

THE CHALLENGES OF THE ARBITRAL PROCESS IN THE RESOLUTION OF DISPUTES  
IN ZAMBIA

By

NKHULA BOTHA

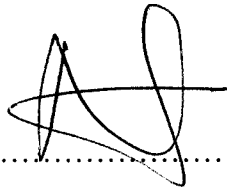
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Being a Directed Research essay submitted to the University of Zambia Law Faculty in Partial  
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## DECLARATION

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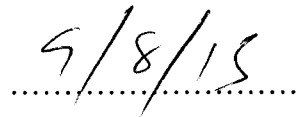
**THE CHALLENGES OF THE ARBITRAL PROCESS IN THE RESOLUTION OF  
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## **ABSTRACT**

The model of arbitration is not a novel occurrence; its birth can be traced as far back as the medieval times and has cautiously evolved for the proper management of justice. The arbitral process, there a number of challenges from the legal and institutional point of view faced by the parties. The rationale of this research was to demonstrate the challenges of the arbitral process in the resolution of disputes in Zambia. This research principally involved desk research and field research which entailed interviews with judges, advocates and scholars. This paper first introduced the concept of arbitration and then looked at the factors that have influenced the development and general preference of arbitration. In order to do this, research paper also identified the challenges of the arbitral process generally. This was done by, highlighting the challenges from the legal and institutional point of view in a general context. This was done in order to appreciate the challenges in a broad sense before narrowing down to the specific challenges of the arbitral process in Zambia.

The research concluded by illustrating that there is need to adhere to the rationale of arbitration by providing recommendations on the challenges of the arbitral process in Zambia that are attainable in order to fully utilize and appreciate the arbitral process. These include the provision of increased education and training for arbitrators, public sensitization, expedited time for enforcement of arbitral awards and increased competence of arbitrators.

## **DEDICATION**

This is dedicated to my beloved parents, Andrew Botha and Mable Botha. Your unconditional love, your unrelenting sacrifices and your extraordinary faith and confidence in me are what make it possible for me to look forward to each day.

## ACKNOWLEDGEMENTS

Firstly, I would like to thank the Lord Almighty for calling me to be a Lawyer for the pursuit of justice for and on behalf of all in the general public as I go aboard on this journey of public service.

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I am eternally grateful to my father and mother who have been nothing but a great pillar of strength and have nurtured me into what I am today. Dad, your wise counsel and trust in me made it all possible and mum, your strength, prayers and belief in me have continued to keep me going. You are the best parents in the world and simply estatic. I would also like to thank my sibling; Rhoda who always looks up to me and offers valuable encouragement, you have been a true source of encouragement. From time to time the journey has been rough but in all our experiences we have stayed together, growing and learning to love and care for each other. I would like to thank my aunt, Leah Msimuko Botha for all the love and support during my academic life. My grandmother, uncles, aunts, cousins, nephews and nieces, I have not forgotten you all as you have been a source of love and laughter and a part of valued family moments through this journey.

I thank my good friends who I have come to treat as part of my own family; Bwalya Chali, Monde Kamwi and Patricia Kakanda. My gratefulness is also extended to every member of the 2013 Law School (evening) graduating class for the comradeship and scholarship during this

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## **TABLE OF STATUTES**

Arbitration Act No. 19 of 2000 of the Laws of Zambia

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The Arbitration (Code of Conduct and Standards) Regulations 2007 of the Laws of Zambia

The Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76, of the Laws of Zambia

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# CHAPTER 1

## ✿ GENERAL INTRODUCTION

### 1.1 INTRODUCTION

Sustained high levels of productive private investment in developing countries are imperative to achieve the growth rates necessary to meet the Millennium Development Goals. One of Zambia's Millennium development goals includes efforts to achieve economic development by increasing economic growth. For this to be achieved, Zambia has to have an enabling environment to attract meaningful investments from both foreign and local investors. One of the major features of such an enabling environment is dispute resolution.<sup>1</sup>

There should be an effective and reliable dispute resolution mechanism in order to settle investment and commercial disputes in a speedy and cost effective manner so as to maintain business efficacy and confidence in investors. Furthermore, it is often preferred by investors to have minimal government intervention in their commercial relations.<sup>2</sup> In developing countries, it is generally the norm to find that national courts are overwhelmed, ineffective and counterproductive to business efficacy. It can therefore be said that, as a solution to this problem in commercial and investment relations, the prospect of the arbitration process and its perceived advantages as opposed to litigation are prominent.<sup>3</sup>

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<sup>1</sup> United Nations Conference on Trade and Development: Investment Policy Review, Zambia, (New York and Geneva: United Nations, 2006).p18

<sup>2</sup> Dennis, Kotov, "How Changing Investment Climate Impacts on the Foreign Investors Investment Decision: Evidence from FDI in Germany" MPRA Paper No. 8777, (May 2008)p.2

<sup>3</sup> Thomas E. Carbonneau, *Cases and Materials on International Litigation and Arbitration* (California: Thomson-West, 2005), 3-15.

Since the liberalization of the Zambian economy, there has been a rise in the number of commercial and investment disputes over the last ten years. It has become common practice to insert an arbitration clause in commercial and investment agreements. The parties increasingly invoke these arbitration clauses when a dispute arises. A reference to arbitration entails a process by which disputes between two or more parties are determined in private, with final and binding effect by an impartial third person (or persons) acting in a judicial manner rather than by a court of competent jurisdiction.<sup>4</sup>

The Arbitration process in commercial and investment disputes is intended to offer a party driven process that is quicker, cost effective and ultimately obtain a higher level of expertise of the triers of fact.<sup>5</sup> In addition, it is intended to pioneer moderately formal methods of dispute resolution, to establish consensual problem solving and empower individuals by enabling them to control the outcome of their dispute and develop a dispute resolution mechanism that would preserve their personal and business relationships.<sup>6</sup>

The arbitral process in Zambia was formerly regulated by the Arbitration Act which was enacted on 5<sup>th</sup> April, 1933 which has now been repealed and replaced by the Arbitration Act, No. 19 of 2000, on 23<sup>rd</sup> December, 2000. The new Act has adopted with modifications the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21<sup>st</sup> June, 1985.

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<sup>4</sup> David M. Lawrance, *A Treatise on the Law and Practise of Arbitrators and Awards* (London: The Estates Gazette Ltd, 1953), 1.

<sup>5</sup> *Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd* SCZ/34/2008 (unreported)

<sup>6</sup> Finn, P., *Mediation and Arbitration*, (St. Paul, Min: West Group, 2002) p. 12

The new Act seeks to redefine the supervisory role of the courts in the arbitral process. In addition it seeks to preserve the legal recognition and enforcement of foreign arbitral awards under the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927).<sup>7</sup>

Despite the recognition of the importance of arbitration in Zambia, the court system has not to a large extent been unburdened of its traditional role of resolving commercial and investment disputes. Therefore, it is perceived that arbitration has not achieved its intended goal. These challenges in commercial and investment dispute resolution in Zambia have led to the increasing demand for quicker and cost effective means of resolving these commercial and investment disputes to avoid disruptions to businesses.<sup>8</sup> This demand has necessitated the need to improve and utilize alternative dispute resolution. Arbitration is of particular interest to this research.

The legal and institutional frameworks for resolving disputes through arbitration which are in place have not been spared by challenges. The use of the arbitral process which is meant to unburden the court system and provide a better alternative to this court system in commercial and investment disputes has met its own challenges. These challenges have impacted negatively on the arbitral process and its use. The challenges have been to the arbitral process itself and the awards from the arbitral process which are final.

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<sup>7</sup> Arbitration, Act No. 19 of 2000 (preamble)

<sup>8</sup> Marriot, A., Mandatory ADR and Access to Justice, (Westbury, N.Y.: Foundation Press, 2002) p. 45



## 1.2 PROBLEM STATEMENT

Despite the recognition of the importance of arbitration in Zambia, the court system has not, to a large extent, been unburdened of its traditional role of resolving commercial and investment disputes. Therefore, it is perceived that arbitration has not achieved its intended goal. The model of arbitration in Zambia over the years has been rendered not to be as effective as it is expected to be for the purposes of settling commercial and investment disputes. It is therefore imperative to consider its efficiency in order to establish whether it justifies being used as an alternative dispute mechanism for commercial and investment disputes. This research consequently seeks to discover the challenges of the arbitral process in Zambia in order to evaluate the degree these challenges hinder the arbitral process in Zambia and suggest how best these challenges can be addressed in order to make arbitration more useful as an alternative means to dispute resolution.

## 1.3 GENERAL OBJECTIVES OF THE STUDY

The main object of this research is to identify the challenges of the arbitral process as an alternative means to dispute resolution and furthermore, to suggest practical remedies to the challenges encountered by the parties to the arbitral process.

## 1.4 SPECIFIC OBJECTIVES

1. To identify the legal challenges of the arbitral process
2. To identify the institutional challenges of the arbitral process
3. To explore the root causes of the challenges in the arbitral process
4. To determine the impact of the challenges in the arbitral process
5. To explore the possible remedies to the challenges identified challenges to the arbitral process.

