

**AN ANALYSIS OF THE ROLE OF THE COURT IN THE ARBITRAL PROCESS IN
ZAMBIA**

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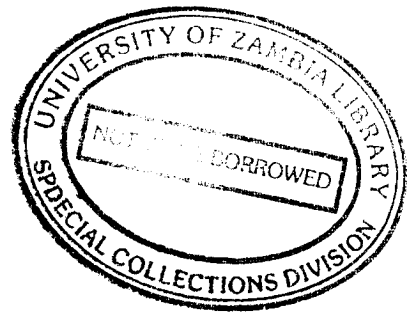
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A dissertation submitted to the University of Zambia in partial fulfillment of the award of

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DECLARATION

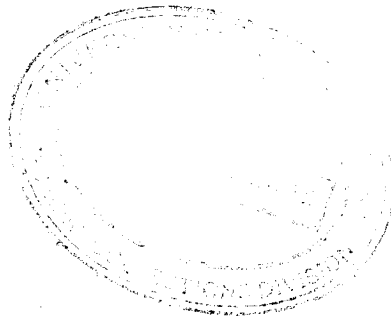
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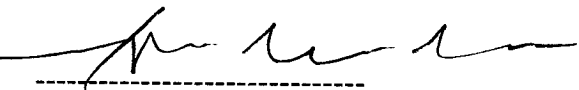
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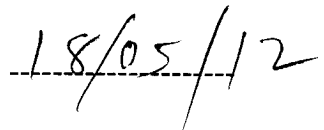
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ABSTRACT

Arbitration is the reference of a dispute by voluntary agreement of the parties to an impartial person for determination, which parties agree in advance to accept the decision of the arbitrator as final and binding. Arbitration enables parties to resolve their disputes without having recourse to the courts. This study was undertaken to analyse the role of the court in the arbitral process in Zambia. The objectives of the study were to examine the various forms of alternative dispute resolution mechanisms with emphasis on arbitration, to examine the instances when recourse can be had to the courts in arbitration, to determine the negative consequences that may flow from the relationship between the court and the arbitral process such as the courts interfering in the arbitral process and to provide a viable solution to the interference of the courts in arbitral matters, if any, as well as any other negative consequences that may flow from the relationship between the courts and the arbitral process. The data was collected by way of desk research namely written sources and through field investigation by way of interviews. From the research, it was observed that arbitration is the most formalised and important form of ADR in Zambia, and that the court plays a complementary role in the arbitral process. It was also noted that the Arbitration Act No. 19 of 2000 and the UNCITRAL Model Law enumerate the circumstances under which the court can intervene in the arbitral process and that if the court intervened in a manner not stipulated by the Arbitration Act or Model Law, this would amount to interference with the arbitral process. However, it was discovered that the Arbitration Act and the Model Law are tailored in such a manner that the court cannot interfere in the arbitral process. It was also noted that in order to set aside or enforce an arbitral award, parties have to apply to the High Court which entails that such cases have to join the backlog of cases already before the courts. This defeats the rationale behind ADR which is to relieve the courts of the heavy load of cases as well as to provide litigants with a quicker and cheaper method of resolving their disputes. In this regard, one of the recommendations was that the court should devise a system whereby arbitral matters taken before the courts do not have to join the backlog of cases such as making it mandatory for such cases to be registered on the commercial cause list as most arbitral matters in Zambia are commercial in nature. Another solution would be for such matters to be heard in Chambers. Other recommendations were that there is need for legal reform in the area of arbitration on a regular basis and there is also need for legal training as most lawyers and judges in Zambia are not knowledgeable of the law of arbitration.

DEDICATION

To my father, mother, brother and sisters.

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Dad, mum, Vincent, Edna and Regina, I can never fully express my gratitude for your invaluable love and support through all my academic endeavours. You have always been there for me and for that I am eternally grateful. My special gratitude goes to my parents who have relented on their efforts to provide me the best education possible and for that I say, *gracias*.

