage emergency arbitration procedures. However, the ICAMEK (Arbitration) Rules 2018 provide for emergency arbitrators under Rule 39. These arbitrators' decisions are binding on the parties to the arbitration until the formation of an arbitral tribunal.

The type of reliefs or orders available to emergency arbitrators are similar to those orders that an arbitral tribunal may make under the arbitration agreement.

Notwithstanding the existence of the emergency arbitrator, the courts can still intervene only to the extent permitted under the ACA.

6.3 Security for Costs

Section 17 of the ACA empowers tribunals and courts to grant orders for interim measures of protection subject to payment of security for costs.

Section 34(5) of the ACA allows the courts, upon the application of a successful party in an arbitration, to make orders for security for costs in applications against a party seeking to set aside an arbitral award. This requirement is buttressed by Rule 12 of the ACA (Arbitration) Rules.

In Excel Construction Ltd v GCC Services (U) Ltd Misc. Cause No. 156 of 2017, the court held that the exercise of the courts in ordering security shall be applied upon the same principles as cases where courts order security for performance of decrees on which appeals have been made.

7. PROCEDURE

7.1 Governing Rules

The principal law governing the procedure of arbitration is the ACA. However, the ACA permits the application of other procedural rules (whether ad hoc or institutional) by agreement of the parties and to the extent possible.

The most common rules include:

- the ACA Arbitration Rules;
- the CADER Arbitration Rules;
- the ICAMEK (Arbitration) Rules 2018; and
- the UNCITRAL (Arbitration) Rules (as revised in 2010).

7.2 Procedural Steps

The parties are generally free to determine the procedure for conduct of the arbitration. In institutional arbitration, the procedural steps are usually governed by the rules of the chosen institution.

In practice, the procedural steps for conduct of arbitral proceedings are:

- a request for arbitration;
- a response to the request for arbitration;
- selection and constitution of the arbitral tribunal;
- first meeting of the arbitral tribunal;
- agreement on procedural timetable;
- filing of pleadings (statement of claim, defence, reply, etc);
- procedural conference;
- conduct of hearing;
- submissions; and
- final award.

7.3 Powers and Duties of Arbitrators

The agreement of the parties is the primary source of the powers and duties of the arbitrators. Under the ACA, arbitrators have a duty to determine the dispute in accordance with the terms of the reference to arbitration.

Under Section 18 of the ACA, arbitrators have a duty to treat the parties equally and give each party a reasonable opportunity to present their respective cases.

Furthermore, under Section 28(4) of the ACA, the arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness, without being bound by the rules of law, unless the parties have expressly authorised it to do so.

Arbitrators have a duty to act impartially and independently, to render a reasoned final award

to the parties and to conduct the arbitration in an appropriate manner, including determining questions of jurisdiction, admissibility, relevance, materiality, weight of any evidence, interim reliefs, appointment of experts and other matters within the scope of the arbitrator's appointment/terms of reference.

7.4 Legal Representatives

Generally, there are no particular qualifications or other requirements for legal representatives appearing in domestic or international arbitrations in Uganda unless the parties agree otherwise.

8. EVIDENCE

8.1 Collection and Submission of Evidence

The general approach to the collection and submission of evidence is that there is no strict requirement for a party to produce all their evidence at the pleading stage. Parties are generally allowed to produce all their evidence at any time prior to the hearing.

There are fewer restrictions to discovery and disclosure under Ugandan law. A party requiring evidence that is in the possession of another party will have to specifically request that evidence while showing its relevance to the determination of the issues, or that party will have to file a formal application for disclosure and/or discovery.

Privileged documents are not generally produced or relied on as part of the evidence. The use of witness statements and cross examination is a common practice in Uganda adopted from the common law system.

The strict rules of evidence in the litigation process are not normally followed in arbitration.

8.2 Rules of Evidence

Under the ACA, the parties are free to agree on the applicable rules of evidence. Parties may adopt institutional rules on the taking of evidence such as the CADER (Evidence) Rules, the ICAMEK Rules or ad hoc rules such as the International Bar Association (IBA) Guidelines on the Taking of Evidence in International Arbitration.

There are no specific rules of evidence that apply to domestic matters. Parties can agree to the application of any rules of evidence in domestic matters.

8.3 Powers of Compulsion

Generally, arbitrators may, with court assistance, order the production of documents, or require the attendance of witnesses (either before or at the hearing) under Section 27 of the ACA.