## 1.5 RATIONALE AND JUSTIFICATION OF RESEARCH

This research is significant and well-timed because arbitration is a lucrative form of commercial and investment dispute resolution mechanism. Zambia is a country where one of the main development goals is to achieve economic development by increasing economic growth through providing an enabling environment for investment. One of the main features of a good investment climate is dispute resolution. Arbitration is a lucrative alternative to the Zambian court system which is generally overwhelmed, ineffective and counterproductive to business efficacy.<sup>9</sup> The rationale of this research is to discover the challenges of the arbitral process in Zambia in order to evaluate the degree these challenges hinder the arbitral process in Zambia and suggest how best these challenges can be addressed in order to make arbitration more useful as an alternative means of dispute resolution for commercial and investment disputes.

## 1.6 RESEARCH QUESTIONS

1. What is alternative dispute resolution?
2. What is arbitration?
3. What has necessitated the growth of arbitration in Zambia?
5. What are the legal and institutional challenges of the arbitral process in Zambia?
7. What are the root causes of the challenges in the arbitral process in Zambia?
9. What are the challenges in the enforcement of awards from the arbitral process in Zambia?
10. How have these challenges impacted on the arbitral process in Zambia?

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<sup>9</sup> United Nations Conference on Trade and Development: Investment Policy Review, Zambia, UNITED NATIONS New York and Geneva, 2006.p18

11. How can these challenges of the arbitral process be addressed in Zambia?

## **1.7 METHODOLOGY**

This research will be qualitative; therefore, it will mostly be characterized by desk research and field research from the relevant departments like the Zambia Association of Arbitrators (ZAA), Chartered Institute of Arbitrators Zambia (CIA), Zambia Centre for Dispute Resolution (ZCDR), the courts and other players involved in the administration of justice. Secondary data in the form of books, journals and scholarly articles will be consulted with a view to disseminating current information.

## **1.8 CHAPTER OUTLINE**

### **Chapter 1**

This Chapter gives a general introduction on the subject matter of the research topic namely '*The Challenges Of The Arbitral Process In The Resolution Of Disputes In Zambia*' and it does this by among other things providing the problem statement, objectives of the research as well as the rationale behind it.

### **Chapter 2**

This chapter will highlight the factors that have influenced the development and general preference of arbitration in commercial and investment disputes in present times. In addition, the chapter shall also look at the salient provisions of the Arbitration Act No. 19 of 2000 will be given in order to better identify and analyse the challenges of the arbitral process in Zambia. In order to do this, this chapter will provide a brief history of arbitration as an alternative dispute resolution. It will furthermore look at the advantages of the arbitral process over litigation.

### **Chapter 3**

This chapter will identify the challenges of the arbitral process generally. This will be done by, highlighting the challenges from the legal and institutional point of view in a general context.

This will be done in order to appreciate the challenges in a broad sense before narrowing down to the specific challenges of the arbitral process in Zambia.

### **Chapter 4**

This chapter will endeavour to identify the peculiar challenges of the arbitral process in Zambia.

In addition, the chapter shall also look the challenges of the arbitral process from a legal and institutional point of view.

### **Chapter 5**

This chapter will give a general conclusion on the research. Furthermore, it shall provide recommendations on the challenges of the arbitral process in Zambia that are attainable in order to fully utilize and appreciate the arbitral process.

## **1.9 CONCLUSION**

This chapter has given the general introduction of the subject matter herein. It has also introduced the role of arbitration in settling commercial and investments disputes in Zambia. In addition this chapter has also introduced the challenges that the arbitral process faces. It has highlighted the problems, objectives and the rationale of the research. It has shown the purpose of the study as well and what it is intended to achieve.

## **CHAPTER 2**

# **ARBITRATION AS A MEANS OF ALTERNATIVE DISPUTE RESOLUTION**



## **2.0 INTRODUCTION**

The aim of this chapter is to highlight, the factors that have influenced the development and general preference of arbitration in commercial and investment disputes in present times. In order to do this, this chapter will provide a brief history of arbitration as an alternative dispute resolution. It will furthermore look at the advantages of the arbitral process over litigation.

## **2.1 A GENERAL HISTORICAL DEVELOPMENT OF ARBITRATION AS AN ALTERNATIVE DISPUTE RESOLUTION IN THE INTERNATIONAL PERSPECTIVE**

Arbitration, in the context of United States law, is a form of alternative dispute resolution: specifically, a legal alternative to litigation whereby the parties to a dispute agree to submit their respective positions (through agreement or hearing) to a neutral third party the arbitrator(s) or arbiter(s) for resolution.<sup>10</sup>

Before the Industrial Revolution, Commercial contractual Agreements to arbitrate were not enforceable at common law. Though, once the parties had actually submitted a pending dispute to an arbitrator, the arbitrator's judgment was usually enforceable. The reasoning for this was that the power of the arbitrator arose solely from the *mutual* consent of the parties to his jurisdiction; but by the time a dispute reached the point that one party wished to take it to an arbitrator, the

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<sup>10</sup> Alternative Dispute Resolution Guidelines: Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce, (GBDe: November 2003)p.55  
<http://AlternativeDisputeResolutionGuidelinesGBDe.com/intl/en/privacy/>. (accessed March 6, 2013)

other often preferred to take their chances in court instead. Thus, without the consent of both parties to his jurisdiction, the arbitrator lacked the power to decide the case.

During the Industrial Revolution, large corporations became increasingly opposed to this policy. They argued that too many valuable business relationships were being destroyed through years of expensive adversarial litigation, in courts whose rules differed significantly from the informal norms and conventions of business people (the private law of commerce, or *jus merchant*). Arbitration was promoted as being faster, less adversarial, and cheaper.<sup>11</sup>

The result was the New York Arbitration Act of 1920, followed by the United States Arbitration Act of 1925. Both made agreements to arbitrate valid and enforceable (unless one party could show fraud or unconscionability or some other ground for rescission which undermined the validity of the entire contract). The main USA Arbitration Law is now known as the Federal Arbitration Act.

In England, arbitration began even before the King's courts were established. England used arbitration as a common means of commercial dispute resolution as far back as 1224. It developed as a means for merchants and traders to avoid the courts. The earliest recorded evidence relating to a written law of arbitration in England dates back to 1698.<sup>12</sup>

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<sup>11</sup> Jerold S. Auerbach, *Justice Without Law?: Non-Legal Dispute Settlement in American History* (Oxford: Oxford University Press, 1983)p.3

<sup>12</sup> Julian D. M. Lew, Loukas A. Mistelis & Stefan Kröll, *Comparative International Commercial Arbitration*, (Kluwer Law International, 2003) p.19. [http://www.wvu.edu/~exten/depts/ilsr/arbitration\\_history.pdf](http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf) (accessed March 9, 2013)

Eastwards, in India, arbitration was conceived in the system called the Panchayat. Indian civilization was an express proponent of encouraging settlement of differences by tribunals chosen by the parties themselves. Usually the tribunals were constituted of wise men in the community. Arbitration in India then continued its development with the first Bengal Regulations, enacted in 1772 during the British rule, followed by more specific legislation, the Indian Arbitration Act 1940, which was later modernized by the Arbitration and Conciliation Act 1996.<sup>13</sup>

## **HISTORICAL DEVELOPMENT OF ARBITRATION LAW IN ZAMBIA**

The first Arbitration law to be enacted in Zambia was the Arbitration Act 1933. This statute was enacted during the colonial era and its original source was the English Arbitration Act 1889. This English Arbitration Act of 1889 was later improved by the Arbitration Act 1934 and other subsequent Acts. Without the benefit of these subsequent improvements from the inherited English arbitration Act of 1889 to the Zambian Arbitration Law, a number of defects to the Arbitration Act of 1933 were inherent. This Act was later repealed and replaced by the current Arbitration Act number 19 of 2000. A number of improvements have therefore been made in the area of Arbitration in Zambia since the 1933, Act.<sup>14</sup>

One of the useful changes to be noted are that there are now two Arbitration organisations in Zambia called the Zambia Centre for Dispute Resolution Limited (Centre) and Zambia Association of Arbitrators (Association). The Association is a membership organisation to which all trained arbitrators in Zambia belong. The Centre trains arbitrators in Zambia and organises

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<sup>13</sup> Krishna Sarma, Momota Oinam & Angshuman Kaushik, "Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution" CDDRL Working Papers, Number 103. Prior to the enactment of the *1996 Act*, (ASLI, October 2009)

<sup>14</sup> Kenneth Mwenda, *Principles of Arbitration Law*. (Florida: Brown Walker Press, 2003) p.9

various workshops and other activities related to alternative dispute resolution. The Centre is affiliated to the London Chartered Institute of Arbitrators and all arbitrators trained at the Centre are eligible for the membership of the London Institute.<sup>15</sup>

## 2.2 SALIENT PROVISIONS OF THE ARBITRATION ACT NO. 19 OF 2000

Arbitration in Zambia is governed by the Arbitration Act, the UNICTRAL model Law on International Commercial Agreements and United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Under the Arbitration Act, arbitration is defined as; referring to any arbitration whether or not administered by permanent arbitral institution or means the conduct of proceedings for the determination of a dispute by an arbitral tribunal. The Act does not seem to be helpful in that it does not define arbitration per se. An arbitration agreement may take the form of an arbitration clause in a contract or a separate agreement between the parties.<sup>16</sup>

In practice, however, it is vital to include a clause providing in clear terms that the parties must resort to arbitration in the event of a dispute. This was emphasised in the case of *Nokia-Maillefer SA (Switzerland) v Mazzer (Italy)*<sup>17</sup>, *in casu*, it was held that a clear manifest and certain meaning which is unambiguous had to be present in the agreement for arbitration to be valid.

