

'AWARDING AND TAXATION OF ARBITRATION COSTS IN ZAMBIA '

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BY

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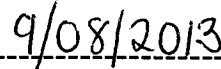
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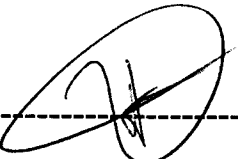
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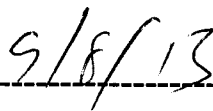
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Abstract

Awarding and taxation of arbitration costs in Zambia is what this paper will look at. There seems to be uncertainty regarding the same, this could be as a result of the lack of clarity of the Arbitration Act No.19 of 2000.

The first chapter is the general introduction. It consists of the statement of problem, the purpose and objective of the study, the significance of the study, how this research will be conducted as well as the chapter outline.

The second chapter looks at the awarding and taxation of arbitrations costs generally.

The role of the courts in awarding and taxing of arbitration costs will be looked into also in the third chapter. This jurisdiction of the courts regarding the same is looked at. A look at the intervention of the courts in the awarding and taxation of arbitration costs is done also as well as the impact of the court annexed programme in Zambia.

The need for clarity in the drafting of the Arbitration Act No.19 of 2000 with regards to the provisions providing for the awarding and taxation of arbitration costs will be covered in this paper. This will be done by comparing the Arbitration Act No. 19 of 2000 to the 1996 Arbitration Act of England.

Upon comparison with the 1996 Arbitration Act of England, there is clearly need for the Arbitration Act No.19 of 2000 to be revised. The Act needs to set out clearly the awarding and taxation procedure, the recoverable costs need to be clearly provided. The Act alone with using other jurisprudence or texts needs to be sufficient so as to enable the arbitrator carry out his work effectively.

Acknowledgements

I would like to thank God for the inspiration as well as giving me the strength to write this paper. It would have been almost impossible without him. I thank my family for all the supported rendered to me as I was writing this paper. I also thank my supervisor Mr Lungisani Zulu for the good supervision. Joyce Chipeta from the Chartered Institute of Arbitrators was really of great help, many thanks.

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Perkins (HG) Ltd v Best-Shaw [1973] 2 All ER 924

Piper Double Glazing Ltd v D.C Contracts [1994] 1 W.L.R 777

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CHAPTER ONE

GENERAL INTRODUCTION

1.0 INTRODUCTION

The awarding and taxation of arbitration costs in Zambia is what this paper will look at. The role of the courts in awarding and taxing of arbitration costs will be analysed also as well as the need for clarity in the drafting of the Arbitration Act No. 19 with regards to provisions that provide for the awarding and taxation of arbitration costs. The issues which were raised in the case of case of **Yougo Limited v Pegasus Energy (Zambia) Limited**¹ will be addressed also.

1.1 STATEMENT OF PROBLEM

There is uncertainty regarding the awarding and taxation of arbitration costs in Zambia. The Arbitration Act No 12 of 2000 does not specify who is in charge of awarding and taxing of costs arising from arbitration proceedings. This seems to be an issue as illustrated in the case of **Yougo Limited v Pegasus Energy (Zambia) Ltd**² where an issue regarding the same arose. As a result of the uncertainty arbitration does not serve its full purpose in Zambia. There is need for the Arbitration Act to shade more light on awarding and taxation of arbitration costs. There seem to be a conflict between the Arbitration Act, the High Court rules and the Supreme Court rules. This conflict raises issues on the applicability of the Arbitration Act, if it is of general application or whether it needs to be applied in light of the High Court Rules and the Supreme Court rules.

1.2 PURPOSE/ OBJECTIVE OF STUDY

¹Yougo Limited v Pegasus Energy (Zambia) Limited (2008/HPC/0299) (2011) ZMHC 11

²Yougo Limited v Pegasus Energy (Zambia) Limited (2008/HPC/0299) (2011) ZMHC 11

The purpose of this paper is to look at the awarding and taxation of arbitration costs in Zambia. The Arbitration Act No 19 of 2000 seems to have a weakness in dealing with the awarding and taxation of arbitration costs. Therefore, there could be need to look at the Act intensely so as to make certain that which is uncertain regarding awarding and taxation of arbitration costs. Zambia is growing commercially at a fast rate, there could be need for precision in the wording of the Arbitration Act No 19 of 2000 to avoid issues which arose in the *Yougo Limited v Pegasus Energy (Zambia) Limited*³. The aforementioned case refers to the case of *Perkins (HG) Ltd v Best-Shaw*⁴ which also raises issues on awarding arbitration costs.

1.3 RESEARCH QUESTIONS

1. What is the jurisdiction of the Courts in awarding and taxing arbitration costs?
2. Why do courts get involved in awarding and taxing of costs that arise from arbitration proceedings when there is the *Zambian Institute of Arbitrators* that can do the same?
3. Is the taxing of arbitration costs and awarding of arbitration costs totally different and independent of one another?
4. To what extent does the Arbitration Act apply to the courts with regards to awarding arbitration costs, or does it only apply to the arbitration tribunal?
5. Does the adoption of the Court Annexed Arbitration Programme contribute to the uncertainty of awarding arbitration costs?

1.4 SIGNIFICANCE OF STUDY

³ *Yougo Limited v Pegasus Energy (Zambia) (2008/HPC/0299)(2011) ZMHC 11*

⁴ *Perkins (HG) Ltd v Best-Shaw (1973) 2 ALL ER 924*

Awarding and taxation of arbitration costs seems to need more precision regarding who is in charge of awarding and taxing these costs. This paper will focus on solving the uncertainty that surrounds awarding and taxation of arbitration costs. There is an issue regarding who qualifies to be the taxing master in respect of bill of costs originating from arbitration proceedings. This seems to change from time to time. This paper will look into what determines the change. Zambia is vastly growing commercially, hence there could be need to clarify matters regarding arbitration costs. It would be of great importance to state how awarding and taxation of arbitration costs works for the clarity of not only foreign investors but local investors as well. The findings of this research paper may be used to ensure that arbitration serves its full purpose in Zambia of being cheap and fast as an option to litigation.

1.5 OPERATIONAL DEFINITION OF TERMS

ADR means Alternative Dispute Resolution

Arbitration Proceedings means proceedings conducted by an arbitral tribunal for the settlement, by arbitration, of a dispute which has been referred to arbitration in terms of an arbitration agreement.⁵

Arbitral Institution means an institution recognised as such in accordance with section 23 of the Arbitration Act.⁶

Arbitral Tribunal means a sole arbitrator or panel of arbitrators as such under the arbitration agreement.⁷

⁵ Section 2 of the Arbitration Act No 19 of 2000

⁶ Section 2 of the Arbitration Act No 19 of 2000

⁷ Section 2 of the Arbitration Act No 19 of 2000

Arbitration refers to any arbitration whether or not administered by a permanent arbitral institution and means the conduct of proceedings for the determination of a dispute by an arbitral tribunal in terms of the Arbitration Act.⁸

Arbitration Agreement means an agreement, whether in writing or not, by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.⁹

Award means the decision of an arbitral tribunal on a substance of a dispute and includes any interim, interlocutory or partial on any procedural or substantive issue.¹⁰

Court for the purposes of this paper means a court of competent jurisdiction.

Dispute includes a difference¹¹

1.6 METHODOLOGY

This research will involve a review of related literature in the form of articles and texts on Arbitration with regard to the awarding and taxation of arbitration costs. A detailed analysis of the relevant Statutes will be made with regards the topic in question. This paper will have five chapters.

CHAPTER OUTLINE

Chapter 1

The first chapter will be the introduction to the topic which will include the purpose for exploring the topic. The problem statement arising from the case given will be outlined. The

⁸ Section 2 of the Arbitration Act No 19 of 2000

⁹ Section 2 of the Arbitration Act No 19 of 2000

¹⁰ Section 2 of the Arbitration Act No 19 of 2000

¹¹ Section 2 of the Arbitration Act No 19 of 2000

objectives of this research will be included as well as the research questions to be answered as the research progresses.

Chapter 2

This chapter will look at the awarding and taxation of arbitration costs. This will be done by analysing the Arbitration Act No 12 of 2000 regarding the same as well as other Statutes and texts that provide for awarding and taxation of arbitration costs.

Chapter 3

This chapter will look at the role of the courts in awarding and taxing of arbitration costs. How the courts come to participate as well as their jurisdiction with regards to awarding and taxation of arbitration costs. The impact of the Court Annexed Programme in Zambia will be analysed in this chapter.

Chapter 4

This chapter will look at the need for clarity in the drafting of the Arbitration Act No 19 of 2000 with regards to the provisions providing for the awarding and taxation of arbitration costs. This will be done by comparing the Act to the Arbitration Act 1996 of England.

Chapter 5

The conclusion and recommendation will be drawn in this chapter.