Arbitrators have powers of compulsion against parties to the arbitration agreement. These powers are derived from the agreement to which the parties are bound. An arbitrator has the power to sanction a party to the arbitration agreement for non-compliance with the orders of the tribunal.

In so far as non-parties are concerned, the tribunal would not have the same powers of compulsion because they are not bound by orders of the tribunal issued pursuant to the arbitration agreement.

In this regard, an arbitrator would have to seek the assistance of the courts to compel a third party to produce documents or attend as a witness. In doing so, Section 27 of the ACA provides that the court will execute a request for assistance from the tribunal within its competence and according to its rules on taking evidence.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

To the extent that the ACA does not exhaustively deal with the question of confidentiality in the context of arbitration, arbitral proceedings or their constituent parts are confidential in Uganda as a matter of practice.

The parties are free to agree to total or partial confidentiality. Where the latter case applies, the arbitral proceedings may be disclosed in subsequent proceedings where disclosure is necessary for purposes of implementation and enforcement.

10. THE AWARD

10.1 Legal Requirements

Section 31 of the ACA regulates the form and content of an arbitral award. According to Section 31(4) of the ACA, an arbitral award must be in writing and signed by the arbitrator (in the case of a sole arbitrator) or the arbitrators (in the case of more than one arbitrator).

The arbitral award must state the reasons upon which it is based. The exception to a reasoned award is a situation in which the parties have agreed that no reasons should be given or in cases where the award is an arbitral award on agreed terms of a settlement.

The arbitral award must state the date of the award and the place of arbitration as agreed by the parties or as determined by the arbitral tribunal in the absence of an agreement of the parties. The award must also be signed and delivered to the parties.

Section 31(9)(a) of the ACA also requires that the costs and expenses of an arbitration (ie, 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 tribunal in the award or any additional award.

Under Section 31(1) of the ACA, an arbitral award must be made in writing within three months after a reference to arbitration has been made or after the arbitral tribunal has been called upon to act by notice in writing from any party. Where the arbitral tribunal has extended time, the award must be delivered within three months from the date of extension.

10.2 Types of Remedies

There are no limits to the type of remedies that an arbitral tribunal may award, provided that a proper reference to arbitration has been made and the award is within the terms of the reference to arbitration and the decisions contained in the award are on matters within the scope of the reference to arbitration.

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs in arbitration. The basis for an award of interest is contractual and would normally be based on the principle that a party has been prevented from using their money and the other party has had the use of the money and obtained a benefit.

The prevailing principle is that costs follow the event unless there are reasons for a tribunal to exercise its discretion to the contrary.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

Appeals on Points of Law

Under Section 38 of the ACA, an appeal of a domestic arbitration can only be made to the

court on questions of law where the parties have agreed as such. This position is confirmed in the decision of Babcon Uganda Ltd v Mbale Resort Hotel Ltd Supreme Court Civil Appeal No. 06 of 2016.

The procedure for appealing a domestic arbitral award on a point of law is set out under Section 38(4) of the ACA, which provides that an appeal shall be made within the time limit and in the manner prescribed by the rules of the High Court or the Court of Appeal.

Section 79(1) of the Civil Procedure Act and Order 43 Rule 1 of the Civil Procedure Rules provides that appeals in the High Court are instituted by filing a memorandum of appeal in the Court within the 30 days following the delivery of the award.

Appeals on Section 34 Grounds

Where the right to appeal on points of law in domestic arbitration is not available, recourse to the court against an arbitral award may be made only by an application to set aside the award on the limited grounds under Section 34 of the ACA.

These grounds are in pari materia with the grounds under Article 5 of the New York Convention for refusal to recognise an arbitral award.

Other Options

Parties can also apply to the tribunal for correction and/or interpretation of an arbitral award under Section 33 of the ACA. An application for correction of an award shall be made within 14 days of the receipt of the award. This application can be made to correct computational, clerical or typographical errors or any other errors of a similar nature.

A party can apply for interpretation of an arbitral award within 14 days of the receipt of the award where the parties have agreed to request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

Section 33(2)(b) of the ACA also provides for the confirmation and variation of an arbitral award or remittance of the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been constituted, to that arbitral tribunal for consideration.

11.2 Excluding/Expanding the Scope of Appeal

The grounds for challenging an award by setting it aside cannot be expanded or excluded by agreement of the parties.

The grounds for setting aside are strictly limited within the provisions of Section 34 of the ACA. In Simbamanyo Estates Ltd v Seyani Brothers Company (U) Ltd UCLR at 427, the Court held that it had no jurisdiction to sit in appeal and examine an arbitral award on merits under Section 34 of the ACA.