An arbitration agreement in a contract is treated as a separate and independent agreement, which survives the termination of the underlying contract. This is known as the doctrine of

<sup>15</sup> Arbitration: Zambia <http://www.practicallaw.com/arbitrationhandbook>. (accessed March 23 , 2013)

<sup>16</sup> Arbitration, Act No. 19 of 2000, ss 2 and 9

<sup>17</sup> Tribunal Cantonal (Vaud), 1993



separability/severability. In the case of *Heyman and another v Darwin's Ltd*<sup>18</sup>, Lord Macmillan described an arbitration clause in the following terms:

..... an arbitration clause in a contract ... is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other .... But the arbitration clause does not impose on one of the parties an obligation that affects the other. It embodies the agreement of both parties that if any dispute arises with regard to obligations, which the one party has undertaken, to the other such dispute shall be settled by a tribunal of their own constitution.... The purpose of the contract has failed, but the arbitration clause is not one of the purposes of the contract.

Later in the case of *Paul Wilson & Co. A/S V Partenreederei Hannah Blumenthal*, (*The Hannah Blumenthal*)<sup>19</sup>, Lord Diplock gave the following characteristics of an arbitration clause:

the first characteristic is that which was established by the House in *Heyman v Darwin Ltd* ... an arbitration clause is collateral to the main contract in which it is incorporated and it gives rise to collateral primary and secondary obligations of its own. These collateral obligations survive the termination (whether by fundamental breach, of condition or frustration) of all primary obligations assumed by the parties under the other clauses in the contract...

The scope of the Arbitration Act as provided by section 3 of the Act includes every arbitration agreement and every arbitral award subject to section 33 of the Act. The Arbitration Act also applies to an agreement between an investor and the State, subject to the state proceedings Act.<sup>20</sup> Furthermore, this Act applies to every arbitration under any other written law, whether that law was in force before or after the commencement of the current Arbitration Act. However, section 5 (3) also provides that the provisions of this Act shall not apply to an arbitration referred to in subsection (1) of section 5 if those provisions are inconsistent with the provisions of the written law concerned or with any rules of procedure applicable under that law or are excluded by the written law concerned or by any other written law.

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<sup>18</sup> (1942) AC 356 or ALL ER 337

<sup>19</sup> (1983) 1 ALL ER 34.

<sup>20</sup> Arbitration, Act No. 19 of 2000, s 4

Any dispute which the parties have agreed to submit to arbitration may be determined by arbitration. However, In relation to commercial arbitration, there are matters that are not capable of determination by arbitration.<sup>21</sup> The Act provides for disputes that are not capable of determination by arbitration. It provides that an agreement that is contrary to public policy, a dispute which in terms of any law, may not be determined by arbitration; and a criminal matter or proceeding except insofar as permitted by written law or unless the court grants leave are not capable of being determined by arbitration.

The Act further provides that a matrimonial cause, a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration, the determination of paternity, maternity or parentage of a person or a matter affecting the interests of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person; are also matters not capable of being determined by arbitration.

The parties are free to agree on a procedure of appointing the arbitrator or arbitrators. The only requirement is that no person shall be precluded from acting as an arbitrator because of his nationality, gender, colour or creed. Such a limitation, if included in an arbitration agreement, would arguably be void. If they fail to agree; in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators appointed, can then appoint the third arbitrator. If a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment; the appointment can then be made, upon request of a party, by an arbitral institution.<sup>22</sup>

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<sup>21</sup> Arbitration, Act No. 19 of 2000, s 6

<sup>22</sup> Arbitration, Act No. 19 of 2000, s 12

The only reference to impartiality and independence of arbitrators in the Arbitration Act is that the court or arbitral institution, in appointing an arbitrator, must have due regard to any qualifications required of the arbitrator by the agreement of the parties and considerations that are likely to secure the appointment of an independent and impartial arbitrator. However, the Arbitration (Code of Conduct and Standards) Regulations 2007, contained in a statutory instrument made under the Arbitration Act, provides a comprehensive guide on the requirements relating to arbitrators' impartiality, fairness and independence.

Further, Article 12 of the UNCITRAL Model Law, included in the Arbitration Act imposes a duty on an arbitrator to disclose any circumstances that are likely to give rise to justifiable doubts about his impartiality or independence. Failure to do so is a ground for terminating the arbitrator's appointment. This position was also affirmed in the case of *Zambia Telecommunications Co. Ltd. v Celtel Zambia Ltd.*<sup>23</sup> where it was stated that situations perceived as having compromised the arbitrators independence and impartiality, create a notion that justice may not have been seen to have been done.

The Act confers general powers on the tribunal to enable them carry out their functions effectively. The powers exercisable by the tribunal in the conduct of the arbitration reflect a significant change in the relationship between the tribunal and the court. The aim is to reduce the need for applications to the court whilst arbitral proceedings are pending by giving the tribunal the widest possible powers subject to the contrary agreement of the parties.<sup>24</sup>

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<sup>23</sup> (90/2006) [2008] ZMSC 23; SCZ No.34 of 2008 (14 May 2008)

<sup>24</sup> Encyclopedia of Forms and Precedents: "Arbitration and alternative dispute resolution" vol 3(1) (1999)

A person can only join or be joined to arbitral proceedings if they are Party to the agreement that is the subject of the dispute or Party to a submission of a dispute to arbitration. Similarly, as in litigation, a third party who is not a "party" to the arbitral proceedings cannot be bound by or benefit from the proceedings unless they claim under or through a substantive party to the arbitral proceedings. The Arbitration Act confirms this by providing that an award made by an arbitral tribunal under an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.<sup>25</sup>

Section 16 of the Act provides that once the tribunal makes an award, the award should be made in writing and should 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 arbitral tribunal shall suffice, provided that the reason for any omitted signatures is stated. Section 18 (1) further provides that an arbitral award, irrespective of the country in which it was made, can be recognised as binding and, upon application in writing to the competent court, is enforceable subject to the grounds for refusing enforcement and recognition provided in section 19 of the Act. An award may be enforced, with leave of the High Court, as an order of the court.<sup>26</sup>

The effect of 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. The finality of the arbitration process does not however preclude one from challenging the award on the grounds provided in the Act.<sup>27</sup>

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<sup>25</sup> Arbitration, Act No. 19 of 2000, s 20

<sup>26</sup> Aden Refinery v Ugland Management Co [1987] QB 650

<sup>27</sup> Arbitration Act No. 19 of 2000 Sections 19 and 20

Under the Arbitration Act, the only way to challenge an arbitral award is to apply to the High Court to set aside the award. An award can be set aside only on the grounds set out in the Act.<sup>28</sup>

An application for setting aside cannot be made after three months from the date on which the party making the application had received the award. If a request has been made under Article 33 of the UNCITRAL Model Law for correction or interpretation of the award, or for an additional award, the time limit runs from the date on which the arbitral tribunal disposed of that request. Where the time limit has expired, or the court has refused the setting aside application, the award is enforceable in the same way as a court order.

The law of limitation applies to arbitration in Zambia. The relevant statute is the Limitation Act of England 1939 (Limitation Act) which applies in Zambia under a local statute. Section 27 of the Limitation Act specifically provides that the Limitation Act applies to arbitration proceedings as it applies to actions in the High Court. The ordinary common law principles apply. The usual limitation period is six years, inclusive of claims based on contract and most other civil law claims. The time begins to run from the date the cause of action accrues. Once time has started to run, it continues running until proceedings are commenced or the claim is barred.

## **2.3 HYPOTHETICAL ADVANTAGES OF ARBITRATION OVER LITIGATION IN ZAMBIA**

Increasingly, parties are submitting disputes arising out of general investment and commercial contracts to arbitration. The marked preference of arbitration as a form of alternative dispute resolution can be explained by several major advantages it offers in comparison to litigation.

The principle feature of arbitration is the fact that it is a creature of contract. It is therefore as a result of this fact that arbitration derives its specificities and invariably its advantages.

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<sup>28</sup> Arbitration Act No. 19 of 2000 Section 17

This assertion is supported by Section 10 (1) of the Arbitration Act, which purports that it is mandatory to refer a matter to arbitration which is the subject of an arbitration agreement. Section 10 (1) of the <sup>29</sup>Zambian Arbitration Act stipulates as follows “A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement 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. Where proceeding referred to have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before court.”

The fact that arbitration is a creature of contract is also acknowledged by the courts which have readily submitted parties to arbitration, where arbitration agreements are present. This is illustrated in the case of *Leoprad Ridge v Zambia Wild Life Authority*<sup>29</sup> where it was stated that “in consideration of the Respondent’s application for the stay of proceedings under Section 10 of the Arbitration Act N0 19 of 2000, we find that the learned trial Judge had no choice but to refer the dispute to arbitration as provided for in the Hunting Concession Agreement.”