CHAPTER TWO

AWARDING AND TAXATION OF ARBITRATION COSTS

2.0 INTRODUCTION

This chapter will look at the awarding and taxation of arbitration costs. This will be done by analysing the Arbitration Act No 19 of 2000 regarding the same. Other texts and jurisprudence that provide for the awarding and taxation of arbitration costs will be relied on as well.

The Arbitration Act No 19 of 2000 does not do justice on how to go about awarding and taxing of arbitration costs as it does not provide guidance for the arbitrators as to how they can go about the awarding and taxation of arbitration costs. This is one of the purposes of this paper to make certain that which is not certain regarding the same.

The Chartered Institute of Arbitrators to whom the Zambia Centre for Dispute Resolution is affiliated to, set out practice guidelines to help arbitrators as they award and tax arbitration costs. This is seen as not only the most important but difficult task the arbitrators have to perform as illustrated in the guideline that “One of the most difficult and important functions which an arbitrator has to perform relates to the making of awards of costs. This guideline attempts to provide assistance on the main problems likely to be encountered in this area”¹²

The Zambia Centre for Dispute Resolution is a recognised arbitral institution as per section 23 of the Arbitration Act No 19 of 2000. Having said that, it ought to be noted that once an institution has been recognised they can perform their duties as occasion requires.¹³ Therefore it would not be wrong to use the Chartered Institute of Arbitrators practice guidelines to

¹² Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, paragraph 1.1.

¹³ Section 23 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.

enable us shed more light on the process of awarding and taxation of arbitration costs upon reliance on section 25 of the Interpretation and General Provisions Act Chapter 2 of the laws of Zambia which reads “where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the act or thing.”

The process of awarding and taxation will be looked at step by step starting from the award of costs stretching all through to ascertain if an award of costs can be set aside if need arises.

It is undisputable that the arbitral tribunal are empowered to fix the costs of an arbitration which does include the expert assistance received by the arbitrators and the fees of each arbitrator to mention but a few as stated in section 16(5) (a) of the Arbitration Act No 19 of 2000 that;

Unless otherwise agreed by the parties the costs and expenses of an arbitration including the legal costs and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration, shall be fixed and allocated by the arbitral tribunal in its award.

2.1 THE AWARD AS TO COSTS

Making of awards of costs is one of the most difficult and important function of the arbitrator as illustrated in paragraph 1.1 of the Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on making Orders Relating to the Costs of Arbitration. Hence the guidelines to help them go around the problems they may encounter when making such orders. In order to understand the award as to costs, one needs to know what these costs are. Article 40 of the UNICITRAL Arbitration Rules of 2010 provides for what the term “costs” encompasses. It reads;

the term “costs” includes only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator with the tribunal itself in accordance with article 41; (b) the reasonable travel and other expenses incurred by the arbitrators; (c) the reasonable costs of expert advice and of other assistance required by the arbitral tribunal; (d) the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA

Paragraph 3 of Article 40 of the UNICITRAL Arbitration Rules of 2010 further states that; “In relation to interpretation, correction and completion unless under articles 37 to 39, the arbitral tribunal may charge the costs referred to in Paragraphs 2(b) to (f), but no additional fees.”

This article is relied on by virtue of Section 2(3) of the Arbitration Act No 19 of 2000 which reads;

In interpreting this Act, an arbitral tribunal and a court may refer to the documents relating to the Model Law on International and Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21st June, 1985 set out in the First Schedule and subject to other provisions of this Act, to the documents of the Commissions working group, namely *travaux préparatoires*; and in interpreting provisions of the First Schedule, regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application.

It could be seen from Article 40 of the UNICITRAL Arbitration Rules of 2010 that arbitration costs are expenses incurred during arbitration proceedings. Initially, arbitrators make orders as to costs, for these orders to be enforceable they have to be in form of awards

as stated that; “An Arbitrator’s order as to costs will not be enforceable unless (1) it is contained in an award (2) it is in for a quantified amount”¹⁴

One would wonder why the need for awarding of costs? The need for the award is set out in paragraph 1.3 of the Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators for Making Orders relating to the Costs of Arbitration which states;

Essentially the need for an award of costs arises because in the course of prosecuting or defending arbitration proceedings, the parties will or may incur costs of three different types (a) liability for the Arbitrators fees and expenses; (b) liability for the fees and expenses of an arbitral institution involved; and (c) legal and other costs incurred directly by the parties.

Section 16 of the Arbitration Act No 19 of 2000 gives an insight on the forms and contents of the award as well as the costs and expenses of arbitration. An award has to be in writing, where there are two arbitrators presiding over the arbitration proceedings, both their signatures are required. Where there are quite a number of arbitrators, the signature of the majority of members will be sufficient to validate an award provided the reason for the omitted signature is given or stated. This is provided in subsection 1 which reads;

The award shall be made in writing and shall be signed by the arbitrator or arbitrators; and in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.¹⁵

Once the award for costs has been made, the award should state on the face of it the date on which it was made as well as the place of arbitration. Subsection 3 provides the specified details as it reads; “the award shall state its date and the place of arbitration as determined in

¹⁴ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration

¹⁵ Section 16 of the Arbitration Act No 19 of 2000.

accordance of Article 20(1) of the First Schedule; and the award shall be deemed to have been made at that place¹⁶. ”

The following are the cases where the arbitral tribunal may make an award, unless otherwise provided by the parties;

(a) in the case of the arbitration which, under article 1(3) of the first Schedule, is international, simple or compound interest in accordance of the law applicable in the arbitration; or (b) in any other case, simple or compound interest in accordance to the law applicable in Zambia to judgement debts¹⁷.

In the above mentioned cases, these awards may be “...on the whole or any part of the sum and in relation to such period and at such rate as is specified in the arbitral award¹⁸” as provided in Section 16(6). The award made by the arbitral tribunal may be interim, interlocutory or partial as they have the power to do so as stated in Section 16(7) of the Arbitration Act No 19 of 2000.

2.2 DETERMINING THE RECOVERABLE COSTS OF THE ARBITRATION

An arbitrator is empowered to determine the amount of recoverable costs, he is however, not obliged to do so unless the arbitration agreement requires him to do so as illustrated in the case of *Morgan v Smith*¹⁹. In practice the main costs of the arbitration are: the arbitrator’s fees and expenses; the fees and expenses of any arbitral institution concerned and the legal and other costs of the parties. The costs of or incidental to any proceedings are included in addition to determine the amount of the recoverable costs of the arbitration²⁰. Establishing the

¹⁶Section 16 of the Arbitration Act No 19 of 2000.

¹⁷ Section 16 (6) (a) and (b) of the Arbitration Act No 19 of 2000.

¹⁸ Arbitration Act No 19 of 2000

¹⁹ *Morgan v Smith* (1842) 9 M. & W.427

²⁰ Micheal O’Reilly, *Practical Guides: Costs in Arbitration Proceedings*, 2nd Edition, pg 55(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

amount of costs due to a party entitled to costs under an award is the purpose of determining the recoverable costs of the arbitration²¹

The recoverable costs may be determined by the arbitrator, or he may allow the court to determine the same. The process for determining recoverable costs requires the following;

- (1) The party entitled to costs has to submit a list of claimed costs which is generally called the bill of costs
- (2) The arbitrator/court considers the list and disallows and/or adjusts costs which were unnecessary or unreasonable;
- (3) The arbitrator/court computes the aggregate amount properly payable and issues an award/certificate determining the entitlement.²²

In an Arbitration the general rule is that “the successful party is awarded costs, unless there are special circumstances to depart therefrom.”²³ The successful party does not recover all the costs they incurred in totality, some of the costs are reduced if need be through a process of taxation. This is set out in paragraph 1.4 of the Association of Arbitrators, Southern Africa Practice Note 22: Awarding and Taxing of Costs in Arbitration, which reads; “the party to whom costs are awarded does not recover all costs actually incurred; certain costs are disallowed or reduced to some norm by a process called “taxation”.

The aforementioned practice note is not binding but may be used for clarifying purposes. However, an arbitral award made under the Practice Note 22 shall be recognised as binding, upon an application in writing to the competent court²⁴

²¹ Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 55(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

²² Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 55(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

²³ Paragraph 1.2 of the Association of Arbitrators, Southern Africa Practice Note 22: Awarding and Taxing of Costs in Arbitration.

²⁴ Section 18 of the Arbitration Act No 19 of 2000.

