

Tanzania

Karel Daele, Nimrod E Mkono and Daniel Krips
Mkono & Co. Advocates

www.practicallaw.com/8-502-1606

GENERAL

1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?

Provision for commercial arbitration is a common feature of the contractual documents facilitating inward foreign direct investment or other commercial activity in Tanzania. Virtually all agreements between foreign investors and state authorities or local companies contain an arbitration clause. These cross-border agreements generally provide for arbitration under the:

- Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention).
- Arbitration Rules of the International Chamber of Commerce (ICC).
- Arbitration Rules of the London Court of International Arbitration (LCIA).

Similarly to other jurisdictions, the main advantages of arbitration, when compared to court litigation, are an independent tribunal and a generally quicker procedure. For example, subject to the parties' agreement to the contrary, an arbitral award must be made in writing within three months after entering the reference, subject to any extension by the arbitrators. The disadvantages are the cost and level of resources necessary to properly present a case to an arbitration tribunal.

Arbitration clauses also are regularly inserted in domestic commercial agreements, as a growing number of parties to commercial agreements appreciate the advantages of arbitration over litigation in the domestic courts. However, domestic arbitrations under the Arbitration Act (Cap 15 Revised Edition 2002) (Arbitration Act) are often conducted inefficiently and there is a possibility of the delaying tactics by resistant parties.

2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.

There are two principal arbitration bodies, both with their own set of arbitral rules:

- Tanzania Institute of Arbitrators (TIA).
- National Construction Council (NCC).

The NCC is a statutory body created under the National Construction Council Act (No. 20 of 1979). In 2001, the NCC adopted a set of Arbitration Rules, to enable parties to settle their construction disputes under these Rules. However, since arbitration is relatively undeveloped in Tanzania, parties can resolve their disputes under the NCC arbitration rules, regardless of the subject matter of the dispute.

3. What legislation applies to arbitration in your jurisdiction? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The Arbitration Act (Cap 15 Revised Edition 2002) is the principal law regulating arbitration in Tanzania. Although it was passed after the UNCITRAL Model Law, it still does not reflect the Model Law closely. The Arbitration Act follows closely its predecessor, which was first introduced in 1931 and amended in 1971. For example, the Arbitration Act still refers to the Geneva Protocol on Arbitration Clauses 1923 (appearing as Schedule 3) and to the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (appearing as Schedule 4).

The Civil Procedure Code (Cap 33 Revised Edition 2002) (CPC) also contains a default set of arbitration rules and procedures that apply if the parties agree to refer a dispute that is being heard before a court to arbitration. In addition, Schedule 2 to the CPC regulates procedure for filing of arbitral awards without court intervention.

Tanzania has entered into 13 bilateral agreements relating to arbitration, including with Switzerland, Germany and The Netherlands. In addition, Tanzania has entered into bilateral investment treaties with the UK, Sweden, Finland and Italy. Tanzania has agreements with Denmark, Egypt, Korea, Mauritius, Malawi and Zimbabwe that are signed but have yet to be implemented.

4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.

Arbitrability

The Arbitration Act does not prohibit any particular type of dispute from being resolved by arbitration. However, disputes concerning land must be heard by the superior courts and specific statutory tribunals (*section 167, Lands Act Cap 113 Revised Edition 2002 as amended*). Therefore, apart from land disputes, all other disputes are arbitrable.

Removal of arbitrators

The High Court of Tanzania (High Court) can remove an arbitrator if he commits "any misconduct" (*section 18, Arbitration Act*). While any misconduct is not defined, a party can probably petition the High Court for the removal of an arbitrator if he shows bias, prejudice or otherwise conducts himself in a manner not appropriate for the office.

Other mandatory provisions

The following provisions of the Arbitration Act apply notwithstanding any agreement to the contrary:

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

5. Are there any requirements relating to independence or impartiality?

There are no express provisions relating to arbitrators' duty of impartiality but they must act fairly and impartially as between the parties (*Arbitration Act*). In addition, the High Court can:

- Remove an arbitrator who shows bias or prejudice (*section 18, Arbitration Act*).
- Set aside an award if an arbitrator has misconducted himself (which includes bias and prejudice) (*section 16, Arbitration Act*) (see *Question 22*).

6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.

The Arbitration Act does not prescribe any general limitation period applicable to arbitration proceedings. However, Part II of the Arbitration Act, which contains all substantive clauses relevant to arbitration, only applies to disputes that would be triable in the High Court of Tanzania if made the subject of a suit. A dispute that had become time-barred by operation of the Law of Limitation Act (Cap 89 Revised Edition 2002) would also become time-barred for arbitration.