Generally, as a creature of contract, the parties to the arbitration agreement have autonomy over the process as there is basically a common intention by the parties to refer a possible dispute to arbitration. As a result of this party autonomy, the parties to the agreement have the ability to control and determine most of the specificities patterning to the arbitration, unlike in litigation. Consequently, the general advantages of arbitration over litigation are:

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<sup>29</sup>[ 2008] Vol 2, ZR 97 at p104

### **2.3.1 Freedom to Choose a Neutral and Competent Decision maker:**

Where the arbitration involves foreign investment, parties to the contract are often reluctant to submit to the jurisdiction of host countries' courts. The mutual unwillingness to risk having a dispute decided by a tribunal that is believed to be more sympathetic to the other party's interest is usually one of the main reasons contracting parties agree to submit future disputes arising out of their contract to arbitration.<sup>30</sup>

Arbitral tribunals can be composed of either one or three arbitrators. One of the most valued features of arbitration is therefore that the parties' have the ability to choose their tribunal, and thereby to ensure that their dispute is heard by a tribunal that they trust, that they consider to be independent, impartial and competent in the relevant subject-matter and that they know has the required availability. Where a high level of technical competence is required, the parties will select arbitrators that are known to have that competence.<sup>31</sup>

### **2.3.2 Speed**

Several features of arbitration favour speedy proceedings. First and foremost, unlike court decisions, arbitral awards are final and not subject to appeal.<sup>32</sup> While court cases where large amounts are at stake will thus often have to go through appeal procedure and sometimes even a third review procedure by the highest court.

Arbitration in principle ends with a final award. The only exception is where the losing party seeks to obtain a *vacatur* from the courts of the seat of arbitration. The lack of a pre-existing

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<sup>30</sup> David Sherwyn, Bruce Tracey & Zev Eigen. "In Defense of Mandatory Arbitration of Employment Disputes" *Pennsylvania Journal of Labor and Employment Law*, Vol. 2, (1999): 73

<sup>31</sup> Arbitration, Act No. 19 of 2000, s 12

<sup>32</sup> Arbitration, Act No. 19 of 2000, s 20

detailed set of procedural rules governing the proceedings in theory allows arbitral tribunals and parties to devise the most efficient procedure for a particular dispute.<sup>33</sup>

Arbitrators in principle have more flexible schedules than judges and can make themselves available in the evenings and during weekends and holidays

### **2.3.3 Cost**

While the cost of arbitration was also traditionally considered an advantage of arbitration over litigation, that judgment is today being revised. International arbitration proceedings have been increasingly influenced by the litigation process, and have grown more and more complex and, accordingly, expensive.

The fact that arbitral awards are not subject to appeal, makes a significant difference in costs. Furthermore, the enforcement of an arbitral award in a foreign country will mostly be simpler and thus more inexpensive than enforcement of a foreign court judgment. By contrast, increases in cost can result from a party's recourse to national courts, be it to obtain relief in aid of arbitration or, to the contrary, to hamper the arbitration process.<sup>34</sup>

If the parties to arbitration are represented by legal practitioners, as they often are, the fee structure under the Legal Practitioners (Costs) Order 2001 is used. This Order provides for an

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<sup>33</sup> Arthur Mazirow, Esq., CRE Los Angeles, California Presented to The Counselors of Real Estate, April 13, 2008 (Chicago: CRE, April 13, 2008) p.1.

<sup>34</sup> Alternative Dispute Resolution Guidelines: Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce, (GBDe: November 2003)p.1  
<http://AlternativeDisputeResolutionGuidelinesGBDe.com/intl/en/privacy/>. (accessed March 6 , 2013)



hourly rated graduated fee structure, which is based on the seniority of the legal practitioner. The fees chargeable by arbitrators are also regulated by statutory instrument No. 12 of 2007.<sup>35</sup>



Contrary to litigation, however, parties to an arbitration have to pay the arbitrators' fees and expenses and, where institutional arbitration is chosen, the administrative costs of the arbitral institution. By far the most significant costs in both litigation and arbitration are, however, attorneys' fees. Those fees will vary significantly depending on the complexity of the procedure and can thus in theory be reduced by streamlining the arbitral process

#### **2.3.4 Confidentiality**

The desire to keep a dispute and its resolution confidential frequently plays an important role in a party's decision to agree to arbitration. Indeed, arbitral proceedings are private and, unlike court proceedings, are not part of the public record.<sup>36</sup> The confidentiality requirement applies to information relating to the arbitration proceedings before the courts. The Arbitration (Code of Conduct and Standards) Regulations 2007 also sets out extensive rules for confidentiality requirements for the arbitrators themselves.<sup>37</sup>

#### **2.3.5 Ability to Select Place and language Of the Arbitration**

Arbitration is convenient in this respect notably to foreign investment disputes, in that it allows the parties to freely determine many aspects of their procedure. In particular, the parties are free to choose where they wish the arbitration to take place, a decision that should systematically be made in the contract's arbitration agreement itself, at a stage where the parties are much more likely to find an agreement than after a dispute has arisen. The parties can thus define which

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<sup>35</sup> S.I No.12 Arbitration (Code of conduct and standards) regulations, 2007 of the Laws of Zambia

<sup>36</sup> Arbitration, Act No. 19 of 2000, s 27

<sup>37</sup> S.I No.12 Arbitration (Code of conduct and standards) regulations, 2007 of the Laws of Zambia

place of arbitration is most convenient for them. Negotiations typically result in agreements pursuant to which the law of one party's country is to govern the contract while the place of arbitration is to be in the other party's country.<sup>38</sup>

Agreeing to arbitration also allows the parties to pick the language in which they would like the proceedings to be conducted. Unlike the situation where a dispute is litigated, the place of arbitration does not predetermine the language and parties can agree on the language that is most convenient. Parties can also agree to have the arbitration proceed in two languages. It is more frequent, however, that parties agree on one language while expressly allowing documents to be filed in two or more languages without translation.<sup>39</sup>

### **2.3.6 Flexibility of Process**

Litigation before national courts is governed by the rules of procedure and of evidence applicable in the court's jurisdiction. Such rules are usually very detailed and intricate and lead to a fairly time-consuming procedure. By contrast, the parties to an arbitration are free to fashion the arbitral process to suit their needs and preferences, with the possible exception of certain very general requirements of the law. No particular set of procedural or evidentiary rules is in principle applicable to arbitration proceeding.<sup>40</sup>

However, where the parties have decided that their arbitration is to proceed under an arbitral institution's rules, such as, for instance, the Rules of Arbitration of the International Chamber of Commerce, those rules will apply to the procedure. Even such institutional arbitration rules provide only broad procedural guidelines and leave the determination of more specific rules to

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<sup>38</sup> Arbitration, Act No. 19 of 2000, s 5

<sup>39</sup> Julie Chiu, Consolidation of Arbitral Proceedings and International Commercial Arbitration, 7(2) J.Int'l Arb. (53 1990)p.40

<sup>40</sup> Article 19, UNCITRAL Model Law

the parties or, if the parties do not reach any agreement in this respect, to the arbitral tribunal. Often arbitrations proceed without any particular set of applicable procedural rules, and tribunals determine issues of procedure, evidence or discovery when and if they arise as they deem fit under the circumstances of the particular case. From a procedural standpoint, arbitrations can thus be simpler and more flexible than court proceedings.

### **2.3.7 Absence of Appeal**

Since commercial arbitration is based upon either contract law or the law of treaties, the agreement between the parties to submit their dispute to arbitration is a legally binding contract. All arbitral decisions are considered to be "final and binding." Arbitral awards are final and cannot be appealed, except where arbitration proceedings can be challenged in the *Zambian High Court* (High Court) on limited statutory grounds.

In countries that have ratified the New York Convention like *Zambia*, such *vacatur* can occur only in very exceptional circumstances.<sup>41</sup> This contractual and binding nature of arbitration can be seen and confirmed in the Nigerian case of *M.V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd*<sup>42</sup>, The Supreme Court held that so long as an arbitration clause is retained in a valid contract and the dispute is within the contemplation of the arbitration clause, the Court ought to enforce the arbitration agreement.

The fact that awards cannot be appealed can be viewed as an advantage in that it ensures that there will be only one procedure and that the losing party will not be able to delay enforcement by initiating time and cost-consuming appellate proceedings. The court in *Kunda N.O. v Keren Motors (Z) Ltd* pointed out that it was necessary to underscore the purpose of an action to have

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<sup>41</sup> New York Convention Section IV(A) (4)(b)),

<sup>42</sup> (2003) 15 NWLR (part 844) 469

the award set aside. The purpose is to preserve the integrity of the arbitral process. The point should be noted that setting aside proceedings do not serve as a means to achieve a review of the tribunal's decision on the merits. This Court's view is fortified by the learned authors, Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, Third Edition, 1999) at pages 417 and 418 where they state that:

Arbitral rules, such as those of UNCITRAL... provide unequivocally that an arbitration award is final and binding. These are not intended to be mere empty words. One of the advantages of arbitration is that it is meant to result in the final determination of the dispute between the parties. If the parties want a compromise solution to be proposed, they should opt for mediation. If they are prepared to fight the cause to the highest court in the land, they should opt for litigation. By choosing arbitration, the parties choose a system of dispute resolution that results in a decision that is, in principle, final and binding. It is not intended to be a proposal as to how the dispute might be resolved; nor is it intended to be the first step on a ladder of appeals through national court.<sup>43</sup>

### **2.3.8 Enforceability**

One of the key advantages of arbitrating rather than litigating commercial and investment disputes is the relative ease with which an arbitral award rendered in one country can be enforced in another country.<sup>44</sup> This advantage is crucial, as the prevailing party in a dispute could under some circumstances have to enforce the judgment or award rendered in its favour in another country in which the unsuccessful party has assets. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by over 140 countries and, subject only to a very limited list of exceptions, requires signatory states to recognize arbitral awards rendered in other countries.<sup>45</sup> It is usually, recommended that, before

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<sup>43</sup> [2011] ZMHC 9

<sup>44</sup> Arbitration, Act No. 19 of 2000, Fourth Schedule (Zambia is a signatory to Convention on the execution of foreign arbitral awards)

<sup>45</sup> New York Convention Section IV(A) (4)(b)

entering into an arbitration agreement, a party check whether at least one of the countries in which the other party has its assets is a signatory to the convention.