The parties may agree on the costs of the arbitration that are recoverable as well as the actual amount of the recoverable costs, if they do not agree, the arbitral tribunal is mandated to fix and allocate arbitration costs and expenses as set out in section 16(5) (a) that;

Unless otherwise agreed by both parties, the costs and expenses for an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration shall be as fixed and allocated by the arbitral tribunal in its award;²⁵

Depending on this section, it was argued by Mr. Mweemba on behalf of the defendant in the case of *Yougo Limited v Pegasus Energy (Zambia) Ltd*²⁶ that the arbitral tribunal and not the court should tax the costs, as it was the arbitral tribunal that allocated the costs. In his judgement, Judge C. Kajimanga stated that Section 16(5) could only be applied in circumstances where the arbitral tribunal had been requested to tax the costs of award. As there was no evidence on record of such an application by the plaintiff, the High Court did have the jurisdiction to tax costs arising from arbitration proceedings. This decision shows not only that awarding and taxation of arbitration costs are not one and the same, but it also shows the type of arbitration system we have in our country which is the court-annexed arbitration which will be discussed further in chapter three of this paper.

Under the court-annexed arbitration, the party entitled to costs ought to supply a bill of costs in such a format as that which would be submitted following litigation proceedings. The bill of costs will then be passed over to the taxing officer/master²⁷. The taxing officer is simply a delegate of the arbitrator as illustrated in the case of *Piper Double Glazing Ltd v D.C*

²⁵ Arbitration Act No 19 of 2000

²⁶ *Yougo Limited v Pegasus Energy (Zambia) Limited* (2008/HPC/0299) (2011) ZMHC 11

²⁷ Micheal O'Reilly, *Practical Guides: Costs in Arbitration Proceedings*, 2nd Edition, pg 56 (LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

Contracts²⁸, he is obliged to carry out if any, the arbitrators instructions as to how the costs are to be determined and also subject to any other discretion of the court.²⁹

It is clearly set out in Order 40, rule 2 of the High Court Rules that all questions that relate to the amount of costs ought to be referred to the taxing master whose role is to ascertain the same as pointed out by Mr.Chisulo in the case of Yougo Limited v Pegasus Energy (Zambia) Ltd³⁰. Order 62, rule 19 of the Supreme Court Rules (White Book) 1999 edition provides that “a taxing master or registrar has the power to tax costs awarded on a reference to arbitration under any Act”. The Arbitration Act No 19 of 2000 included that is.

In Perkins (HG) Ltd v Best-Shaw³¹ it was stated that; “a taxing master is merely the delegate of the arbitrator for the purposes of settling or taxing the amount of the costs awarded by the arbitrator”.

The taxing officer has the discretion to ascertain the amount of costs to be allowed. Upon receiving the bill of costs, he considers the bill and considers objections, and decides whether activities claimed are reasonable, what time is allowable for each and at what rate. The taxing officer issues a certificate for the costs allowed at the end of his taxation.³²

2.3 BASIS OF THE DETERMINATION

The arbitrators are given the power to award arbitration costs by the Act, the same Act checks on the power acquired by the arbitrators as they ought to state the reason upon which the award so given is based. Section 16(2) of the Arbitration Act No 19 of 2000 provides for this as it states that;

²⁸Piper Double Glazing Ltd v D.C Contracts (1994) 1 W.L.R. 777

²⁹Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition,pg 56(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

³⁰Yougo Limited v Pegasus Energy(Zambia) Limited (2008/HPC/0299) (2011) ZMHC 11

³¹Perkins (HG) Ltd v Best-Shaw (1973) 2 ALL ER 924

³²Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition,pg 57(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

The award shall state the reason upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30 of the First Schedule.

The basis for the award may be one which has been agreed by the parties as provided that;

If the arbitrator determines the recoverable costs of the arbitration it is incumbent upon him to state the ‘basis’ on which he has acted. That basis may be one which has been agreed by the parties. If there has been no such agreement, the arbitral tribunal may determine the recoverable costs ‘on such basis as it thinks fit’ provided that the basis is specified³³

Where the parties have not agreed on the basis, the arbitrator or court may determine that some is applicable. It could be determined that some elements of costs are determined on the “indemnity basis”. This is;

where doubts are resolved in favour of the receiving party rather than in favour of the paying party. This should only be done, however, where the behaviour of the paying party was unreasonable.”³⁴

In order to indicate that they are not using the detailed technical court rules of “taxation”, arbitrators frequently assert that they determine costs on a “commercial basis”.³⁵ Under this basis;

the arbitrator frequently calls for a schedule of costs for which the receiving party is actually liable as the basis for his determination, rather than the rather artificial rates (which are based on typical charging patterns) used for taxation in court³⁶.

³³ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, paragraph 5.2.1

³⁴ Micheal O’Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 57(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

³⁵ Micheal O’Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 57(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

³⁶ Micheal O’Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 58(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

2.3 FACTORS TO CONSIDER WHEN DETERMINING ARBITRATION COSTS

When determining arbitration costs, there are factors the arbitrators ought to consider. As stated in paragraph 5.2.5 that;

.....these include (1) the conduct of all the parties;(2) the amount or value of any property involved; (3) the importance of the matter to all the parties; (4) the particular complexity of the matter or the difficulty or the novelty of the questions raised;(5) the skill, effort, specialized knowledge and responsibility involved; (6) the time spent on the case (7) the place where and the circumstances in which work or any part of it was done.³⁷

Two of the above mentioned factors will be looked at in details, not that they are the most important or anything but just because, there is need for elaboration, as most of them are precise and quite straight forward.

2.3.1 Conduct of all the parties

The conduct of the parties is not with the arbitration and the claims made in it, therefore it could be assumed that this factor does not need to be considered when determining recoverable arbitration costs. When considering the parties conduct, the arbitrators will look at whether the allegations so pursued under arbitration were reasonable as stated in paragraph 4.5.1 that;

The question whether it was reasonable for a party to raise pursue or contest a particular allegation is, on the other hand a relevant matter and if the arbitrators consider that the hearing has been prolonged by unreasonable conduct of this kind he is fully entitled to make an order which reflects this view(eg by depriving a successful party of the proportion of its costs)³⁸

³⁷ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration

³⁸ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

Depriving the successful party of the proportion of its costs should not depend on the arbitrators personal feelings, caution has to be taken before depriving the successful party of his costs as stated in paragraph 4.5.2 that;

However in deciding whether it was reasonable to bring a particular claim the arbitrator should act by reference to objective criteria (in particular whether the claim has been successful) and should exercise great caution before depriving the successful party of his costs merely because of the arbitrators personal feeling that the claim was immoral, lacked merit or for some other reason ought not to have been brought.³⁹

The parties conduct may also affect the determination of the basis used for determining the costs of the arbitration as noted earlier. Where the behaviour of the receiving party was unreasonable, some elements of the costs may be determined on the “indemnity basis”⁴⁰.

2.3.2 The amount or value of any property involved

The arbitrators when determining the recoverable costs ought to weigh that the arbitration costs awarded are proportional to the amount or value of any property involved. The following example will help in understanding the concept of proportionality;

Suppose a claimant in an arbitration advances a claim for £5,000 damages and is wholly successful in recovering that amount but, in so doing, incurs costs amounting to £100,000 and suppose each item, examined in isolation, is reasonable, still a bill of £100,000 might be regarded as wholly disproportionate to the sum involved and therefore not recoverable⁴¹.

³⁹ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

⁴⁰ Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 57(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁴¹ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration paragraph 5.2.4.

2.4 RECOVERABLE COSTS

The costs which are incurred in or incidental to the arbitration are the ones that are recoverable as illustrated in the case of *Johnson v Reed Corrugated Cases Ltd*⁴². These costs exclude those of applications to the courts which will be dealt by the court itself as far as the arbitrator is concerned as illustrated in the case of *Higham v Havant and Waterloo U.D.C*⁴³ where it was stated that;

I should have doubted very much whether it was competent for the arbitrator to deal with costs which might be incurred before the Divisional Court. I think that those costs were necessarily in the discretion of the Divisional Court.

Items in the bill which the arbitrator considers unreasonable may be disallowed, for example, if he considers the number of hours so being claimed for particular items of work to be excessive he may reduce the allowable time as shown in the case of *Re Gibson's settlement Trusts*⁴⁴. The fees claimed by representatives as well as witnesses may be reduced. According to the case of *Barlett v Higgins*⁴⁵, the question of reasonableness is to be judged at the time when the decision to incur the costs was made and not in hindsight, in the holding of this case it was stated that;

In my judgment, it is not correct to say that costs are to be allowed simply because in the ultimate event they turn out to be necessary. The taxing master must not consider, whether they have been 'necessary' having regard to the event, but whether they have been necessary or proper for the attainment of justice-that is (as I think) necessary or proper having regard to the state of things at the time the (items of work for which the costs were incurred) were ordered.

2.4.1 Legal representation.

⁴²*Johnson v Reed Corrugated Cases Ltd* (1992) 1 All E.R. 169.

⁴³*Higham v Havant and Waterloo U.D.C.* (1951) 2 T.L.R. 87 per Cohen L.J at 90.