In SDV Transami Ltd v Agrimag Ltd & Another HCT-00-CC-AB-0002-2006, it was observed that the Court can only set aside an award in accordance with the provisions of Section 34 of the ACA. The same decision confirms the position that a dissatisfied party can only appeal against an award on questions of law where there is an agreement to do so.

On the other hand, parties can agree to exclude appeals in domestic arbitration on points of law but cannot agree to expand the scope of appeal beyond points of law under Section 38 of the ACA.

11.3 Standard of Judicial Review

Review of awards under Sections 34 and 38 of the ACA is deferential. This is premised on the reverence the courts have for arbitration agree-

ments as well as their minimal intervention in arbitration under Section 9 of the ACA.

In Simbamanyo Estates Ltd v Seyani Brothers Co (Ug) Ltd (supra), the Court emphasised its inability to examine the evidence before the tribunal even if doing so would lead to a different conclusion.

In the decision of Lakeside Dairy Ltd v Midland Emporium & Another (supra) the judge stated that parties take to their arbitrator for better or worse both as to decision of fact and law.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

The ACA incorporates the 1958 New York Convention and the ICSID Convention under parts III and IV of the ACAA respectively.

1958 New York Convention

Uganda ratified the New York Convention on 12 February 1992. The Republic of Uganda will only apply the Convention to recognition and enforcement of awards made in the territory of another contracting state. Part III of the ACA regulates the enforcement of New York Convention awards.

Under Section 39(1) of the ACA, a "New York Convention award" means an arbitral award made, in pursuance of an arbitration agreement, in the territory of a state (other than Uganda) which is a party to the New York Convention adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958.

A New York Convention award is treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties. A New York Convention award is treated as binding for all purposes on the parties between whom it was made and it is recognised and enforced pursuant to Section 35 of the ACA, whereby it is deemed to be a decree of the court of a foreign seat of arbitration.

ICSID Convention

On the other hand, the ACA recognises an ICSID Convention award rendered pursuant to the ICSID Convention. Under Section 46(1) of the ACA, a person seeking enforcement of an ICSID Convention award shall be entitled to have the award registered in the court subject to proof of the prescribed matters and to other provisions of this part.

Section 46(4) of the ACA provides that the power of CADER under Section 68 of the ACA includes the power to prescribe the procedure for applying for registration of an ICSID Convention award. The rules prescribing such procedure have not been made. However, Section 47(1) of the ACA stipulates that an ICSID Convention award shall be of the same force and effect for the purposes of enforcement as if it had been a judgment of the court.

The prevailing view therefore is that an ICSID award is to be enforced through the same procedure provided under Section 35 of the ACA.

12.2 Enforcement Procedure

Enforcement Procedure

The ACA regulates the enforcement of domestic and international arbitral awards. Under Section 36 of the ACA, the award shall be enforced as if it were a decree of the court.

Enforcement is subject to expiry of the time for making an application to set aside the award under Section 34 of the ACA or the refusal of such an application. Under Section 34(3) of the ACA, the application for setting aside the

award must be made within one month from the date on which the party making the application received the award.

Similarly, if a party has made an application for correction and interpretation or for an additional award under Section 33 of the ACA, the opportunity to apply to have the arbitral award set aside starts to run from the date a request under Section 33 has been disposed of.

Section 35(2) of the ACA sets out the procedures and standards for enforcing an award. A party applying for enforcement must furnish the duly authenticated original award or a duly certified copy of it and the original arbitration agreement or a duly certified copy of it.

Rule 4 of the ACA provides that any party filing an award shall serve notice of the filing or registering of an award on the other parties and shall forthwith certify the date and manner of service of notice in writing to the registrar of the High Court.

In practice, on being filed or registered by the High Court, an award shall be given its serial number and all subsequent proceedings in connection with it shall be similarly numbered. In essence, subsequent proceedings include an application to set aside the award.

Awards from Other Jurisdictions

An award that has been set aside by the courts in the seat of arbitration can be enforced in Uganda. As a matter of Ugandan law, any New York Convention award that would be enforceable under the ACA is to be treated as binding for all purposes on the persons between whom it was made.

In the absence of the setting aside of proceedings on the limited grounds under Section 34 of the ACA, it follows that an award set aside in a foreign seat may be enforced in Uganda.