On the other hand The <sup>46</sup>Zambian courts enforcement of foreign judgments is weak, and final court decisions can take a prohibitively long time. The Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76, of the Laws of Zambia (cited as the Act) makes provision for the enforcement in Zambia of judgments given in foreign countries that accord reciprocal treatment. The registration of a foreign judgment is not automatic. This can be seen in the case of *The Attorney General v. Chiluba and others*<sup>46</sup> where a London civil judgment against former president Frederick Chiluba could not be registered in a Zambian court, despite precedent.

There is no equivalent multilateral treaty in which countries agree to recognize and enforce each other's judgments. The recognition of a judgment obtained in a foreign court will thus usually be subject to the domestic rules on the recognition of foreign judgments of the country in which recognition is sought. Generally, such rules allow for much more extensive review of the judgment than the New York Convention does with respect to foreign awards, and recognition and enforcement are more likely to be denied.

### **2.3.9 Potential Need for Court Intervention**

The complications that are found in the arbitration process in certain situations require the intervention of courts. That is the case mostly where either the arbitral tribunal has not been constituted yet, or where the coercive power of a court is needed to obtain or enforce an interim measure.<sup>47</sup> Court intervention can be necessary in some situations and is therefore foreseen by

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<sup>46</sup>2007/HP/FJ/004

<sup>47</sup> Arbitration, Act No. 19 of 2000, ss 9,13,14,15 and 16

the Arbitration Act No. 19 of 2000 in Zambia. The most important need for court intervention arises out of the fact that, most arbitration tribunals lack *imperium*, or coercive power. Their procedural orders are necessarily less effective than those of courts and may have to be enforced through a separate court order.<sup>48</sup>

### 2.3.10 Limited Discovery

A major difference between international arbitration and litigation is that in the former discovery is generally limited, and sometimes totally excluded. Depending on the situation of a party in a particular dispute, that can be viewed as either an advantage or a disadvantage. It is mostly viewed as an advantage by parties with a civil law background, as they are unfamiliar with and often hostile to discovery.<sup>49</sup>

Contrary to litigation in civil law countries, however, a certain degree of discovery is often permitted by arbitration tribunals. Parties who are favorable to discovery will thus prefer international arbitration to litigation before courts in a civil law country.

The degree of discovery allowed in international arbitration will vary greatly from one case to the other, and will often depend on the legal background of the tribunal. Whether or not a party wishes the tribunal to allow discovery should thus factor into its selection of an arbitrator.

As with most procedural elements in international arbitration, the parties are free to agree to the scope of discovery they choose to allow in the arbitration. If the parties agree to the style of discovery, the tribunal will have to comply with that agreement. It is in practice rare, however,

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<sup>48</sup> Halsbury's Statutes (4<sup>th</sup> Ed) ARBITRATION

<sup>49</sup> Redfern & Hunter, Law and Practice of International Commercial Arbitration (2d ed. 1991)p.154

for parties to refer to discovery in their arbitration agreement, and it is generally impossible for them to reach an agreement on the issue once a dispute has materialized.

### **2.3.11 The concept of Separability**

The concept of separability means that the validity of the arbitration clause does not depend upon the validity of the remaining parts of the contract in which it is contained. This allows an arbitration tribunal to declare a contract invalid and yet retain its jurisdiction to decide a dispute *as to the consequences of such invalidity provided that the arbitration clause is valid as a separate entity* and is sufficiently broad in its wording so as to cover non-contractual disputes. This provision is found in Article 16(1) of the UNCITRAL Model Law which states that “an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”

However, the doctrine of separability does not apply to a non-existent contract. There is a clear distinction in principle between a contract that is void *ab initio* and one that is non-existent. If no contract came into existence, no arbitration agreement could have come into existence either. However, in the case of *United World Inc. v. M.T.S Ltd*<sup>50</sup> the Court of Appeal held that in certain limited cases, for example fraud, the arbitration agreement may be declared invalid on the same grounds as the wider contract.

## **2.4 CONCLUSION**

In conclusion, it can be stated that from the historical development of arbitration as an alternative dispute resolution, it can be seen that it has been preferred in contrast to litigation as a matter of business efficacy in commercial and investment disputes. This has also looked at the salient features of the *Zambian arbitration Act*. Furthermore, it can be said that hypothetically

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<sup>50</sup> (1998)10 NWLR (PART 568) 106

arbitration does have a number of advantages over litigation to support the fact that its effective utilization can promote business efficacy in commercial and investment transactions both inside and out of Zambia. It can also be seen that these advantages of arbitration arise from the fact that it is a creature of contract and therefore it gives the parties autonomy over most of the specificities of the process.



## **CHAPTER 3**

### **THE CHALLENGES OF THE ARBITRAL PROCESS GENERALLY**

#### **3.0 INTRODUCTION**

The aim of this chapter is to identify the challenges of the arbitral process generally. Although Arbitration is a private process for the binding resolution of a dispute through the decision of one more private individuals selected by the parties to the dispute it has its own challenges. In trying to identify the challenges of the arbitral process recourse shall be had to the legal and institutional challenges that apply generally.

### **CHALLENGES OF THE ARBITRATION PROCESS GENERALLY**

#### **3.1.1 Arbitrators' Inability to Consolidate Actions or Join Third Parties**

Because of the consensual nature of arbitration, arbitrators cannot generally consolidate actions absent an agreement by both parties.<sup>51</sup> This constitutes a significant drawback where disputes between the same parties relate to different contracts that have not been subjected to the same arbitration agreement.<sup>52</sup> Such disputes are resolved before either two arbitral tribunals or an arbitral tribunal and a court, thus leading to increased costs and to two distinct decisions that may not constitute a satisfactory overall resolution.

Furthermore, the privity of the arbitration agreement bars arbitrators from ordering the joinder of parties who have not signed the arbitration agreement. Such joinder can occur only where a legal

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<sup>51</sup> Arbitration, Act No. 19 of 2000, s 20

<sup>52</sup> Julie Chiu, Consolidation of Arbitral Proceedings and International Commercial Arbitration, 7(2) J.Int'l Arb. (53 1990)p.45

theory allows the tribunal to find that the third party can be considered to have agreed to arbitration even though it is not formally a signatory.<sup>53</sup>

### 3.1.2 Kompetenz-kompetenz

An Arbitrator can decide his or her own jurisdiction. This is not only a customary rule, but also the terms themselves of the clause by virtue of which the Sole Arbitrator has been appointed; require that the Sole Arbitrator should be competent to decide his own jurisdiction. Arbitrators decide the validity of the clause and have the competence to rule on their own jurisdiction. This position has also been codified in Article 16(1) of the UNCITRAL Model Law which states that “the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement”.<sup>54</sup> This can often fly in the face of the much needed transparency and control contemplated by the parties since such power on the arbitrator can result and does result in unknown bias and incompetence of the arbitrator.

Furthermore kompetenz- kompetenz can also lead to increased costs of the parties to the arbitral process resulting into review of the arbitrator’s determination by the courts. In the Pyramids case it was held that the doctrine kompetenz- kompetenz could not prevent the courts at the situs of the arbitration in Paris from afterwards reviewing that decision and coming to the opposite conclusion, thereby vacating the award and rendering futile the entire procedure conducted on the basis of the Kompetenz- kompetenz of the arbitral tribunal.<sup>55</sup>

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<sup>53</sup> Arbitration: Zambia <http://www.practicallaw.com/arbitrationhandbook>. (accessed April 8, 2013)

<sup>54</sup> Article 16(1) of the UNCITRAL Model Law

<sup>55</sup> Redfern & Hunter, Law and Practice of International Commercial Arbitration (2d ed. 1991)p.177

### 3.1.3 Piercing of the corporate veil

The “group of companies doctrine” or any other method of piercing the corporate veil is not expressly provided for or recognised under the *Zambian Arbitration law*<sup>56</sup> and many other jurisdictions. Group of companies will therefore only be recognised as parties to an arbitration agreement or an arbitration proceeding upon the express agreement of the parties to the arbitration agreement. However, it is not clearly expressed whether an arbitral tribunal can “pierce” the corporate veil to bind a third party group company, where the arbitral tribunal is persuaded that the existence of a separate corporate entity is merely a façade. This misconception was also expressed in the Nigerian case of *Alade v. Alic Nigeria Ltd*<sup>57</sup>, in this case the supreme court of Nigeria held that an arbitral tribunal could pierce the corporate veil.