⁴⁴*Re Gibson's Settlement Trusts* (1981) Ch. 179 at 189

⁴⁵*Barlett v Higgins* (1901) 2 K.B. 230

Costs for legal representation are recoverable unless otherwise agreed by the parties, these include those of arbitrator-appointed experts, advisors, assessors etc⁴⁶. The arbitrator will have to consider the reasonableness and proportionality of those costs as stated that;

The costs of representatives of the appropriate level of skill and experience are generally recoverable, subject to the arbitrator's overriding discretion based on considerations of reasonableness and proportionality⁴⁷.

The number of representatives has to be reasonable so as the fees claimed are not in excess as provided that;

If the arbitrator is of the view that the numbers of representatives or the fees claimed are in excess of what is reasonable, he may disallow some or all of the claims for costs made in respect of individual representatives.⁴⁸

2.4.2 Costs of evidence

The expenses the successful party incurs to when collecting evidence is recoverable as seen in paragraph 5.7.2 of the Chartered Institute of Arbitrators Practice Guideline 9 that;

The costs of evidence include those for preparing witness (including experts') statements, attendance of witnesses at the hearing, preservation of physical evidence, tests, expert reports etc⁴⁹.

The arbitrator will have to ensure that the costs being claimed are reasonable as stated in the above mentioned paragraph that;

The receiving party may recover a reasonable amount in respect of these costs. The test to be applied is whether such costs were reasonably incurred in all the

⁴⁶ Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 58(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁴⁷ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration paragraph 5.7.1.1.

⁴⁸ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration paragraph 5.7.1.1.

⁴⁹ Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

circumstances. The costs of needless duplication and evidence to prove facts admitted in the pleadings will normally be disallowed⁵⁰

2.4.3 Party's own internal costs- Employees

It is not imperative that a party seeks legal representation, a person may decide to represent himself, in such a situation, reasonable compensation may be allowed for that person as stated that; "Reasonable compensation may normally be allowed for a person who represents himself or his employer in an arbitration"⁵¹,

Where a company or a firm is involved in an arbitration, the staff of that company or firm may spend substantial time preparing for the case, such costs may be recoverable as long as they are reasonable as seen in paragraph 5.7.3.2 that;

The staff of a company or firm involved in an arbitration often dedicate substantial time to the case, including the generation of figures and attendance at the hearing. These costs, except for reasonable out-of-pocket expenses necessarily incurred in the arbitration, are normally irrecoverable on the general principle that the lay client's time in instructing those who conduct the proceedings is not allowable.⁵²

4.4 Accomodation and other administrative costs

The cost of the room where the arbitration was being heard as well as all administrative costs are recoverable as evidenced in paragraph 5.7.4 that; "The costs of hearing rooms, necessary photocopying and other similar items of administration are clearly recoverable unless unreasonable."⁵³

Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration paragraph 5.7.3.1.

Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

Chartered Institute of Arbitrators Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration.

These rules are a way of avoiding parties from being exploited as well as to help the arbitrators in the making of awards of costs as this is perceived to be one of the most important and difficult function of an arbitrator.

2.6 CONCLUSION

It is clearly seen that upon relying on the Chartered Institute of arbitrators practice guidelines, more light has been shade on the awarding and taxation of arbitration costs. This indicated the need for the Arbitration Act No 19 of 2000 to shade more light on the same. Alternatively there could be rules or practice guidelines that would be established to help arbitrators carry out what is seen as not only the most important, but also difficult task which is the awarding and taxation of arbitration costs.

CHAPTER THREE

THE ROLE OF THE COURTS IN AWARDING AND TAXATION OF ARBITRATION COSTS

3.0 INTRODUCTION

This chapter will look at the role of the courts in awarding and taxing of arbitration costs. How the courts come to participate as well as their jurisdiction with regards to awarding and taxation of arbitration costs. The impact of the Court Annexed Programme will be analysed in this chapter. There seem to be uncertainty regarding the role of the courts regarding the awarding and taxation of arbitration costs. This is what this chapter will try to make certain.

It needs to be made clear that this chapter will not focus on the assistance of the courts to the arbitration proceedings such as the appointment of the arbitrators, ensuring that witnesses do attend the hearing and also that the arbitrator's award is enforced. Rather it will focus on the intervention of the courts in arbitral proceedings. Ascertaining the role of the courts in awarding and taxation of arbitration costs will call for short look into the jurisdiction of the courts.

3.1 JURISDICTION OF THE COURTS

The Arbitration Act No 19 of 2000 clearly shows that arbitration matters can be solved in courts as illustrated in the section 2 of the Act which is the Interpretation part where the word court is defined as;

means the High Court or any other court, as may be designated by statutory instrument by the Chief Justice, having the jurisdiction to decide the issues constituting the subject matter of the arbitration as if the subject matter had been the subject-matter of the suit; and the expression "the court" shall be construed accordingly.

3.1.1HIGH COURT

The jurisdiction of the High Court is set out in section 9 of the High Court Act cap 27 of the Laws of Zambia. Subsection 1 of the aforementioned section states that

The Court shall be a Superior Court of Record, and in, addition to any other jurisdiction conferred by the constitution and by this or any other written law, shall, within the limits and subjects as in this Act mentioned, possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England.

Subsection 2 of the same section further elaborates on the jurisdiction of High Court stating that;

The jurisdiction vest in the court shall include the judicial hearing and determination of matters in difference, the administration or control of property or persons, and the power to appoint or control guardians of infants and their estates, and also keepers of persons and estates of idiots, lunatics and such as, being of unsound mind, are unable to govern themselves and their estates.

From this section it could be said that judicial hearing and determination of matters in difference would encompass arbitration matters.

Practice and Procedure

Without stating how the so given jurisdiction may be used it would be deemed that the jurisdiction is limitless, which is not the case as illustrated in the case of Zambia National Holding Limited and United Nation Independence Party v. The Attorney General⁵⁴ where it was held that; “the jurisdiction of the High Court is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law....”

Section 10 of the High Court Act Cap 27 clearly sets out the practice and procedure of the High Court with regards to its jurisdiction. It states;

⁵⁴Zambia National Holding Limited and United Nation Independence Party v The Attorney General 1993-1994 ZR 115 (SC)

The jurisdiction vested in the Court, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or said Code, or such written law, and in default thereof in substantial conformity with the law or practice for the time being observed in England in the High Court of Justice.

3.1.2 SUPREME COURT

The jurisdiction of the Supreme Court is laid down in section 7 of the Supreme Court Act Cap 25 of the Laws of Zambia which reads;

The Court shall have to hear and determine appeals in civil and criminal matters as approved in this Act and such other appellant or original jurisdiction as may be conferred upon it by or under the constitution of any other law.

According to Winnie Sithole in her research titled Paradigms of Alternative Dispute Resolution & Justice Delivery in Zambia she noted that;

In civil matters an appeal lies to the Court from any judgment of the High Court. However, this right is subject to the following exceptions and restrictions, namely....., no appeal lies to the Supreme Court for an order as to costs only which by law is left to the discretion of the Court, without leave of the Court or the Judge who made the order or without leave of the Judge of the Supreme Court.

Practice and Procedure

As laid down under section 8 of Cap 25 of the Laws of Zambia that

The jurisdiction vested in the courts shall, as regards practice and procedure, be exercised in the manner provided by this Act and rules of the court: Provided that this Act or rules of court do not make provision for any particular point of practice and procedure, then the practice and procedure of the court shall be..... (ii) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal of England. Except that the Civil

Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes.

3.2 THE COURTS INTERVENTION

It should be noted that the courts play a vital role in the arbitral process. It prevents parties circumventing the arbitration process in breach of an arbitration agreement. The court also plays a role of being a disciplinary body as it can remove an arbitrator, set aside an award as not being one that should be complied with, or remit the award to the arbitrator pointing out where he went wrong and ordering him to issue a fresh award in whole or in part. This is evidenced in section 17 of the Arbitration Act No 19 of 2000 which allows parties to an arbitration to apply to the court to set aside as exclusive recourse against an arbitral award.

It is accepted that the court does deal with the law, however the court need to be very careful as it is not meant to interfere with what an arbitrator has done or has awarded unless there is good reason for this. It is apparent under Article 5 of the First Schedule of the Arbitration Act No 19 of 2000 which provides for the extent of Court Intervention that; “In matters governed by the law, no court shall intervene except where so provided in this Law”. This indicates that the court may intervene where the law permits.

The Arbitration Act No 19 of 2000 only states under section 17, how the court can intervene in arbitration matters which is through an application for setting aside as exclusive recourse against an arbitral award. It states that; “Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3)”.

The Arbitration Act No 19 of 2000 does not explicitly lay down how applications to the court in respect of costs can be made. What the Act does instead is lay down how an application to the court can be made for setting aside as exclusive recourse against arbitral awards which is

set out in section 17 of the Act. Which is rather general than specific as it caters for all awards. Therefore, what will be done is to refer to the Arbitration Act 1996 of England and Wales as it shades more light on how challenges to awards in respect to costs can be made. The above mentioned Act will be used as a guide line to give effect to section 17 of the Arbitration Act No 19 of 2000 of Zambia.