Under the Law of Limitation Act, the relevant limitation period commences at the point when the cause of action accrues (*section 4*). A cause of action is deemed to accrue when all events entitling a claimant to take legal action have occurred. The applicable limitation periods for different claims are specified in a Schedule to the Law of Limitation Act. Generally, a limitation period is six years.

Part IV of the Law of Limitation Act provides detailed rules, including the circumstances when the limitation period is interrupted. These can be summarised as follows:

- If a claimant is under a legal disability at the time a cause of action accrues or becomes subject to a legal disability during the normal running of a limitation period, the period during which the disability was present is not counted in the calculation of a limitation period.
- No limitation period applies to a suit against a trustee if the suit relates to:
 - the recovery of trust property held by the trustee; or
 - fraud, dishonesty or illegality on the trustee's part.
- Time during which a defendant is absent from Tanzania following the accrual of a cause of action is excluded from the computation of limitation period.
- Time during which a claimant is bona fide pursuing its rights arising from the same cause of action in other civil proceedings is excluded from the computation of limitation period.
- If the institution of proceedings has been stayed or stopped by injunction by a competent authority, the time during which the action is stayed or enjoined is excluded from the computation of limitation period.
- If a claimant dies before the accrual of a cause of action, the limitation period starts running from the later of:
 - the first anniversary of the date of death; or
 - the date on which the right to sue accrues to the deceased's estate.
- If a claimant dies after the accrual of a cause of action, the period of time during which the application for letters of administration or probate is being pursued is excluded from the computation of limitation period.
- In proceedings for relief from the effects of the defendant's fraud or mistake, the period of limitation does not begin until the claimant discovers the fraud or mistake or ought to discover the same through proper diligence.
- If a cause of action has accrued in relation to a debt and the defendant subsequently acknowledges the liability by signed written instrument or makes a partial payment in satisfaction of the debt, a fresh limitation period commences on the date of the debtor's acknowledgment or part payment.

Under Tanzanian law, the parties are free to agree binding limitation periods in the arbitration clause. In addition, the High Court can extend any time period specified in an arbitration clause to alleviate any undue hardship (*section 7, Arbitration Act*).

ARBITRATION AGREEMENTS

7. For an arbitration agreement to be enforceable:

- What substantive and/or formal requirements must be satisfied?
- Is a separate arbitration agreement required or is a clause in the main contract sufficient?

There are no specific substantive or formal requirements for an arbitration agreement to be enforceable. The arbitration agreement only needs to be drafted with sufficient clarity to be

capable of certain interpretation. This is the standard requirement applicable to any contractual provision.

A separate arbitration agreement is not required. In practice, almost all references to arbitration are through an arbitration clause in the underlying commercial contract.

8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?

There are no statutory restrictions or rules in relation to the number, qualifications/characteristics or selection of arbitrators. These issues are left to the parties to agree and record in the respective arbitration clause. In the absence of agreement, Schedule 1 of the Arbitration Act (Schedule 1) provides a default set of rules (see *Question 10*). For example, the dispute is heard by a sole arbitrator.

9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.

There is no legislative provision enabling a joinder of a third party to an arbitration. If a party is not privy to a contract containing a reference to arbitration, that party cannot be joined to any subsequent arbitration.

PROCEDURE

10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?

Schedule 1 provides a default set of rules relating to most aspects of arbitration procedure. Subject to the parties' contrary expression, a submission to arbitration is irrevocable and must be deemed to incorporate the provisions in Schedule 1 (*section 4, Arbitration Act*). Matters not addressed explicitly are generally left to the tribunal to determine. Provisions under Schedule 1 can be summarised as follows:

- Subject to a contrary provision, a reference is deemed to be to a single arbitrator.
- If parties agree to two arbitrators, those two arbitrators can appoint the chairman at any time.

In addition, provisions of the Arbitration Act enable a party to petition the court for orders to overcome either:

- The counterparty's or an appointed arbitrator's refusal to meet the prescribed timelines, including for the appointment of an arbitrator.
- An arbitrator's inability to carry out duties on the basis of physical or mental incapacity.

For example, a party can petition the court to appoint an arbitrator if the other party fails to appoint an arbitrator in a

timely manner (*section 8*). This allows a party to legitimately commence proceedings irrespective of the counter party's lack of engagement.

The High Court can remove an arbitrator (see *Question 4, Other mandatory provisions*) and this power cannot be waived by the parties.

Schedule 1 does not contain any provisions relating to the start of arbitration proceedings.

11. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the legislation provide any default rules governing procedure?

The parties are free to adopt any set of procedural rules they see fit. If the parties do not specify the applicable procedural rules, the default provisions of Schedule 1 are deemed to apply (*section 4, Arbitration Act*) (see *Question 10*). Any procedural matter not covered by Schedule 1 can be determined by the tribunal in its discretion.