Where there are ongoing proceedings to set aside an arbitral award in the courts of the seat of arbitration, the courts in Uganda will suspend enforcement proceedings pending a resolution of the proceedings at the seat of arbitration. The suspension of proceedings is based on the principle of lis pendens to avoid uncertainty and inconsistency of decisions.

12.3 Approach of the Courts

The courts will normally recognise and enforce an arbitral award except for where the limitations under Section 34(2) and (3) of the ACA apply.

In Uganda Lottery Ltd v Attorney General Miscellaneous Cause No. 627 of 2008, the Court observed that recognition and enforcement of an arbitral award follow as a matter of course.

The test or standard for refusing enforcement on public policy grounds is that the award must be patently illegal and contravenes the provisions of Ugandan law. Judicial interference on grounds of a public policy violation can be used to set aside an arbitral award only when it shocks the conscience of the court to the extent that it renders the award unenforceable.

An award will be considered to be in conflict with the public policy of Uganda if the making of the award:

- was induced or affected by fraud or corruption;
- is in contravention of the fundamental policy of the constitution or other laws of Uganda; or
- is in conflict with the most basic notions of morality or justice.

This includes acts which would be generally detrimental or harmful to the citizens of the country.

13. MISCELLANEOUS

13.1 Class Action or Group Arbitration

Class action arbitration is not generally provided for in Uganda.

13.2 Ethical Codes

The professional conduct of counsel is generally governed by the Advocates Act Cap 267 and the Advocates (Professional Conduct) Regulations. These are complemented by institutional rules regarding the conduct of legal representatives of parties to arbitrations.

The ACA does not expressly provide for the ethical conduct of arbitrators conducting proceedings. The ethical conduct of arbitrators is generally governed by specific institutional rules or various codes of ethics. For example, the CADER Code of Ethics for Arbitrators establishes canons which generally regulate the conduct of arbitrators.

13.3 Third-Party Funding

Third-party funding is generally prohibited in litigation as being against the rules of champerty and maintenance. A similar restriction regarding third-party funding in arbitration does not exist.

However, the prohibition in litigation may extend to arbitration due to public policy considerations against champertous agreements.

13.4 Consolidation

An arbitral tribunal seated in Uganda can consolidate separate arbitral proceedings. This would be based on express agreement of the parties, or it may be permitted by institutional rules governing the arbitral proceedings.

For example, under Rule 13 of the ICAMEK (Arbitration) Rules, 2018, two or more arbitrations may be consolidated into a single arbitration, where:

- the parties have agreed to consolidation;
- all of the claims in the arbitrations are made under the same arbitration agreement;
- the claims in the arbitrations are made under more than one arbitration agreement;
- the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship; or
- the arbitration agreements are compatible.

13.5 Binding of Third Parties

Third parties can be bound by an arbitration agreement or award where:

- they are privy to the contract;
- the contract expressly allows for joinder or intervention of third parties;
- specific rules provide a mechanism for third parties to be bound by an arbitration agreement or arbitral award; or
- they have participated in the arbitral proceedings.

National courts can bind foreign third parties in these circumstances.

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Trends and Developments

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The Judicial Approach to Staying Legal Proceedings in Favour of Arbitrations

Introduction

It is now common for commercial disputes in Uganda to be referred to arbitration as a method of dispute settlement. This trend is partly attributed to the well-known advantages of arbitration over traditional litigation.

Recent judicial trends and developments show that Ugandan courts are alive to the reality of arbitration as a preferred method of dispute resolution. This reality is reflected in the growing consistency of court decisions adopting a pro-arbitration approach to claims brought in breach of a valid arbitration agreement.

More recent developments show the strict application by the courts of the Arbitration and Conciliation Act, 2000 of Uganda (ACA) to matters concerning arbitration in a manner that upholds its central theme, namely, to facilitate rather than frustrate or interfere in matters of arbitration.

This article examines recent judicial trends and developments in Uganda towards the courts' general approach to dealing with applications for stay of proceedings in favour of references to arbitration. The article further examines the growing relationship between the courts and arbitration in a deliberate attempt to advance the growth of arbitration in Uganda.

The court's power to stay legal proceedings

The law applicable

A stay of legal proceedings is governed by Section 5 of the ACA. A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement is empowered to refer the matter to arbitration upon an application by a party to the case.