The arbitrator's lack of substantive jurisdiction, serious irregularity affecting the arbitrator, the proceedings as well as the award and on a question of law are the three bases upon which an arbitrators award may be challenged⁵⁵. There are a number of applications that may be made to the court in respect to challenging costs, these include the following;

3.2.1APPLICATIONS IN RESPECT OF THE ARBITRATORS FEES AND EXPENSES

APPLICATION TO HAVE THE AMOUNT OF THE ARBITRATORS FEES AND EXPENSES ADJUSTED

The party is able to apply to the courts to have the amount of the arbitrator's fees and expenses considered as well as adjusted as long as they have sufficient reason to show that there is need for the same to be done. They can make an application to the court by relying on section 17 of the Arbitration Act No 19. This application can be brought under subsection (2) (v) of section 17 which reads;

the arbitral award may be set aside by the court only if the award has not yet become binding or has been set aside or suspended by a court of a country in which, or under the law of which, that award was made⁵⁶.

⁵⁵ Douglas A. Stephen, Arbitration Practice in Construction Contracts, paragraph 10.3 pg 121, 5th Edition, (Blackwell Science Ltd, Editorial Offices, Osney mead, Oxford OX2 0EL. 2001)

⁵⁶ Arbitration Act No 19 of 2000

Article 13 paragraph (3) of the First Schedule of the Arbitration Act No 19 of 2000 can be relied on also to challenge the arbitrators fees it reads;

If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request within thirty days after having received notice of the rejecting the challenge, the court or other authority specified, in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator may continue the arbitral proceedings and make an award

The agreements as to costs properly made between the arbitrator and the parties needs not to be affected by this power of review. As soon as the appointed arbitrator sends an indication of his proposed charges, this application can be made. The fact that payment has already been made to the arbitrator will not prevent an application as provided that;

Where money is paid over to the arbitrator, however, there may be circumstances in which it is unreasonable to order repayment and so an early application may be appropriate.⁵⁷

3.2.2APPLICATION FOR THE COURT TO DETERMINE THE RECOVERABLE COSTS OF THE ARBITRATION

There could be cases where the arbitral tribunal will not determine the recoverable costs of the arbitration, in such a case the party may apply to the courts to have them determined.

Section 16 (5) (a) of the Arbitration Act No 19 of 2000 clearly states that;

Unless otherwise agreed by the parties the costs and expenses of an arbitration including the legal and other expenses of the parties. The fees and expenses of the

⁵⁷ Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 126(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997). It should be noted however, that there may be reasons why a party may be uneasy about making an application part way through an arbitration. Order 73, rule 10(2) of the Rules of the Supreme Court provides that the arbitrator is to be made a respondent to the application. Furthermore, the application is required to identify the respondent against whom the order for costs is made as per rule 4(2)(c), and this is likely to be the arbitrator. Therefore,

arbitral tribunal and other expenses related to the arbitration, shall be fixed and allocated by the arbitral tribunal in its award.

Therefore, reliance on Article 14 of the First schedule of the Arbitration Act No 19 of 2000 would be appropriate to enable parties apply to the court to determine the recoverable costs in an arbitration.

3.3 CHALLENGES ON THE GROUNDS OF SERIOUS IRREGULARITY IN RESPECT OF COSTS

Where it is alleged by the party that there has been serious irregularity, the irregularity may be in relation to the tribunal or the proceedings and even the award. The parties may use section 17 of the Arbitration Act No 19 of 2000 or Article 33 of the First Schedule of the Arbitration Act No 19 of 2000. Where the challenge is made in relation to the award, a significant period of time may elapse between the alleged irregularity and the application. This application may be made by any party upon giving notice to the other party and the arbitral tribunal. A challenge on an award based on serious irregularity may be made to the court through an application for setting aside as exclusive recourse against arbitral award as stipulated in section 17 of the Arbitration Act No 19 of 2000. Serious irregularity can be one of the following.

- (1) Failure by the arbitrator to act fairly & impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of the opponent.

This claim could be brought by relying on s 17(2)(a)(ii) of the Act which reads;

an arbitral award may be set aside by the courts only if the party making the application furnishes proof that the party making the application was not given proper notice of the

appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case;

- (2) Failure by the arbitrator to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined. Section 17(2)(a)(iii) which reads;

The arbitral award may be set aside by the court only if the party making the application furnishes proof that the award deals with a dispute not contemplated by, or falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission of the arbitration, provided that, if the decision on the matter submitted to the arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to the arbitration may be set aside.

- (3) The arbitrator exceeding his powers, except by exceeding his substantive jurisdiction.
- (4) Failure by the arbitrator to conduct the proceedings in accordance with the procedure agreed by the parties. As illustrated in section 17(2)(a) (iv) of the Act which states;

An arbitral award may be set aside by the court only if the party making the application furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place

- (5) Failure by the arbitrator to deal in his award with all the issues put to him. When there is such a situation the party may make an application for an additional award as illustrated in Article 33 paragraph (3) of the First Schedule of the Arbitration Act No 19 of 2000 which reads;

Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but

omitted from the award, if the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days

- (6) Uncertainty or ambiguity as to the effect of the award. This falls under the scope of article 33 paragraph (1) (b) of the First Schedule of the Arbitration Act No 19 of 2000 which reads;

Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties: if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

- (7) The award being obtained by fraud. As shown in section 17(2)(b)(iii) and it reads;

The arbitral award may be set aside by the court only if the court finds that the making of the award was induced or affected by fraud, corruption or misrepresentation.

- (8) The award or the way it was procured being contrary to public policy. As shown in section 17(2)(b)(ii). It states "The arbitral award may be set aside by the court only if the court finds that the award is in conflict with public policy".

The list actually goes on, though the list is wide and comprehensive, there are prerequisites to a successful challenge and these are:

- (1) The challenge must be made to an award, where for instance an irregular order or direction is made, no challenge is possible until the award is made which is affected by the irregularity
- (2) The irregularity must be properly classified under one or more of the grounds set out in section 68(2). These are widely drawn. Where an injustice is perceived by the courts, it is likely that an appropriate ground will be found.
- (3) The irregularity complained of has caused or will cause substantial injustice to the applicant.

- (4) The applicant must not have lost his right to object. Where there has been failure to comply with the Act, or the proceedings have been improperly conducted, or there has been any irregularity, the applicant must raise his objection “forthwith” unless he could not reasonably have known of irregularity and raises his objection as soon as he knows of it.
- (5) The applicants time limits have not expired, the time limit require that the challenge is made within 28 days of the date of the award.⁵⁸

Prerequisite number 2, where there is section 68(2) it would be replaced by section 17 of the 2000 Arbitration Act and number 19. While number 5 would reflect that the time limit for the challenge is 3 months from the date of the award as stated under section 17(3) of the Act.

An award being challenged on the basis of serious irregularity can brought under 2 grounds which are serious irregularity affecting the proceedings and serious irregularity affecting the award.

3.3.1 SERIOUS IRREGULARITY AFFECTING THE PROCEEDINGS

Serious irregularity affecting the award would include the following;

Where there has been a procedural mishap. For example where an advocate inadvertently fails to request that a decision on the costs be reserved for further submissions and the arbitrator proceeds to award costs without being aware of an offer, the court may remit the award for his reconsideration⁵⁹; or the award on costs is made because of a mistake or a possible misapprehension⁶⁰ on the arbitrators part.

3.3.2 SERIOUS IRREGULARITY AFFECTING THE AWARD

Irregularities affecting the award may be such where no award has been made in respect of costs. The arbitral tribunal are empowered by the Arbitration Act upon request to

⁵⁸ Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 128(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁵⁹ King v. Thomas Mckenna Ltd. (1991) 2 Q.B. 480.

⁶⁰ The Angeliki (1982) 2 Lloyd's Rep. 594

“make an additional award as to claims presented to the arbitral procedure but omitted from the award⁶¹”. Where such an application has been made there is room for extension of the time limits⁶².

- a. Where the award as to costs is uncertain or ambiguous.
- b. Where the award deals with elements of costs which are not within the arbitrators jurisdiction. An example arises where two arbitrators are heard concurrently without being formally consolidated and a party in one arbitration is ordered to pay the costs of a party in the respect of the other arbitration.
- c. Where the award as to costs is defective as to form. This may create substantial injustice where the defect renders the award unenforceable in the place where it is to be enforced.⁶³

3.5AN APPEAL ON POINT OF LAW

If either party considers the award as to costs to be wrong in principle, an appeal under section 17(2) (a) (i) of the Arbitration Act No 19 of 2000 will be appropriate as it is the only permissible application. The aforementioned section reads;

An arbitral award may be set aside by the court only if the party making the application furnishes proof that a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon under the laws of Zambia.