### 3.1.4 No precedence.

Despite arbitration being final and binding, the parties do not obtain a binding legal precedent on which they can rely in future disputes. This may be significant in circumstances where the dispute arises out of a standard form document or agreement in common use. The concept of arbitral precedent raises numerous questions, as it is common knowledge that both international and national arbitration lack a doctrine of precedent.<sup>58</sup> The precedential doctrine considered under the common law legal system is based on the value of prior decided cases that are subsequently relied upon for determining later cases involving similar facts or issues.<sup>59</sup> This is in contradistinction to persuasive precedents, which as the words suggest, is not binding but is entitled to respect and careful consideration by subsequent courts or tribunals.

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<sup>56</sup> Arbitration, Act No. 19 of 2000, s 20

<sup>57</sup> (2010) 19 NWLR PART 1226, 111. (Supreme Court of Nigeria).

<sup>58</sup> Gabrielle Kauffman-Kohler, “Arbitral Precedent: A Dream, Necessity or Excuse?” *Arbitration International Articles*, 14(November 2006): 357-78.

<sup>59</sup> Black’s Law Dictionary, 7<sup>th</sup> edition, (St. Paul Minnesota: West Publishing Co., 1999).

In the recent past, several scholars have noted the growing trend of arbitrators' reliance, reference or discussion of earlier decided cases. One takes cognisance of the fact that investment arbitrators have a tendency of relying or referring to decisions in earlier decided cases when faced with similar circumstances. The peculiarity of such a system is that the arbitrators are under no legal obligation to follow prior decisions and thus merely apply a *de facto* doctrine of precedent.<sup>60</sup>

This observation raises the issue of the necessity of having a formal system of precedence as the interests of the stakeholders is wider and may have much more extensive ramifications. Therefore, one questions whether a *de jure* doctrine of precedent augments the credibility of a dispute settlement system based on its consistency of decisions and decision making process. The crux of the matter is that the existence of precedent in the arbitration process generally would create an atmosphere that is certain, predictable and most importantly consistent.

### 3.1.5 Speed

Until fairly recently, speed was considered to be generally one of the main advantages of arbitration. In the past few years, however, practitioners have increasingly questioned whether *arbitration in general is a speedier procedure than litigation. Arbitrations have, despite these features, become increasingly lengthy, for a variety of reasons. One of the reasons is that the disputes submitted to arbitration are increasingly complex. While the parties and the tribunal are free to determine the procedure they wish to follow, it has become almost customary for them to*

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<sup>60</sup> Kauffman-Kohler, "Arbitral Precedent," Gabrielle Kauffman-Kohler, "Arbitral Precedent: A Dream, Necessity or Excuse?" *Arbitration International Articles*, 14(November 2006): 357

agree on a fairly lengthy procedure. Furthermore, a party can make nuisance applications to a court to try and delay arbitral proceedings. In practice, this occurs infrequently.<sup>61</sup>

In addition it has also been observed that increasingly, arbitrators agree to order documents to be produced, inevitably affecting the length of the proceedings. Furthermore, some arbitrators agree to serve despite overly busy schedules, thus causing hearing dates to be set and awards to be rendered months later than otherwise possible. It has also been observed that, for commercial and investment arbitration involving foreigners, when the arbitration has its seat in a country which has not enacted modern arbitration laws, one of the parties disrupt the proceedings by causing courts to interfere with them. It is often difficult for arbitral tribunals to resist a party's dilatory tactics and deny time extensions. Indeed, tribunals are often very careful not to provide a party with a basis to argue that it was not treated fairly and that it was unable to present its case.<sup>62</sup>

### 3.1.6 Costs

The increasingly lengthy arbitration procedures and the dilatory tactics of making court applications in the arbitration process has recently resulted in the high cost of the process.<sup>63</sup> While the cost of arbitration is theoretically and traditionally considered an advantage of arbitration over litigation, that judgment is today being revised. Arbitration proceedings have been increasingly influenced by the litigation process, and have grown more and more complex and, accordingly, expensive.<sup>64</sup> In addition, Contrary to litigation, however, parties to an arbitration have to pay the arbitrators' fees and expenses and, where institutional arbitration is

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<sup>61</sup> Arbitration: Zambia <http://www.practicallaw.com/arbitrationhandbook>. (accessed April 8, 2013)

<sup>62</sup> Arbitration: Zambia, <http://www.practicallaw.com/arbitrationhandbook>. (accessed April 8, 2013)

<sup>63</sup> Kenneth K. Mweenda, principles of arbitration law (Florida: Brown Walker Press, 2003)p. 82

<sup>64</sup> Micheal Mustill and Stewart Boyd, Commercial Arbitration, (London: Butterworths, 1989) 423

chosen, the administrative costs of the arbitral institution. By far the most significant costs in both litigation and arbitration are, however, attorneys' fees. Parties to arbitration are usually represented by legal practitioners of their choice. These Arbitrators inevitably charge for their time and expertise and their fees can often be prohibitive to some medium-size commercial parties.

### **3.1.7 Enforcement of Awards**

One of the key advantages of arbitrating rather than litigating international disputes is the relative ease with which an international arbitral award rendered in one country can be enforced in another country. This advantage is crucial, as the prevailing party in an international dispute frequently has to enforce the judgment or award rendered in its favour in another country in which the unsuccessful party has assets also poses as a challenge.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by over 140 countries and, subject only to a very limited list of exceptions, requires signatory states to recognize arbitral awards rendered in other countries.<sup>65</sup> It is recommended that, before entering into an arbitration agreement, a party check whether at least one of the countries in which the other party has its assets is a signatory to the convention.

There is no equivalent multilateral treaty in which countries agree to recognize and enforce each other's judgments. The recognition of a judgment obtained in a foreign court will thus usually be subject to the domestic rules on the recognition of foreign judgments of the country in which recognition is sought. Generally, such rules allow for much more extensive review of the

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<sup>65</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ( Section IV(A) (4)(b))

judgment than the New York Convention does with respect to foreign awards, and recognition and enforcement are more likely to be denied.



Enforcement proceedings under the arbitration process usually only requires two weeks. However, in practice, due to certain intervening matters that arise, such as the resistance of the party against whom enforcement is sought, enforcement may take up to six months. It is often difficult for arbitral tribunals and the courts to resist a party's dilatory tactics and deny time extensions. Indeed, tribunals and the courts are often very careful not to provide a party with a basis to argue that it was not treated fairly and that it was unable to present its case in the arbitration. This for instance, leads to lose of confidence in the arbitral process which has recently lead to most commercial and investment arbitration matters ending up before the Zambian Commercial Court, which is a fast track court. Matters before this court are usually heard under an expedited procedure.<sup>66</sup>

### 3.1 CONCLUSION

This chapter has analysed and shown the challenges that affect the credibility and effectiveness of the arbitration process in general. From the aforementioned, it has generally been deduced that in most jurisdictions legal stance on arbitration is yet to be fully engrained and developed. With the influx of investors, an upturn will certainly have to take place in the arbitration process in order to facilitate effective disputes resolution. It has thus become imperative for the law and the courts to develop and allow a method of determination in arbitration disputes which will ultimately lean towards upholding the arbitration agreement. As already intimated, in most jurisdictions the stance on arbitration still hangs in the balance and it would be pre-emptive to

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<sup>66</sup> Kenneth K. Mweenda, *Principles of Arbitration Law*, (Florida: Brown Walker Press, 2003) p. 87

suggest that dispute resolution process in the area of arbitration, which is intended to create a favourable business operational environment and therefore exude confidence in them, is effective.

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## CHAPTER 4

### IDENTIFICATION OF THE CHALLENGES OF THE ARBITRAL PROCESS IN ZAMBIA

#### 4.0 INTRODUCTION

This chapter will endeavour to identify the challenges of the arbitral process in Zambia having looked at the general challenges of arbitration in the preceding chapter. In this the discussion shall narrow down to identify the actual challenges of arbitration in Zambia from the legal and institutional point of view. In addition a summation of the salient provisions of the Arbitration Act No. 19 of 2000 will be given in order.

#### 4.1 Specialized competence of arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges in contrast to arbitration. It is imperative to state that one of the key advantages is expertise that is involved in the arbitration. This gives the parties to seek expert knowledge of the arbitrator. It is vital to state that Zambia being a developing country does not have a lot of experts are practicing as arbitrators as in the case of *U&M Mining Zambia Ltd v Konkola Copper Mines plc.*<sup>67</sup> This comes as a challenge of the arbitral process if having regard the dispute between the parties that is of a technical nature and the persons to arbitrate with the expertise are not available in Zambia.

Having regard to section 10<sup>68</sup> of the Arbitration Act which provides that:-

- (1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement 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.

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<sup>67</sup> [2013] EWHC 260(Comm)

<sup>68</sup> Arbitration Act No. 19 of 2000 Section 10

The question that comes up for consideration here is what happens if there is an arbitral clause and there is no expert in that area? The Act does not provide a solution to this problem.