The determination of a reference to arbitration under Section 5 of the ACA is based on an exercise of judicial discretion by the court. The court must refer a matter to arbitration unless it is found that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

Court's approach to exercise of discretion

The court's approach to exercise of discretion was discussed in British American Tobacco Uganda Limited v Lira Tobacco Stores HCMA No. 924 of 2013. In that case, the judge had to determine an application brought under Section 5 of the ACA for a reference of the dispute brought through litigation for resolution by arbitration in accordance with the parties' agreement.

It was held that the court has no discretionary powers under Section 5(1) of the ACA not to refer the dispute to arbitration. The powers of the court are confined to establishing whether the arbitration agreement is null and void, inoperative or incapable of being performed, or whether there is in fact no dispute as contemplated by the parties for reference to arbitration.

Validity of the arbitration agreement

The court, in examining whether the arbitration agreement is null and void, will apply the ordinary rules of contract. This is because the arbitration agreement is primarily a substantive

contract by which the parties agree to refer their disputes to arbitration.

This therefore implies that, for the agreement to come into existence, the requirements for the conclusion of a contract must be fulfilled. The parties must have agreed on the extent of the referral to arbitration and there should be no factors present that may vitiate their consent under general contract law.

In Lakeside Dairy Limited v International Centre for Arbitration and Mediation Kampala & Another Miscellaneous Cause No. 021 of 2021, the Court was faced with a challenge as to the validity of the arbitration agreement for lack of consent.

The Court observed that the rules applicable to an arbitration agreement are governed by (i) the law expressly or impliedly chosen by the parties, or (ii) in the absence of such a choice, by the system of law with which the arbitration agreement is most closely connected. It is that law that will guide the court when establishing whether there is an agreement to refer a particular matter to arbitration and whether that agreement is lawful.

The term inoperative is not generally defined by the courts in the context of arbitration. In one recent decision in MTN Uganda Limited v VAS Garage Limited Miscellaneous Cause No. 44 of 2018, a claim was commenced in arbitration by the claimant. The same claimant had previously brought the same dispute in the form of a complaint before a quasi-judicial forum, and there the matter had been largely determined.

The respondent in the arbitration challenged the jurisdiction of the arbitral tribunal, arguing that the dispute in the arbitration had already been determined and therefore the arbitration clause was inoperative and incapable of being performed. The tribunal accepted jurisdiction in the matter.

On appeal to the court, it was held that the tribunal lacked jurisdiction on account of the fact that the arbitration clause was inoperable and incapable of being performed since the dispute had already been determined.

The term "incapable of being performed" has been the subject of judicial consideration in Uganda. In Fulgensius Mungereza v PriceWaterHouseCoopers Africa Central Civil Appeal No. 18 of 2002, the appellant pleaded inability to go to arbitration in London on account of poverty. The Supreme Court held that poverty was not a sufficient ground for exercising any discretion to refuse to order a stay. According to the Court, the appellant's inability to afford arbitration did not render the arbitration agreement incapable of being performed.

Timing and form of the stay application

An application for a stay of legal proceedings is normally made at any time after a party to the case has filed a statement of defence. The reference to arbitration upon a stay application is granted subject to both parties to the case being given a hearing.

The courts have held that an application for a stay must normally be in writing. Therefore, a party moving the court to order a stay must do so in writing. In addition to holding that an application for a stay in favour of a reference to arbitration must be in writing, the Supreme Court in Shell (U) v AGIP (U), Supreme Court Civil Appeal No. 49 of 1995 (Unreported) summarised the requirements for the court's exercise of its discretion under Section 5 of the ACA as follows:

- the presence of an arbitration agreement that is valid, operative and capable of being performed;
- the presence of pending stay of legal proceedings in Court commenced by a party

who is privy to the arbitration agreement against another party to the agreement;
- the stay of legal proceedings concerns a dispute so agreed to be referred;
- the application for a stay of legal proceedings is filed after appearance by the applying party, and before that party has delivered any pleadings or taken any other step in the proceedings; and
- the party applying for a stay was and is ready and willing to do all the things necessary for the proper conduct of the arbitration.

According to Farmland Industries Ltd v Global Exports Ltd [1991] HCB 72, the court's duty in stays of legal proceedings is to carry out the intention of the parties. This intention, according to the Court, is that the parties need to first negotiate a settlement and, if they fail, they can turn to arbitration before resorting to expensive and long procedures of dispute settlement.

The courts have also addressed those unique instances where a reference to arbitration is made during proceedings in court outside of a case involving pre-existing arbitration agreements. In the Farmland Industries Ltd case, the Supreme Court confirmed that the court can only refer a matter to arbitration upon:

- written application by one of the parties; and
- obtaining the consent of all the parties to the case before it.