If the award as to costs does not clearly follow the general principle that costs follow the event and no reasons are given, an application under section 17, should be made.⁶⁴

⁶¹Article 33 paragraph (3) of the First Schedule of the Arbitration Act No 19 of 2000

⁶²Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 129(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁶³Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 129(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁶⁴Micheal O'Reilly, Practical Guides: Costs in Arbitration Proceedings, 2nd Edition, pg 130(LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

The appeal will only be heard by the court if both parties consent to an appeal as long as all arbitral processes of appeal have been exhausted and the application is brought within 3 months of the date of the award. Leave to appeal is required where only one party wishes to appeal. The courts have adopted a policy of giving leave only in serious cases of injustice based on an error of law or when there is a major point of principle which is of importance to the development of the commercial law. The situations where leave can be given are restrictive. In practice leave will be given;

- (1) Where the award is so perverse that no proper discretion can have been exercised and the amount of costs at stake is large relative to the amount in dispute; or
- (2) Where the arbitrator sets out reasons for his award as to costs which clearly demonstrate that he has used his discretion on an incorrect basis in law⁶⁵ and the amount of costs at stake is large relative to the amount in dispute; or
- (3) Where the arbitrator purports to apply a principle of law and in so doing undermines the very principle which he seeks to apply.⁶⁶

An appeal has to be made within 3 months of receipt of the award, if no appeal is made within the said days the award as to costs becomes “final valid and unassailable”. If the parties have entered into an exclusion agreement, no appeal in relation to costs will be possible. If the appeal is heard, the court may confirm, vary or set aside or remit the award with its opinion.

An illustration of this is the case of *President of India v. Jadranska Slobodna Plovid*⁶⁷ where it was stated that;

It will be appreciated that in order to succeed on an application for leave to appeal in respect of an award on costs a party will have to be prepared to satisfy the highest category of test in *The Nem* which is the case which established the principles which

⁶⁵ *Metro-Cammell Hong Kong Ltd v F.K.I. Engineering plc* (1996) A.D.R.L.N May 1996.

⁶⁶ Micheal O'Reilly, *Practical Guides: Costs in Arbitration Proceedings*, 2nd Edition, pg 130 (LLP Limited, Legal Publishing Division, 69-77 Paul Street, London EC2A 4LQ, 1995&1997).

⁶⁷ *President of India v. Jadranska Slobodna Plovid* (1992) 2 Lloyd's Rep. 274.

are largely enacted in section 69(3) of the Arbitration Act 1996 which is tantamount to persuading the court that the appeal will almost certainly be successful. The point will be ‘one off’; the decision being attacked is the exercise of discretion which is fortiori a question of mixed fact and law. Further there will often be other factors present which make it inappropriate that the court should grant leave to appeal⁶⁸

In the case of *Pioneer Shipping Ltd v BTP Tioxide (The Nema)*⁶⁹, Lord Diplock’s judgment was mainly related to the question whether leave to appeal to the High Court from the arbitrator’s award ought or ought not to have been granted by the judge under Arbitration Act 1979 (c. 42), s. 1 (1) (2) (3) (4) (7). Lord Roskill, in his turn, considered questions whether charterparty concluded on 2nd November 1978 is indivisible from the adventures contemplated in addendums 2 and 3, and whether the arbitrator was, upon the facts found by him, entitled in point of law to hold that the 1979 adventure was frustrated⁷⁰.

3.6 THE ROLE OF THE COURTS IN TAXING COSTS AWARDED IN ARBITRATION PROCEEDINGS

It is seen in the case of *Yougo Limited v Pegasus Energy (Zambia) Limited*⁷¹ that either the arbitral tribunal or the Taxing Master can tax costs awarded in arbitration proceedings. If there is a prior agreement between the parties to that effect or if an application in that regard has been made to the arbitral tribunal, the arbitral tribunal will tax the costs. In the absence of such an agreement or application, the Taxing Master which is the court has not only the jurisdiction but the power to tax costs arising from arbitration proceedings once an application for taxation has been made before it.

⁶⁸Hobhouse J. at 280-81

⁶⁹*Pioneer Shipping Ltd v BTP Tioxide (The Nema)* (1982) AC 724

⁷⁰*Pioneer Shipping Ltd v BTP Tioxide (The Nema)* (1982) AC 724

⁷¹*Yougo Limited v Pegasus Energy (Zambia) Limited* (2008/HPC/0299) (2011) ZMHC 11

The case of Perkins Ltd(HG) v Best- Shaw⁷², the taxing master was defined as being “merely the delegate of the arbitrator for the purposes of settling or taxing the amount of costs awarded by the arbitrator”. Other cases that show the definition of the Taxing Master as stated in the above mentioned case are Holdsworth v Wilson⁷³, Simpson v Inland Revenue Commissioners⁷⁴ and Matthews v Inland Revenue Commissioners⁷⁵. This shows that the taxing master in his own right cannot tax costs arising from arbitration proceedings, unless the arbitrator delegates him to do so. The following case was referred to in the judgment of Perkins (HG) Ltd v Best- Shaw⁷⁶, Knott v Long⁷⁷ where it was held that “if an arbitrator does not himself tax the costs, he can only delegate the taxation to an officer of the court and not to some third party.”

A report of Knott v Long⁷⁸ is given in the judgment of Perkins (HG) Ltd v Best- Shaw⁷⁹ which reads as follows;

an award that the defendant should pay what costs two persons named in the award (who were not officers of any court) should appoint for costs; provided they are such as Master in Chancery would allow; was held ill, for they can only delegate their authority in that instance to one who, the court will take notice, understands it better than themselves.

3.7 THE IMPACT OF THE COURT ANNEXED PROGRAMME IN ZAMBIA

The court-annexed arbitration is a court-run dispute resolution process to which cases that meet some specified criteria are involuntarily assigned. Arbitrators hear the case and render awards that are not binding, as a litigant may always request a trial.⁸⁰

⁷² Perkins(HG) Ltd v Best- Shaw (1973) 2 ALL ER 924

⁷³ Holdsworth v Wilson (1863) 4 B & S 1 at 8

⁷⁴ Simpson v Inland Revenue Commissioners (1914) 2 KB 842

⁷⁵ Matthews v Inland Revenue Commissioners (1914) 3 KB 192

⁷⁶ Perkins (HG) Ltd v Best- Shaw (1973) 2 ALL ER 924

⁷⁷ Knott v Long (1735) 2 Stra 1025

⁷⁸ Knott v Long (1735) 2 Stra 1025

⁷⁹ Perkins (HG) Ltd v Best- Shaw (1973) 2 ALL ER 924

The Arbitration Act No 19 of 2000 compels certain types of cases to use arbitration as illustrated in section 10 of the Act which states;

(1) A court before which legal proceedings are brought in a matter which the subject of an arbitration shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (2) where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

In Zambia the High Court enforces arbitration awards and judgements of that court enforcing or denying enforcement of an award can be appealed to the Supreme Court. The power the courts have to over the arbitration process is the impact of the court annexed programme in Zambia.

CONCLUSION

It could be said that the Arbitration Act No19 of 2000 would need to be amended as it is not exhaustive. An Act that is similar to the English Arbitration Act of 1996 would be of recommendation, one that really is clear and focuses on all aspects of arbitration which will make the work of the arbitrators quite easy.

⁸⁰Elizabeth S. Rolph, Introducing Court Annexed Arbitration; A policymakers guide. Rand Report, Vol 3167 of the Rand Cooperation Report.

CHAPTER FOUR

THE NEED FOR CLARITY IN THE DRAFTING OF THE ARBITRATION ACT NO 19 OF 2000 WITH REGARDS TO SECTIONS THAT PROVIDE FOR AWARDING AND TAXATION OF ARBITRATION COSTS.

4.1 INTRODUCTION

This chapter will look at the need for clarity of the Arbitration Act No 19 of 2000 with regards to the sections that provide for the awarding and taxation of arbitration costs. This will be done by comparing the Act to the Arbitration Act 1996 of England as well as other texts and jurisprudence that will enable us to do the same.

It could be said that due to the lack of clarity of the Arbitration Act No 19 of 2000 with regards to the awarding and taxation of arbitration costs does to some extent defeat the whole purpose of arbitration. If the Act could be much clearer as compared to the Arbitration Act 1996 of England, then arbitration as an alternative dispute resolution would be very popular in Zambia.

THE PURPOSE OF ARBITRATION

A quick look at the purpose of arbitration will enable us see the need for clarity of the Arbitration Act no 19 of 2000. In ascertaining the purpose of arbitration there will be need to look at the advantages as well as disadvantages of arbitration.