This is the more reason<sup>69</sup> as to why a lot of parties drafting their contracts for the extraction of natural resources often agree to resolve their disputes in a different jurisdiction from the place of extraction. The common rationale for this is that the procedures for arbitration are more established and the experience of the available arbitrators is greater than the equivalents in countries in which the resources are located. This was the issue in the case of *U&M Mining Zambia Ltd v Konkola Copper Mines plc*.<sup>69</sup>

## **4.2 Time for enforcement of the arbitral award**

A further challenge of the arbitral process is that the arbitral awards are not directly enforceable as a party seeking the enforcement of an award has to resort to judicial intervention for the confirmation of the award.<sup>70</sup> As for Zambia an arbitration award is enforceable under the provisions of section 20(3) of the Act as any other order of the court.<sup>71</sup>

However, the challenge is with the period for enforcement in Zambia which usually take about two weeks unless their other intervening matters arise. This in turn acts as a delay in the enjoyment of the fruits of the arbitral award granted. Although arbitration is cheaper a method in dispute resolution it is also time consuming as regards the confirmation of the award. After an award has been given by an arbitral tribunal, the successful party is required to go to court to register the award before one can enforce it. As the enforcement procedures usually take two weeks this will affect the business of the parties to the dispute. As the case is in the business world time is of the essence. Nonetheless if there are other intervening matters that arise, such as

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<sup>69</sup> [2013] EWHC 260(Comm)

<sup>70</sup> Micheal Mustill and Stewart Boyd, *Commercial Arbitration*, (London: Butterworth, 1989) 425

<sup>71</sup> Arbitration Act No. 19 of 2000 Section 20(3)

the resistance of the party against whom enforcement is sought, enforcement may take up to six months.<sup>72</sup> As for Zambia an arbitration award is enforceable under the of section 20(3) of the Act as any other order of the court.

Section 18 of the Act provides that:-

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section *nineteen*.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If the award or agreement is not made in the official language, the party shall supply a duly certified translation thereof into the official language.<sup>73</sup>

*This simply goes to show that the courts are indispensable in the arbitral process for the enforcement of awards. Hence it is the very procedure of registering the arbitral award in the courts that consume a lot of time rendering the enforcement of judgment prolonged.*

### 4.3 Training programmes

Arbitration in Zambia is relatively a new concept. The centre in Zambia responsible for dispute resolution is the Zambia Centre for Dispute Resolution which has registered the Zambia Association of Arbitrators. The Zambia Association of Arbitrators has not as an institution done enough to provide for formal training after considering their members for associate membership for arbitrators in the Zambian legal system. The association has not spear headed the training of under-graduate students in law at the various institution of training. This is so as to develop potential arbitrators at an early stage of their academic life. The association does not conduct

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<sup>72</sup> Nchima Nchito, interview by Nkhula Botha, June 14, 2013.

<sup>73</sup> Arbitration, Act No. 19 of 2000, s 18

international training programmes in arbitration in order to raise the standards of best practice of arbitration in Zambia to international standards on a regular basis.

The failure by the Zambia Association of Arbitrators has negatively impacted on the potential cases on arbitration that would have conducted in Zambia had the international best practice standards been improved. This can be demonstrated from the case of U&M Mining Zambia Ltd v Konkola Copper Mines Plc Konkola Copper Mines Plc (“Konkola”), the Defendant, was the owner of a number of mines in Zambia. U&M Mining Zambia Ltd (“U&M”), the Claimant, was charged with the operation of one these mines. The terms and conditions for the provision of these services were set out in various contracts, including a Footwall and Hanging Wall agreement dated 15 December 2011 (the “FW/HW Contract”), under which these proceedings were brought. The FW/HW Contract provided for disputes to be referred to LCIA arbitration in London. The parties opted to use the LCIA because of the lacked of skilled human capital in Zambia in mining. The clause also provided that the ‘place’ of arbitration would be England. The FW/HW Contract also provided for the Zambian courts to have exclusive jurisdiction.<sup>74</sup>

#### **4.4 Technicality of the award**

The drafting of the award of the arbitral process is technical one hence the informality of the process is watered down. The arbitral award has to be drafted in a particular manner thereby requiring expertise which in turn consumes a lot of time in the drafting of the award as provided for in section 16 of the Act.<sup>75</sup>

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<sup>74</sup> [2013] EWHC 260(Comm)

<sup>75</sup> Arbitration, Act No. 19 of 2000, s 16

This is due to the fact that the courts will not accept any award that is drafted in any informal fashion or manner. The Act in section 16 provides the form and contents of the award and costs and other expenses of arbitration which is couched in the following terms:-

- (1) 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 arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.
- (2) The award shall state the reasons 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.
- (3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1) of the First Schedule; and the award shall be deemed to have been made at that place.
- (4) After the award is made, a copy signed by the arbitrators in accordance with subsection (1) shall be delivered to each party.<sup>76</sup>

If the award of the arbitral tribunal does not confirm with the provisions of section 16 of the arbitration Act, the award cannot be enforced and registered rendering the award null and void.

This position was affirmed by the court in *Mobil Oil (Z) Ltd v Malawi Petroleum Control Commission*.<sup>77</sup> The form and content of the arbitral award makes the award technical and very formal which takes away the informality of arbitration.

## 4.5 Public perception

Many countries around the world today are turning to alternative dispute resolution particularly arbitration as one of the means of to promote social justice and good governance. Despite there being various forms of alternative dispute resolution other than arbitration to help decongest the court this has not gained public confidence.<sup>78</sup>

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<sup>76</sup> Arbitration, Act No. 19 of 2000, s 16

<sup>77</sup> (SCZ JUDGMENT NO. 25 OF 2004)

<sup>78</sup> Kenneth K. Mwenda, *Principles of Arbitration Law*, (Florida: Brown Walker Press, 2003) p. 22

The public perception is that although as thought by many that arbitration will decongest the court systems that experience a back log of cases this will invariably be a breed for kangaroo courts and bring about kangaroo justice. The process of arbitration is a new concept hence most of the population has very little confidence in it as there is still a lot of great belief and confidence in the courts in Zambia.<sup>79</sup> This is the reason why a lot of people are averse to the *usage of the arbitral process compared to the traditional court system.*

## 4.6 Registered practitioners

There are about 100 arbitrators registered with the Zambia Association of Arbitrators (ZAA) but only a few get to arbitrate as the distribution of the work is confined to a few people mainly because it is controlled by the courts or ZCDR. This in turn raises a problem that the same arbitrators are selected to arbitrate by parties to an arbitral process hence bringing problems of conflict of interest and time wastage. This is so because the same arbitrators have to arbitrate on a number of case that they have been selected by the parties for their expertise hence taking a lot of time. In section 29 the Act provides that:-

- (1) The Minister may, in consultation with the Chief Justice and by statutory instrument, make regulations providing for a code of conduct for arbitrators and standards of arbitration.
- (2) Until such time as regulations made under subsection (1) come into force, Parts II, III and IV (except sections *sixteen* and *seventeen*) of the Judicial (Code of Conduct) Act, 1999 shall apply, with necessary modifications, to every person appointed an arbitrator and in relation to arbitral proceedings in which the person is an arbitrator.<sup>80</sup>

An illustration of this is in the case of Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd, where an arbitral tribunal was constituted to consider the interpretation of paragraph 2.1 of Appendix B of the Inter Connection Agreement between the plaintiff and the defendant. The

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<sup>79</sup> Kenneth K. Mwenda, Principles of Arbitration Law, (Florida: Brown Walker Press, 2003) p. 22  
<sup>80</sup> Arbitration Act No. 19 of 2000 Section 29

arbitral tribunal was chaired by Hon. Mr. Justice C. Kajimanga, a High Court Judge. Prior to the awarding of the arbitral award the Chairman accepted an appointment to serve as a member of another tribunal at the request of the defendant's advocate. This was because there are a few practising arbitrators from which the parties could choose from. The acceptance of the appointment was perceived to have had an influence on the decision of the Tribunal, more so that the Chairman never disclosed his acceptance of that appointment which was at the request of the defendant's advocate and another. It was for this reason that an application to set aside the arbitral award was made to the High Court. Subsequently, a High Court Judgment of 10th March, 2005, set aside an arbitral award of 28th May, 2004. The matter did not end here: Zambia Telecommunications Company Ltd went on to make an appeal against the High Court Judgment and this led to a Supreme Court Judgment of 14 May 2008.<sup>81</sup>

## 4. 7 CONCLUSION

This chapter was devoted to the identification of the challenges of the arbitral process in the resolution of disputes. The chapter has also given a summation of the salient provisions of the Zambian Arbitration Act. Pertinent legal issues which impede on the arbitral process in Zambia have been examined. The chapter has looked at the legal and institutional challenges of arbitration.

It is well argued that arbitration is thought by many as a way to decongest the courts of the back log of cases that they have at the same time it is viewed as a way breeding kangaroo courts and kangaroo justice. These challenges have negatively impacted on the parties such as loss of income and business ties. The next chapter will give a conclusion of this research and advance a number of recommendations as to challenges of the arbitral process in Zambia.

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<sup>81</sup> SCZ/34/2008 (Unreported)

## CHAPTER 5

### GENERAL CONCLUSION AND RECOMMENDATIONS

#### 5.0 INTRODUCTION

This chapter will give a general conclusion on the research. Furthermore, it shall provide recommendations on the challenges of the arbitral process in Zambia that are attainable in order to fully utilize and appreciate the arbitral process.

