

GETTING THE DEAL THROUGH

Arbitration

in 42 jurisdictions worldwide

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**GLOBAL ARBITRATION
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Tanzania

Wilbert Kapinga, Karel Daele and Susanne Seifert

Mkono & Co Advocates in association with DentonWildeSapte

Law and institutions

- 1** Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to arbitration is your country a party to?

The Arbitration Act (Cap 15 RE 2002) of Tanzania still incorporates multilateral agreements like the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

The New York Convention entered into force in Tanzania on 12 January 1965. There were no declarations made according to articles I, X and XI of the Convention. Tanzania is also a contracting state to the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992 and to the Multilateral Investment Guarantee Agency of 1985 since 19 June 1992.

- 2** Do bilateral agreements relating to arbitration exist with other countries?

So far, Tanzania has entered into 13 bilateral agreements relating to arbitration. The corresponding countries are: Switzerland (in force since 16 September 1965), Germany (in force since 12 July 1968), the Netherlands (in force since 28 July 1972); and bilateral investment treaties with the United Kingdom (in force since 2 August 1996), Sweden (in force since 1 March 2002), Finland (in force since 30 October 2002) and Italy (in force since 25 April 2003). Tanzania also has agreements with Denmark, Egypt, Korea, Mauritius, Malawi and Zimbabwe, which are not yet implemented.

- 3** What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The Arbitration Act governs domestic arbitral proceedings and enforcement of foreign arbitral awards. A link to the Arbitration Act can be found at www.mkono.com. Pursuant to schedule 4 of the Act, foreign arbitral proceedings are recognised as binding when they are or have been conducted in the territories of any contracting party of the Geneva Convention on the Execution of Foreign Arbitral Awards.

- 4** Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

As the Tanzanian legislation on arbitration was first introduced

in 1931 and amended in 1971, the UNCITRAL Model Law of 1985 has had no influence on it. The major differences between the domestic arbitration law and the Model Law are:

- under the Model Law, three arbitrators are the established requirement, whereas schedule 1 of the Arbitration Act provides that only a single arbitrator is necessary;
- domestic law requires arbitrators to proceed in an impartial manner whereas the Model Law prescribes the additional requirement of independence; and
- unlike the Model Law, the tribunals' determination of its own jurisdiction under domestic law is not a necessary prerequisite to a party's desire to appeal to court.

- 5** What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The mandatory provisions under the Arbitration Act and 'having effect notwithstanding any agreement to the contrary' are:

- the ability to apply for a stay of legal proceedings if there is prima facie evidence of a valid arbitration clause;
- the power of the court to extend time for beginning arbitral proceedings and other time limits;
- the power of the court to remove an arbitrator on grounds of legal misconduct;
- the parties' joint and several liability to pay to the arbitrators such reasonable fees and expenses (if any) as are appropriate in the circumstances and the power of the tribunal to refuse to grant the award in the event the arbitrators' fees and expenses are not paid;
- the tribunal's duty to act fairly and impartially as between the parties;
- securing the attendance of witnesses; and
- the enforcement of the award.

- 6** Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

The rule of domestic arbitration law is that the arbitral tribunal should apply the substantive law chosen by the parties in the arbitration agreement. For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not to its conflict of laws rules. If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

7 What are the most prominent arbitral institutions in your country?

The only arbitral institution in Tanzania is:

Tanzania Institute of Arbitrators (TIA)

1st Floor, Co-Architecture Building
junction of Lumumba and Uhuru Street
Mnazi Mmoja
Dar es Salaam
Tanzania
Tel: +255 22 2184429 / +255 773 211633.

It was established five years ago in accordance with the Arbitration Act. The majority of arbitral proceedings that have taken place in Tanzania over the years have been conducted in a haphazard and inefficient manner, which leads to most disputers ending up before international arbitration institutes such as the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce and the London Court of International Arbitration.

Arbitration agreement**8** Are there any types of disputes that are not arbitrable?

Other than disputes under the Land Act 1999, there no types of disputes that are not arbitrable.

9 What formal and other requirements exist for an arbitration agreement?

The sole formal requirement is that the arbitration agreement must be in writing.

10 In what circumstances is an arbitration agreement no longer enforceable?

Pursuant to section 6 of the Act, a party can no longer apply to the court for stay of proceedings pending arbitration if that party has taken steps in the legal proceedings against him or has taken any step in those proceedings to answer the substantive claim. The termination of the underlying contract does not affect the validity of the arbitration agreement.

11 In which instances can third parties or non-signatories be bound by an arbitration agreement?

There are no legally specified instances in which third parties are bound to an arbitration agreement. However, an agency is a common law exception that might be raised by a party that wishes to extend an arbitration to a non-party. An agent, acting within the boundaries of his or her authority, can bind his or her principal by entering into a contract with an arbitration agreement.