Arbitration has a basic principle which is namely the determination of a dispute arising from a contract between two parties by a third party chosen by the contracting parties. The efficacy of arbitration is dependent upon a framework of law within which it is recognised, without

such a framework the award of the arbitrator could have no value if the losing party chose to simply ignore it.⁸¹

According to English law, arbitration may be defined as;

a private mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties, under which the parties agree to be bound by a decision to be given by the arbitrator according to the law after a fair hearing, such decision being enforceable at law⁸².

4.2.ADVANTAGES OF ARBITRATION

The arbitral process rests on agreement between parties, it is consensual in nature. It ought to be made clear that;

there can be no arbitration proper without an arbitration agreement, and there can be no arbitration initiated by, or conducted against a person who is not a party to the arbitration agreement.⁸³

As an alternative to litigation, arbitration has a number of advantages which include the following;

4.2.1 PROCEDURAL FREEDOM

One of the most significant feature of an arbitration is the freedom of the parties to organise their proceedings as they like. This feature is far more significant than the freedom which the parties have to choose the proper law, as parties have this equally, whether in arbitration or

⁸¹Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 1, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁸²Henry J. Brown & Arthur L. Marriot, ADR Principles and Practice, 2nd Edition, pg 49, Sweet & Maxwell, 100 Avenue Road London NW3 3PF, 1999.

⁸³Henry J. Brown & Arthur L. Marriot, ADR Principles and Practice, 2nd Edition, pg 52, Sweet & Maxwell, 100 Avenue Road London NW3 3PF, 1999.

before the court.⁸⁴ A suitable person may be chosen by the parties to an arbitration agreement to be an arbitrator. This is quite important because for an example;

frequently disputes arising from construction contracts involve such questions as to whether or not the ground conditions encountered could reasonably have been foreseen by an experienced contractor, having regard to the subsoil information available to the contractor at the time of making the contract; whether or not the issue of drawings or instructions on certain dates caused delay towards the works; whether or not variations ought to be valued at contract rates or in some other way having regard to the provisions of the contract⁸⁵.

Such questions could only be answered by a person who is an expert in the construction industry as they have a proper understanding of the same. If the parties can not directly choose their arbitrator, some appointing authority may do so on their behalf, this is upon agreement by the parties or the courts in their supportive role may assist in this process.⁸⁶ Though having being appointed by parties, the arbitral has a duty to not only be impartial but to act judicially as well. A breach of any of the above mentioned duties may result in the arbitrator being challenged and eventually removed by either the court or the arbitral institution concerned.⁸⁷ This is illustrated in Article 12 of the First Schedule of the Arbitration Act No 19 of 2000 which provides for grounds on which an arbitrator may be challenged and it reads;

(1) when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such

⁸⁴Henry J. Brown & Arthur L. Marriot, ADR Principles and Practice, 2nd Edition, pg 53, Sweet & Maxwell, 100 Avenue Road London NW3 3PF, 1999.

⁸⁵Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 6, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁸⁶Henry J. Brown & Arthur L. Marriot, ADR Principles and Practice, 2nd Edition, pg 53, Sweet & Maxwell, 100 Avenue Road London NW3 3PF, 1999.

⁸⁷Henry J. Brown & Arthur L. Marriot, ADR Principles and Practice, 2nd Edition, pg 53, Sweet & Maxwell, 100 Avenue Road London NW3 3PF, 1999

circumstances to the parties unless they have already been informed of them by him....

The procedural freedom affords the parties so much convenience as seen that; “the parties are, subject to the agreement of the arbitrator, free to choose the dates, times and venues of hearings and of meetings⁸⁸.”

The parties to an arbitration proceeding “are entitled to expect that the arbitrator will where the parties are in agreement and where he can, comply with their wishes as to such agreements⁸⁹”

4.2.1 FLEXIBILITY

The procedural freedom in arbitration allows for the arbitral process to be flexible. For example;

Disputes arising from construction contracts may involve sums of money varying from a few thousand pounds to tens or hundreds of millions. They may involve questions of law or of fact or both, and the questions of law may arise either from the construction of standard forms of contract or from ‘one-off’ terms in a contract; while the questions of fact may be simply what happened during construction ,or what might have been foreseen by an experienced professional⁹⁰.

Such matters may affect the choice of an appropriate procedure as well as the form and level of representation, if at all there is any, of the parties.⁹¹ Parties in arbitration through agreement are free to determine these matters. It should be noted though that;

⁸⁸Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 9, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁸⁹Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 9, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁹⁰Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 6, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁹¹Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 7, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

neither party can dictate to the other as to its choice of representation, a party may bring to the notice of the arbitrator a contention that costs are being incurred unnecessarily by its opponent, and may request that this be taken into account in the arbitrator's award for costs⁹²

4.2.4 PRIVACY

Unlike litigation, arbitration proceedings are not open to the press or to the public. The persons involved in the proceedings are the only ones entitled to attend the hearings and the meetings that may be needed.⁹³ By the agreement of the parties, those that are not directly involved may be invited to attend; such invitations frequently extend to for example pupils of the arbitrator who intend to gain experience. Their attendance is permitted on the condition that those so invited are to respect the confidentiality of the proceedings.⁹⁴ The confidentiality of arbitration is not explicitly provided for by the Arbitration Act. The duty of confidentiality is implied by the courts as they require parties to an arbitration to maintain the confidentiality of not on the award but of the hearing as well as the documents used during the proceedings.⁹⁵ The documents generated and used during the proceedings cannot be disclosed without the consent of the other parties to the proceedings as illustrated in the case of *Ali Shipping Corp v Shipyard Trogir*⁹⁶

4.2.5 BINDING AWARD

One principle feature of commercial arbitration is that the award is to be binding though it may or may not be final as illustrated in section 20 which reads;

⁹²Douglas A. Stephenson, *Arbitration Practice in Construction Contracts*, 5th Edition, pg 7, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁹³Douglas A. Stephenson, *Arbitration Practice in Construction Contracts*, 5th Edition, pg 8, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁹⁴Douglas A. Stephenson, *Arbitration Practice in Construction Contracts*, 5th Edition, pg 8, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

⁹⁵Stephen Jagusch & Andrea Dahlberg, *A Q&A guide to arbitration law and practice in the UK (England and Wales)*, 2011.

⁹⁶*Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136

(1) Subject to subsections (2) and (3), an award made by an arbitral tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.⁹⁷

It is possible to challenge the award when there are any defects in it, this is provided for in section 20 (2) of the Arbitration Act No 19 of 2000 which states; “Subsection (1) shall not affect the right of a person to challenge the award by any available process provided for in this Act”.

The available process is that set out in section 17 of same Act. Section 20(3) further states;

where the time for making an application to set aside an arbitration award has expired or where the application has been refused by a court, the award shall be deemed to be, and shall be enforceable in the same manner as, an order of the court⁹⁸

4.3 DISADVANTAGES OF ARBITRATION

4.3.1 COSTS OF THE ARBITRATOR AND OF COURT FACILITIES

It has been mentioned earlier that in contrast to litigation where both the judge and the court facilities are provided at public expense, in arbitration, the parties to an arbitration, or one of them will ultimately have to bear the costs of the arbitrator and of the court facilities.⁹⁹ Such costs are quite small in many cases compared to litigation¹⁰⁰.

4.3.1 INCOMPETENT ARBITRATORS

It is mentioned earlier in this paper that the choice of an arbitrator may affect the costs of the arbitration. Judges are appointed after having gained extensive knowledge and experience, while arbitrators having inadequate qualifications and experience may be chosen by either the

⁹⁷ Arbitration Act No 19 of 2000

⁹⁸ Arbitration Act No 19 of 2000

⁹⁹ Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 9, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

¹⁰⁰ Douglas A. Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 9, Blackwell Science Ltd, Editorial Offices, Osney mead, OX2 0EL. 2001

ties themselves or the appointing authority in ignorance of the requirements of the appointment¹⁰¹. Appointing authorities now maintain panels of qualified arbitrators, therefore, parties seeking make an appointment by agreement are given the chance to choose name of an arbitrator from the list who seems to have the necessary knowledge and experience.¹⁰² These precautions are not always sufficient as seen in the case of Pratt v Inmore Builders and Baker,¹⁰³

where an arbitrator appointed by the Chartered Institute of Arbitrators who had 'shown himself to be quite incompetent to conduct the arbitration' and had 'allowed the arbitration to be reduced to such a state that there was no prospect of justice being done' was removed by order of the High Court¹⁰⁴ case of Fairclough Building v Vale of Belvoir Superstore¹⁰⁵ an arbitrator appointed by appointing authority made three errors of law in his award in which he allowed only some GBP against an uncontested claim of over 400,000 GBP had the award.¹⁰⁶ Therefore of the precautions taken by these authorities, some arbitrators still show inconsistency.