12. What procedural powers does the arbitrator have? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

If the parties agree on a set of rules or procedures, these regulate the tribunal's power to order disclosure, attendance of witnesses and so on. If the parties do not specify any set or rules of procedures, the tribunal has the power to (*Schedule 1*):

- Require all parties and/or those claiming through them to submit to examination on oath.
- Require all parties and/or those claiming through them to disclose all books, deeds, papers, accounts, writings and documents within their possession or power that may be called for during the arbitration.

All witnesses can be examined on oath as the tribunal sees fit (*Schedule 1*).

EVIDENCE

13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?

Subject to a contrary provision in the parties' agreement, Schedule 1 applies. The extent of disclosure is very broad and the parties must, subject to any legal obligation (*clause 6*):

- Disclose all books, deeds, papers, accounts, writings and documents within their possession or power that may be required or called for during the arbitration.
- Perform other tasks that the tribunal may require during the arbitration.

This position differs to disclosure in litigation, as the disclosure is driven by the tribunal (in civil litigation under the CPC parties merely disclose all relevant documents in their possession). Schedule 1 also enables arbitrators to request the parties to disclose certain items they deem relevant to the dispute. In addition, the parties can provide that the tribunal be able to give directions to a party for the preservation of any evidence in its custody or control.

CONFIDENTIALITY

14. Is arbitration confidential?

The law is silent on the confidentiality of arbitration proceedings. However, the legislature clearly intended that arbitration proceedings be between the parties, with no involvement of third parties or the general public. Therefore, confidentiality is an implied requirement under the Arbitration Act.

COURTS AND ARBITRATION

15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?

Unless otherwise agreed by the parties, the court has the same powers to make orders in relation to the matters under consideration in arbitration proceedings as it has in the context of court proceedings. This includes the power to grant an interim injunction or appoint a receiver.

16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?

The local courts are generally unwilling to interfere once an arbitral tribunal is constituted, and will stay the proceedings that are brought in breach of an arbitration agreement (see *Question 17*).

17. What remedies are available where a party starts court proceedings in breach of an arbitration agreement, or initiates arbitration in breach of a valid jurisdiction clause?

If a party brings proceedings before “any court” in breach of an arbitration agreement, that court must stay the proceedings to enable the arbitration to take place (*section 27, Arbitration Act*).

There is no statutory provision for a situation where a party initiates an arbitration in breach of a jurisdiction clause. However, an arbitral tribunal is likely to decline to proceed in breach of an agreement to refer arising disputes to the local court.

18. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

To date, local courts have not issued an anti-suit injunction.

19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Kompetenz-kompetenz

The concept of kompetenz-kompetenz is recognised and the tribunal's power to determine its own jurisdiction is inherent in any arbitration agreement. If a party raises an issue of the tribunal's competence, the tribunal generally considers this application and makes a ruling, which prima facie resolves the matter.

If a party disputing the tribunal's jurisdiction refuses to attend any hearings or engage in correspondence issued by the tribunal, the party risks having a default award made against it, which, once filed, is enforceable as a decree of the High Court. The disputing party would then have to petition the High Court for an order that the award or arbitration had been improperly procured on the grounds of lack of jurisdiction (*section 16, Arbitration Act*).

A tribunal that considers there to be some doubt in relation to its competence or jurisdiction can refer any question of law arising under the dispute for the resolution by the High Court (*section 11, Arbitration Act*).

Separability

The concept of separability is also recognised. An arbitration clause is considered to have a separate and collateral existence to that of the underlying agreement, and, therefore, can survive even if the underlying contract is found void or otherwise of no binding force.

REMEDIES

20. What interim remedies are available from the tribunal? Can the tribunal award:

- Security for costs?
- Security or other interim measures?

The parties can agree on the tribunal's powers exercisable for the purposes of, and in relation to, the proceedings (*Arbitration Act*). This includes the tribunal's power to order a claimant to provide security for the costs of the arbitration. The tribunal can give directions in relation to any property that is:

- The subject matter of the proceedings or in relation to which any question arises in the proceedings.
- Owned by, or is in the possession of, any party involved.

In addition, the parties can enable the tribunal to have the power to order, on a provisional basis, any relief that it could grant in a final award.

21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?

While not explicitly stated in the Arbitration Act, a properly constituted arbitral tribunal has all the powers of the High Court.

It can, therefore, make all final orders and remedies that the court can, including the award of:

- Damages.
- Injunctions.
- Declarations.
- Costs and interest.

APPEALS AND CHALLENGES

22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal?