12 Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the so-called 'group of companies' doctrine?

Courts and arbitral tribunals may not extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company.

13 What are the requirements for a valid multiparty arbitration agreement?

There is a possibility for multiparty arbitration agreements as long as the drafting is clear and the parties express their willingness to be bound by the agreement. This kind of agreement is often used in construction contracts.

Constitution of arbitral tribunal**14** Are there any restrictions as to who may act as an arbitrator?

The Arbitration Act provides in section 5 that the parties to a submission may agree about the reference and qualification for an arbitrator or arbitrators or appoint a person designated in their agreement. As a rule of practice a sitting judge may not be appointed as an arbitrator. There are no other restrictions.

15 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Section 8 of the Arbitration Act covers the situation where parties fail to come to an agreement regarding the appointment of the arbitrator(s). Any party may serve the other party or the arbitrators, as the case may be, with a written notice to concur in appointing the missing arbitrator. Subsequently, by virtue of the same section, the court may, on application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint the arbitrator.

16 On what grounds and how can an arbitrator be challenged and replaced?

According to section 18 of the Act, an arbitrator can be removed for the following reasons:

- for misconduct during the proceedings;
- there are justifiable doubts as to his impartiality;
- he does not possess the qualifications required by the arbitration agreement;
- he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so; or
- he has refused or failed to properly conduct the proceedings or to use all reasonable despatch in conducting the proceedings or making an award.

17 What is the relationship between parties and arbitrators?

The general duty of arbitrators includes fairness and impartiality as regards the parties. However, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith. The remuneration of the arbitrator lies solely in the hands of the involved parties.

Jurisdiction**18** What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

Pursuant to section 6 of the Act, a party may apply to the court to stay the legal proceedings if he can establish the existence of a valid arbitration agreement on a matter which under the arbitration agreement is to be brought to arbitration. The court will normally grant the stay unless there is evidence the arbitration agreement is null and void, inoperative, incapable of being performed or the applicant has taken a step in the court proceedings.

19 What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The tribunal decides on its own substantive jurisdiction, unless it is otherwise settled by the parties. A party may object on the ground that the tribunal lacks substantive jurisdiction, but this objection must be raised before contesting the merits of the case.

Arbitral proceedings

20 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Where the parties have not agreed upon the place of arbitration and the language of the arbitral proceedings, the tribunal will decide on the matter. In Tanzania the language of arbitration will usually be English and the place will be determined having regard to the proximity of the subject matter to the place of arbitration or the convenience of the parties involved.

21 How are arbitral proceedings initiated?

Arbitral proceedings are initiated by the notice of arbitration. In any event, the following provisions apply:

- where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated;
- where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter; and
- where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

22 Is a hearing required and what rules apply?

The parties are free to agree on how their disputes are to be resolved. In other words, the parties can agree to a hearing if they deem it required, subject only to such safeguards as are necessary in the public interest.

23 By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. This may only be done with the permission of the tribunal or the agreement of the other parties.

The tribunal may decide whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and

presented. It will also decide whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law, and whether and to what extent there should be oral or written evidence or submissions.

24 In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

As arbitration is essentially a private matter, the law outlines a mere peripheral function for the court. However, the collaboration of the court in respect of the production of certain documents and the attendance of witnesses is provided for.

25 Is confidentiality ensured?

Although there is no direct provision for confidentiality in Tanzanian law, the legislature clearly intended that proceedings are between the parties and the public is not involved. So it can be safely assumed that confidentiality is ensured.

Interim measures

26 What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Unless otherwise agreed by the parties, the court has, for the purposes of and in relation to arbitral proceedings, the same power in relation to the making of orders regarding matters under consideration, as it has for the purposes of and in relation to legal proceedings. Those matters include the granting of an interim injunction or the appointment of a receiver.

27 What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

The Arbitration Act gives the parties freedom to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings. This includes that the tribunal may order a claimant to provide security for the costs of the arbitration. It may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings and that is owned by or is in the possession of any party involved. It may also direct that a party or witness shall be examined on oath or affirmation and may for that purpose administer any necessary oath or take any necessary affirmation. The tribunal may also give directions to a party for the preservation, for the purposes of the proceedings, of any evidence in his custody or control. Apart from that the parties are free to agree the tribunal shall have the power to order on a provisional basis any relief which it would have power to grant in a final award.

Awards

28 Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences if an arbitrator refuses to take part in a vote or sign the award?

The arbitral tribunal can make decisions by majority vote. In the unlikely event of all the arbitrators refusing to take part in a vote or sign the award, the arbitral proceedings would necessarily fail and the matter would be referred to court.