THE NEED FOR CLARITY IN THE DRAFTING OF THE ARBITRATION ACT OF 2000 WITH REGARDS TO THE SECTIONS PROVIDING FOR THE DRAFTING AND TAXATION OF ARBITRATION COST.

Comparison with the 1996 Arbitration Act of England will highlight the need for clarity or precision in the drafting of the Arbitration Act No 19 of 2000. The uncertainty that

Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 12, Blackwell Science
Offices, Osney mead, OX2 0EL. 2001
Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 12, Blackwell Science
Offices, Osney mead, OX2 0EL. 2001
Inmore Builders and Baker (1980) 15 BLR 37
Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 12, Blackwell Science
Offices, Osney mead, OX2 0EL. 2001
Building v Vale of Belvoir Superstore (1990) 56 BLR 74
Stephenson, Arbitration Practice in Construction Contracts, 5th Edition, pg 12, Blackwell Science
Offices, Osney mead, OX2 0EL. 2001

surrounds the awarding and taxation of arbitration costs could be due to the lack of clarity in the drafting of the Arbitration Act No 19 regarding the same.

4.4.1 COSTS OF THE ARBITRATION

The costs and expenses of the arbitration are provided for in section 16 of the Arbitration Act No 19 of 2000 which also provides for the form and content of the award. Section 16(5) reads;

unless otherwise agreed by the parties (a) the costs and expenses of an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration, shall be as fixed and allocated by the arbitral tribunal in its award; (b) where the award does not specify otherwise, each party shall be responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.¹⁰⁷

Section 59 provides for costs of the arbitration and it reads;

(1) References in this Part to the costs of the arbitration are to (a) the arbitrator's fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal and other costs of the parties. (2) Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration¹⁰⁸.

This section though similar to section 16 (5) of the Arbitration Act No 19 of 2000, the latter section seems clearer in the way it has been drafted.

4.4.2 AGREEMENT TO PAY COSTS

¹⁰⁷ Arbitration Act No 19 2000

¹⁰⁸ 1996 Arbitration Act of England

Section 60 provides for an agreement to pay costs in any event and it reads "any agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen"¹⁰⁹.

This section is very similar to section 16 (5) (b) which states;

where the party does not specify otherwise, each party shall be responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.¹¹⁰

However, this is not clearly set out in the Arbitration Act No. 19 of 2000 in the sense that it is not clearly headed as it is in the 1996 Arbitration Act of England.

1.4.3 AWARD AS TO COSTS

Award as to costs is clearly provided for under Section 61, it states;

(1) the tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties (2) unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs¹¹¹.

This section could be likened to section 16(5)(a) of the Arbitration Act No 19 of 2000, the difference being the level of clarity of the former. Section 62 provides for the effect of an agreement or award as to costs, it reads;

unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be born, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable¹¹².

4.4.4 RECOVERABLE COSTS OF THE ARBITRATION

Section 63 lays down the recoverable costs of the arbitration; it states;

- (1) the parties are free to agree what costs of the arbitration are recoverable (2) if or to the extent that there is no such agreement, the following provisions apply. (3) the tribunal may determine by award, the recoverable costs of the arbitration on such basis as it thinks fit, if it does so, it shall specify (a) the basis on which it has acted, and (b) the items of the recoverable costs and the amount referable to each; (4) if the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may- (a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or (b) order that they shall be determined by such means and upon such terms as it may specify¹¹³

Subsections (5) to (7) of the same Act elaborate further on recoverable costs.

The Arbitration Act No. 19 of 2000 does not provide for the recoverable costs clearly, one would have to assume that the costs mentioned in section 16(5)(a) are the recoverable costs, or refer to the other texts and jurisprudence such as the Chartered Institute of Arbitrators Practice Guidelines or the UNICITRAL Rules on arbitration.

4.4.5 RECOVERABLE FEES AND EXPENSES OF THE ARBITRATORS

Section 64 provides for the recoverable fees and expenses of the arbitrators, it reads;

- (1) unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.(2) if there is any question as to

¹¹²1996 Arbitration Act of England

¹¹³1996 Arbitration Act of England

what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties)- (a) determine the matter, or (b) order that it be determined by such means and upon such terms as the court may specify; (3) subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator); (4) nothing in this section affects any right of the arbitrator to payment of his fees and expenses.¹¹⁴

Upon reliance on the Arbitration Act No.19 of 2000, the recoverable fees and expenses would have to be deduced from section 16(5)(a). It is not bad to have to deduce it from section 16(5)(a), however, it would be better if it was clearly set out as it is in the 1996 Arbitration Act of England.

4.4.5 THE POWER TO LIMIT RECOVERABLE COSTS

The power to limit recoverable costs is provided for under section 65 which states;

(1) unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount; (2) any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.¹¹⁵

This is not expressly provided for in the Arbitration Act No. 19 of 2000, but it would be of help if such a section was included for the benefit of the arbitrators, as their work would be made easier.

¹¹⁴1996 Arbitration Act of England

¹¹⁵1996 Arbitration Act of England

CONCLUSION

In order to fully appreciate the advantages of arbitration, there could be need to draft the Arbitration Act more clearly. It should be bore in mind that under the provision that provides for the appointment of the arbitrators which is section 12 of the Arbitration Act No.19 of 2000, it stipulates that any person can be appointed as one with due regard to the qualifications required of the arbitrator. Therefore, it would be good to draft the Act in such a way that it could be used by any person so appointed as an arbitrator without need for interpretation or clarification on the wording of the provisions of the Act. Clarity of the Arbitration Act would enable arbitration to serve its purpose.

CHAPTER FIVE

GENERAL CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

This chapter will summarise the whole paper and also make recommendations based on the findings of the research.

SUMMARY

It is apparent from the findings of this paper that the Arbitration Act No. 19 of 2000 would need to be revised. It should be bore in mind that before the Arbitration Act No. 19 of 2000 was enacted the 1933 Arbitration Act of England was in force. It took 67years for Zambia to pass its own legislation, while in this period England had quite a number of Arbitration Acts enacted which led to the enactment of the 1996 Arbitration Act which is now in place. Looking at the 1996 arbitration Act of England does highlight the need for clarity and revision of the Arbitration Act No.19 of 2000. The clarity was not established simply by incorporating the UNICITRAL Model Laws only, but also by revising their Act from time to time when need to do so arise.

Awarding and taxation of arbitration costs is seen as not only the most difficult but the most important function an arbitrator has to perform. The Arbitration Act No.19 of 2000 is not exhaustive regarding the same. In order to get a clear overview of the awarding and taxation of arbitration costs one has to make reference to texts such as the Chartered Institute of Arbitrators Practice Guideline 9: Guide for Arbitrators on making Orders Relating to Costs of the Arbitration. UNITRAL Arbitration Rules of 2010 also have to be relied on to understand what the term costs encompass, which the Arbitration Act No. 19 of 2000 does not fully exhaust.

The role of the courts in awarding and taxing of arbitration costs needs to be clearly set out in the Arbitration Act No.19 of 2000. The Act needs to specify how applications to the courts can be made in respect awards as to costs as it is set out in the 1996 Arbitration Act of England. Having adopted the Court Annexed, its impact on our legal system needs to be clearly set out and emphasized in the Arbitration Act No 19 of 2000.

Upon comparison to the 1996 Arbitration Act of England in chapter four, it is clear that there is need for clarity in the drafting of the Arbitration Act No.19 of 2000 with regards to provisions that provide for the awarding and taxation of arbitration costs. The provisions that provide for not only the most difficult but important functions of an arbitrator which is the awarding of arbitration costs needs to be made clear in order to fully appreciate arbitration as an alternative to litigation. A person of expert knowledge could be an arbitrator, this could be an engineer, or even a contractor, thus, the Act needs to be clear enough to accommodate such experts to be able to rely on it alone and be able to carry out their duty as an arbitrator.

RECOMMENDATION

Arbitration being a form of Alternative Dispute Resolution (ADR) should be able to serve its purpose in entirety as an alternative to litigation as set out in chapter four. Therefore there could be need to revise the Act or rather modify it, considering that from the 1933 that was in force, it was only in 2000 that another Act had been enacted. If revising the Act would seem impossible, incorporating the Chartered Institute of Arbitrators Practice Guidelines to be part of the Act would be a good move towards making the Act that which it ought to be.

The way the UNITRAL Model Laws have been incorporated is a good thing as it has made the Act carter for both domestic and international cases, however there is need to move towards the way the 1996 Arbitration Act was drafted, clear and precise.

CONCLUSION

From the findings of this paper it could be seen that there is need for the Arbitration Act No.19 of 2000 to be clear in its drafting regarding the awarding and taxation of arbitration costs. The most important and most difficult task of the arbitrators is the awarding and taxation of arbitration costs according to the Chartered Institute of Arbitrators. Therefore, an Act that would be clear regarding the same would make arbitration be appreciated as an alternative to litigation.

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