#### 5.1 SUMMARY

Chapter 1 of this research paper gave a general introduction on the subject matter of the research topic namely '*The Challenges Of The Arbitral Process In The Resolution Of Disputes In Zambia*'. In this introduction of the topic, Chapter 1 has shown in the problem statement that despite the recognition of the importance of arbitration in Zambia, the court system has not, to a large extent, been unburdened of its traditional role of resolving commercial and investment disputes. Therefore, it is perceived that arbitration has not achieved its intended goal. The model of arbitration in Zambia over the years has been rendered not to be as effective as it is expected to be for the purposes of settling commercial and investment disputes.

Chapter 1 of this research paper has also shown that it was therefore imperative to consider the efficiency of Arbitration in Zambia in order to establish whether it justifies being used as an alternative dispute resolution mechanism for commercial and investment disputes. Chapter 1 has further shown that the purpose of this research was therefore to discover the challenges of the arbitral process in Zambia in order to evaluate the degree these challenges hinder the arbitral process and suggest how best these challenges could be curbed.



Chapter 2 of this research paper looked at '*Arbitration As A Means Of Alternative Dispute Resolution*'. This chapter highlighted the factors that have influenced the development and general preference of arbitration in commercial and investment disputes in present times. This chapter also provided a brief history of arbitration as an alternative dispute resolution. It also highlighted the advantages of the arbitral process over litigation.

It was concluded in chapter 2 that from the historical development of arbitration as an alternative dispute resolution, it can be seen that it has been preferred in contrast to litigation as a matter of business efficacy in commercial and investment disputes. This chapter highlighted the salient provisions of the Arbitration Act No. 19 of 2000. Furthermore, it can be said that hypothetically arbitration does have a number of advantages over litigation to support the fact that its effective utilization can promote business efficacy in commercial and investment transactions both inside and out of Zambia. It can also be seen that these advantages of arbitration arise from the fact that it is a creature of contract and therefore it gives the parties autonomy over most of the specificities of the process.

Chapter 3 of the research was devoted to the identification of the challenges of the arbitral process generally. This chapter has given the challenges of the arbitral process in order to fully understand the challenges in general before narrowing down to the specific challenges in Zambia.

This chapter has highlighted the challenges of the arbitral process in summation from the legal and institutional point of view.

Chapter 4 looked at the crux of the research paper. It analyzed the Arbitral process in Zambia, and based on the findings, it highlighted the challenges of the arbitral process from the legal and institutional point of view in Zambia.

This chapter has shown that the arbitration process in Zambia does face a number of challenges. It was also shown that these challenges ultimately affect the credibility and effectiveness of the arbitration process in Zambia. It was deduced that generally Zambia’s legal stance on arbitration is yet to be fully engrained and developed. With the influx of investors, an upturn will certainly have to take place in the arbitration process in order to facilitate effective dispute resolution in Zambia. It has thus become imperative for the law and the courts to develop and allow a method of determination in arbitration disputes which will ultimately lean towards upholding the arbitration agreement. As already intimated, the Zambian stance on arbitration still hangs in the balance and it would be pre-emptive to suggest that the Zambian dispute resolution process in the area of arbitration, which is intended to create a favourable business operational environment and therefore exude confidence in them, is effective.

## 5.2 RECOMMENDATIONS

### 5.2.1 Specialised Competence of Arbitrators

Because of the technical nature of some disputes in the business community arbitration is best suited for the dispute resolution in Zambia. However, there are areas of the business community that do not have specialised competence of arbitrators and these include fashion, music, medical and manufacturing industries. Hence whenever there is a problem recourse has to be made to foreign arbitrator’s in these industries. This constitutes a significant drawback where disputes between the same parties relate to the cases that lack arbitrators with the technical knowhow.

There is need for the business community to work hand in hand with the various bodies responsible for arbitration to co-opt persons to be trained as arbitrators in order have experienced arbitrators in all sectors. Such disputes are resolved before a local arbitral tribunal thus leading to reduced costs.

It is recommended that in order for arbitral tribunals to perform their purpose effectively, the Arbitration Act No. 19 of 2000 should be amended to include a mandate on the arbitration bodies to train people on arbitration in different sectors of the economy so as to have specialized competence of the arbitrators.

### **5.2.2 Time for Enforcement of the Arbitral Award**

The enforcement of arbitral awards is cardinal to every arbitral process. The arbitration Act does not requires the arbitral award to be taken to court for enforcement and recognition of the award.

The enforcement of an arbitral award is the same as any order of the court under section 20(3) of the Arbitration Act No19 of 2000. The Arbitration Act needs to be reviewed to make the *enforcement time immediate from the conclusion of the arbitral proceedings* in order to safeguard the business interests of the parties to the arbitral process. The arbitrator should be given powers to give to the successful party the right to have the arbitral award stamped by the court and thereby ready to be enforced. This is so because justice delayed is justice denied.

### 5.2.3 Training Programmes

The education and training of arbitrators is essential for there to be a successful arbitration proceeding with minimised court intervention. Arbitrators thus need to be trained on the issues required of arbitration such as the impartiality of the arbitrators.

As was established in chapter four that the principles of impartiality under arbitration are not distinct from litigation, arbitrators will thus need to be educated on these principles. Once arbitrators are trained on the best practice standards continuously then there would be professionalism on the arbitral process and thereby avoiding the need for court intervention.

There is also need for association to work with the institutions of higher learning so that a standardized curricular is developed for arbitration and the course should run on an annual basis and should not be elective course. Professionally trained arbitrators are essential as they promote confidence in the ADR system especially in the business community and there is need for further formal training for arbitrators.

### 5.2.4 Technicality of the Award

Generally, informality is considered to be one of the main advantages of arbitration. In Zambia, Arbitration has become increasingly technical. The technicality of the award as required by section 16 of the Arbitration Act No 19 of 2000 make the award technical which takes away the informality of the process. Hence it is cardinal that the Arbitration be reviewed in terms of section 16 to make the awards of the arbitral process informal.

It is recommended that in order for arbitral tribunals to achieve its intended purpose of dispensing with actions in an informal manner for the sake of business efficacy, the Arbitration Act No. 19 of 2000 should emphasize this very important quality of informality.

This can be done by awareness activities by the stakeholders involved in it and through seminars and workshops on arbitration. The parties should also be educated on the importance of speed for business efficacy in arbitration so that from the onset any party that presents dilatory tactics can be recognized as such and given penal measures in order to avoid such a situation. When the parties understand the main purpose of arbitration as opposed to litigation, this will also ultimately deal with the problem of cost caused by dilatory tactics, legal fees and complex procedures.

### **5.2.5 Public sensitization**

Arbitration in Zambia has been viewed by many as being Kangaroo Courts for breeding Kangaroo justice. Hence there is need for the various bodies responsible for arbitration to have programmes to educate the general public on the benefits of the arbitral process. This will help remove the perceived fears and encourage most people to have confidence in the arbitral process.

Restoration of public confidence will help gain legitimacy of the arbitral process and respect of the arbitral awards. Furthermore, there should be an awareness mechanism for the parties in order to educate them on the difference between arbitration and litigation and to show them that the very nature of arbitration is designed to dispense with disputes in a speedy manner, that is why most of the rules of procedure, evidence and formalities found in litigation are not present in arbitration.

This can be done by awareness activities by the stakeholders involved in it and through seminars and workshops on arbitration. The parties should also be educated on the importance of speed for

business efficacy in arbitration so that from the onset any party that presents dilatory tactics can be recognized as such and given penal measures in order to avoid such a situation. When the parties understand the main purpose of arbitration as opposed to litigation, this will also ultimately deal with the problem of cost caused by dilatory tactics, legal fees and complex procedures.

### 5.2.6 Registered Practitioners

Generally, arbitrators in Zambia are registered with the Zambia Association of Arbitrators. It is therefore imperative on the association to encourage their members provide cases that they would have arbitrated on as a condition for their registration. The association needs to take stock of how well it's members are performing for purposes of their evaluation. In the alternative they should provide accrued hours of Continuously Development Programmes (CDP) to enable them register with the association which must be backed by the law. It is recommended that association should effectively deal with cases of arbitrator's incompetence in the manner in which the arbitral process is conducted.

## 5.3 CONCLUSION

It can be deduced from the forgoing chapters that, the challenges facing the arbitration process are mostly perpetrated by the legal and institutional in nature relating to public perception and lack of specialized competence of arbitrators, lack of training and educational programmes for arbitrators and lack of adequate statutory empowerment on the arbitral tribunal to perform their functions effectively. Arbitration is a consensual mode of dispute resolution. Parties agree that the dispute that has arisen between them shall be resolved by someone who understands the

complications and intricacies involved in their particular trade or business. The parties make the arbitrator the master of the procedure to be followed in the arbitration.

As it has already been alluded to in the forgoing chapters that most of the features of arbitration flow from the fact that it is as a result of mutual consent of the parties, it has been concluded that ultimately it falls upon the parties themselves to exuberate confidence in the arbitration process as it is a result of their mutual understanding and ultimately they have control of most of its specificities.

It has also been concluded that the Arbitration law and the Courts must therefore play an empowering and supporting role on the arbitral tribunal in order to ensure that they perform their functions accordingly and effectively. This as has been recommended in the forgoing chapters will definitely go a long way in curbing most of the challenges facing the arbitration process in Zambia. This must be done in order to create and maintain a good investment climate in Zambia that would dispense with commercial and investment dispute in a speedy and efficient manner for business efficacy. This is important so as to uphold the credibility of this much sought-after and much desired commercial and investment dispute resolution mechanism.

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