Subject to the parties' contrary agreement, the award is final and binding on all parties (*Schedule 1*). Therefore, there are no statutory appeal provisions and an award cannot be appealed on the substantive merits. However, it is theoretically possible for the parties to agree an appeal procedure, which could include nominating an authority with the power to hear an appeal. In addition, the procedural rules selected by the parties may provide for the appeal procedure. Generally, the parties have wide discretion to agree all aspects of arbitration, including appeals.

The High Court can, from time to time, remit the award to the reconsideration of the arbitrators or chairman (*section 15, Arbitration Act*). Where the remission is made, the arbitrators must make a fresh award within three months of receiving the order. The grounds on which the High Court can remit an award are not specified and it is reasonable to suggest that it may do so if either:

- A serious procedural irregularity is evident.
- The arbitrators have proceeded based on a manifest error of law.

In addition, the High Court of Tanzania can set aside an award if either (*section 16, Arbitration Act*):

- An arbitrator has misconducted himself.
- An arbitration or award has been improperly procured.

A party seeking to set aside an award on the above grounds must petition the High Court under Rule 5 of the Arbitration Rules, which are subsidiary legislation made under section 21 of the Arbitration Act.

COSTS

23. What legal fee structures can be used? For example, hourly rates and task-based billing? Are fees fixed by law?

Unless parties specify any particular costs regime in the arbitration agreement, the tribunal can, at its discretion, award costs on any basis it sees fit (*clause 9, Schedule 1*). This explicitly includes an award of legal fees. The tribunal can also tax and settle the amount to be paid, and specify the manner of payment.

Subject to the parties' agreement to the contrary, costs are in the sole discretion of the tribunal (*Schedule 1*).

MAIN ARBITRATION ORGANISATIONS

Tanzania Institute of Arbitrators (TIA)

Main activities. The TIA conducts commercial arbitration under its own set of rules and has a list of available arbitrators. It can conduct domestic and international arbitrations.

W *No website available.*

National Construction Council (NCC)

Main activities. The NCC, initially created to deal with construction disputes, now conducts commercial arbitration generally under its own set of rules.

W *www.ncc.or.tz*

24. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

See *Question 23*.

ENFORCEMENT

25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.

On payment of the arbitrator's fees and costs, a party to the arbitration can require the tribunal to file a signed copy of the award in the High Court and provide notice of the filing to all parties. Once filed, the award can be enforced as if it were a decree of the court. The enforcement provisions contained in the CPC apply. The creditor can seek the debtor's civil arrest or attachment of assets to secure the satisfaction of the award.

26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Tanzania is a party to the New York Convention. Therefore, bona fide awards by the properly constituted Tanzanian arbitral tribunals can be enforced in other jurisdictions (party to the Convention), subject to the Convention and particular court rules in the relevant foreign jurisdiction.

27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.

A foreign award is enforceable through the High Court if the following conditions are met (*Schedule 4, Arbitration Act*,

adopting the Convention on the Execution of Foreign Awards):

- It has been made under an arbitration agreement that was valid under the law governing the agreement.
- It has been made by the tribunal provided for in the agreement or constituted in the manner agreed 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.
- It has been made in relation to a matter that can lawfully be referred to arbitration under the law of Tanzania and its enforcement is not contrary to the public policy or the law of Tanzania.

A foreign award is not enforceable in the High Court of Tanzania on one of the following grounds (*Schedule 4, Arbitration Act, adopting the Convention on the Execution of Foreign Awards*):

- The award has been annulled in the country in which it was made.
- The party against whom the enforcement is sought 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.

- The award does not deal with all the questions referred to or contains a decision on matters beyond the scope of the arbitration agreement. In these circumstances, the court can postpone the enforcement of the award or order its enforcement subject to the giving of security by the person seeking the enforcement.

The enforcing party must pay court expenses as well as legal fees in the preparation of court documents and attendance at any hearings that may be required.

28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?

Enforcement proceedings take between one and six months. There is no expedited procedure.

CONTRIBUTOR DETAILS

Karel Daele, Nimrod E Mkono and Daniel Krips
Mkono & Co. Advocates
 T +255 22 211 4664
 F +255 22 211 6635
 E karel.daele@mkono.com
 W www.mkono.com

PLC**Corporate**

PRACTICAL LAW COMPANY



“We find the standard documents and drafting notes to be of a very high quality - practical and focused on the needs of front-line fee earners.”

Larry Nathan, Partner, Corporate/Commercial Department, Mishcon de Reya.

PLC**Corporate** is the essential know-how service for corporate lawyers. Never miss an important development and confidently advise your clients on law and its practical implications. www.practicallaw.com/about/corporate