Criticisms of the courts' jurisdiction

The pro-arbitration stance has not been without criticism. In obiter remarks, the High Court in East African Development Bank v Ziwa Horticultural Exporters Ltd (High Court Miscellaneous Application 1048 of 2000) delivered a threefold critique.

- Firstly, the ACA appears to make arbitration and court proceedings mutually exclusive, for instance in making court-based or court-initiated arbitration untenable.
- Secondly, the ACA seems to separate alternative dispute resolution mechanisms from court proceedings.
- Thirdly, the ACA tends to curtail the courts' inherent power to resolve disputes.

The Court was of the view that empowering people to resolve their own disputes should not oust the core mandate and function of courts in the context of governance. Notwithstanding this criticism, the Court ordered a stay of legal proceedings in this case. This result effectively underscores the reality of the court's limited powers in arbitration matters.

Ugandan jurisprudence relating to ouster of jurisdiction of the court's jurisdiction had however been very progressive in light of Section 9 of the ACA, which limits the intervention of courts in matters concerning arbitration. More recent decisions have held that Section 9 of the ACA ousts the jurisdiction of the courts in matters of arbitration.

For example, the Court of Appeal in Babcon Uganda Limited v Mbale Resort Hotel Limited Civil Appeal No. 06 of 2016 held that Section 9 of the ACA ousts the jurisdiction of the Court in matters of arbitration except to the extent provided under the ACA. This decision has been followed in other subsequent decisions.

There has always been uncertainty as to whether the High Court is competent to decide whether it has jurisdiction to handle a matter where the parties raise the question of validity of an arbitration clause in the context of Section 5 of the ACA. Some earlier court decisions have ruled that the question of validity of an arbitration clause must be determined by an arbitral tribunal.

However, the prevailing view is that the arbitral tribunal and the High Court exercise a concurrent jurisdiction to determine the validity of an arbitration clause. There is support for this view in two recent cases, namely Vantage Mezzanine Fund II Partnership v Simba Properties Investment Co Ltd and Another, High Court Miscellaneous Application No 201 of 2020 before the High Court, and Alain Francois Goetz and another v Barnabas Taremwa and 2 others, Court of Appeal Civil Application No. 159 of 2021 before the Court of Appeal.

The Alain Francois Goetz case is particularly significant because it was handed down by the Court of Appeal. The ongoing appeal proceedings arise from a decision of the High Court declining to refer the matter to arbitration. The High Court proceedings also concerned parties who were not privy to the arbitration agreement.

In this context, the Court of Appeal, while determining an application for leave to appeal, held that the High Court had jurisdiction in an ordinary suit to determine whether there was a valid agreement to refer a dispute between the parties to arbitration and whether the dispute was one envisaged for reference to arbitration.

Considering the position in the Vantage and Allain Goetz cases, the prevailing view is that the Court and the arbitral tribunal exercise concurrent jurisdiction depending on the forum in which the question of validity and existence of an arbitral agreement is raised. If the question is raised for the first time before an arbitral tribunal, it will be determined at that point and vice versa.

Effect of a reference to arbitration

Where a reference is made under Section 5 of the ACA, the head note of that section appears to suggest that a court will stay the court proceedings. Indeed, previously, the courts used to grant a stay order and keep the Court file active in the courts. However, a different stance has since been taken by the courts.

In Daniel Delestre & others v Hits Telecom Uganda Limited, Miscellaneous Application No. 310 of 2012, the Court held that the only order that could be made is that the dispute shall be resolved through arbitration and not the process of the Court. Where the Court orders the dispute embodied in the proceedings before the Court to be referred to arbitration, the pending suit lapses and the Court file is closed.

In this case, the Court typically adopted a hard stance in that once the Court has made a reference of a dispute in Court to arbitration, the Court has no further business with the matter before it. This is in line with the restrictions against Court intervention in matters of arbitration. This trend has continued to date.

Conclusion

The progressive approach taken by the courts towards staying legal proceedings in favour of arbitration has been influenced by the enactment of the ACA, which is consistent with the UNCITRAL Model Law. The courts have moved away from the largely interventionist approach under the old Arbitration Act, which was inconsistent with progressive international trends and developments in arbitration.

The consistency of the decisions of the courts in support of the arbitration process is a positive development in Uganda. The body of existing decisions provide certainty as to the approach a court will take in dealing applications to refer matters to arbitration. The approach of the courts also shows the deference for arbitration as a dispute resolution mechanism.

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