29 What form and content requirements exist for an award? Does the award have to be rendered within a certain time limit?

The award must be in writing and signed by all the arbitrators or all those assenting to the award. The award must contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. The award shall further state the seat of the arbitration and the date when the award is made.

30 For what time limits is the date of the award decisive and for which is the date of delivery of the award decisive?

Unless the parties agree differently, the date of the award is the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them. The date of the award is crucial for any challenge to the award or any application for rectification, clarification or correction.

31 What types of awards are possible and what types of relief may the arbitral tribunal grant?

The arbitral tribunal can make a declaration as to any matter to be determined in the proceedings and order the payment of a sum of money. Moreover the tribunal has the same powers as the court in respect of ordering a party to do or to refrain from doing anything or to force a specific performance of a contract. The tribunal may also make interim, partial or final awards depending on the circumstances of the case. If the dispute is settled during the proceedings, the parties may request that a consent award is attached to the settlement agreement for the purpose of recognition and enforcement.

32 By what other means than an award can proceedings be terminated?

The premature termination of the proceedings is possible by the settlement of the dispute. In that case, the tribunal terminates the substantive proceedings and, if so requested by the parties, records the settlement in the form of an agreed award. An agreed award states that it is an award of the tribunal and has the same status and effect as any other award on the merits of the case.

33 How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

The costs of the award are at the discretion of the arbitrators or umpire, who may direct how and by whom those costs or any part thereof will be paid. In addition, he may tax or settle the amount of costs to be paid and may award costs to be paid between advocate and client. The award of costs is in the sole discretion of the arbitrator(s) and there is no rule or practice that the loser pays the costs of the winner or the splitting of the costs in any proportion.

34 May interest be awarded for principal claims and for costs and at what rate?

Unless otherwise agreed, the tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers sufficient for the case. The interest can be on the whole or part of any amount awarded by the tribunal and in respect of any period up to the date of the award. The tribunal may also award simple or compound interest on the outstanding amount of any award from the date of the award (or any later date) until payment, at such rates and with such interest as it considers appropriate. The normal interest is the

commercial rate, or around 25 per cent of the value of the subject matter.

Proceedings subsequent to issuance of award

35 Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The parties are principally free to agree on the powers of the tribunal to correct an award or make an additional award. If there is no such agreement, the tribunal may on its own initiative or on the application of a party correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission, or to clarify or remove any ambiguity in the award, or make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award. Any correction of an award forms part of the award.

36 How and on what grounds can awards be challenged and set aside?

According to section 16 of the Act, the court may set aside the award where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured and serious irregularities affected the tribunal, the proceedings or the award. Misconduct and serious irregularities include the negligent conduct of the proceedings by the arbitrator and a behaviour that causes one or all of the parties involved to lose confidence in his or her abilities to settle the dispute out of court.

37 What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

An award made by the arbitral tribunal will, by leave of the court, be enforceable as if it were a decree of the court. The leave to enforce an award will not be given where the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

A foreign award is enforceable if:

- it has been made pursuant to an arbitration agreement that was valid under the law by which it was governed;
- it has been made by the tribunal provided for in the agreement or constituted in the manner agreed upon by the parties;
- it has been made in conformity with the law governing the arbitration procedure;
- it has become final in the country in which it was made; and
- it has been made in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania and its enforcement is not contrary to the public policy of or the law of Tanzania.

Foreign awards will not be enforceable if:

- the award has been annulled in the country in which it was made;
- the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented; or
- the award does not deal with all the questions referred to or contains decisions on matters beyond the scope of the agreement for arbitration. In that case, the court may postpone the

enforcement of the award or order its enforcement subject to the giving of such security by the person seeking the enforcement.

38 What costs are incurred in enforcing awards?

When enforcing awards, court expenses have to be paid by the enforcing party as well as lawyers fees for the timely effort used to prepare the required documentation.

Other

39 What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Provision or production of documents is available. Written witness statements are not uncommon and party officers may testify.

40 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

All foreigners from non-Commonwealth countries are required to have a valid visa. The business visa (class 'B') that a foreign practitioner would need to work in Tanzania is issued to prospective investors who intend to visit Tanzania for the purpose of professional and business matters. The validity of the visa can vary from one to six months.

Mkono & Co Advocates

Wilbert Kapinga
Karel Daele

wilbert.kapinga@mkono.com
karel.daele@mkono.com

9th Floor, PPF Tower
Garden Avenue/Ohio Street
Dar es Salaam
Tanzania

Tel: +255 22 211 4664/211 8789-91
Fax: +255 22 211 6635/211 3247
www.mkono.com