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Mobil Oil (Z) Ltd v. Malawi Petroleum Control Commission SCZ Judgment No. 25 of 2004

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Yougo Limited and Pegasus Energy Limited 2004/HPC/0299

LIST OF ACRONYMS

ADR-Alternative Dispute Resolution

UNCITRAL-United Nations Commercial and International Trade Law

ZAA-Zambia Association of Arbitrators

ZCDR-Zambia Centre for Dispute Resolution Limited

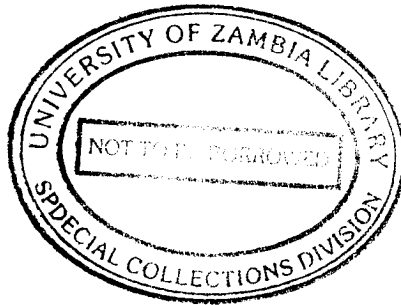


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CHAPTER ONE

1.0 INTRODUCTORY CHAPTER

1.1 INTRODUCTION

This chapter is intended to provide a basis for analysing the role of the court in the arbitral process in Zambia. To accomplish this, first and foremost, a general introduction to alternative dispute resolution will be given with emphasis on arbitration. In order to fully address this title, the statement of the problem, objectives and significance of the study will also be given. The system for collecting and organising data, that is, the methodology that is intended to be used for data collection will also be provided.

1.2 WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution (ADR) can be defined as virtually any process whose objective is to facilitate the resolution of disputes by the consensus of the parties to the dispute in a non-adjudicative manner.¹ It is a method used to resolve disputes without having recourse to the courts. ADR offers an alternative to litigation, which involves the settling of disputes via the court system.²

The mischief behind the introduction of ADR in Zambia was the delays and costs associated with litigation.³ It is a notorious fact that the Zambian court system is heavily burdened with cases and that the resolution of these cases takes long, often leaving the litigants frustrated and

¹K.K. Mwenda, *Principles of Arbitration Law* (Florida: Brown Walker Press, 2003),14

²Mwenda, *Principles of Arbitration Law*, 14

³Winnie Sithole Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*,” Thesis, University of South Africa, 2006, 25

unable to proceed with their business.⁴ This therefore necessitated the introduction of alternative mechanisms for resolving disputes into the Zambian legal system.⁵

1.3 ADVANTAGES AND DISADVANTAGES OF ALTERNATIVE DISPUTE RESOLUTION

ADR is increasingly being opted for as a means of resolving disputes particularly by the corporate world for a number of reasons. One of the advantages of ADR is that most of the ADR techniques are cost effective unlike litigation which can prove to be very costly.⁶ Another advantage of ADR is the speed with which disputes are settled. In this regard, arbitration is clearly more advantageous than litigation in which disputes take long to be resolved.⁷

An additional motivation to use ADR is that it offers other benefits that litigation does not offer such as privacy as disputes are held in a private setting chosen by the parties unlike in open court.⁸ Furthermore, as disputes are resolved in a consensual manner, this enhances the maintenance of good relations between disputants.⁹ As already stated, ADR is hinged on the consent or agreement of the parties and hence this allows for party autonomy as the disputants determine the conduct of the proceedings.¹⁰

Another argument for ADR is that as ADR techniques are consensual in nature, this empowers the parties to control the outcome of the dispute as they can agree on an outcome that is desirable

⁴Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁵Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁶Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁷Harris Bor, "ADR Possibilities in Investor-State Disputes," *The International Journal of Arbitration, Mediation and Dispute Management* 73, no.2 (February 2007): 97

⁸Bor, "ADR Possibilities in Investor-State Disputes", 97

⁹Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

¹⁰Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

for both parties.¹¹ A further advantage is that ADR introduces less formal methods of dispute resolution and this enhances justice as procedures used in ADR processes are simplified and can therefore be employed even by lay-men.

Finally, although ADR is beneficial, it also has disadvantages.¹² One of the disadvantages of ADR is that as strict rules of evidence do not apply in such proceedings, irrelevant material may be presented resulting in the expenditure of money and other resources on issues that are not necessary.¹³ Another disadvantage is that the argument that ADR is less costly and more expedient than litigation does not apply to all cases as depending on the type of process and complexity of the issues involved in the dispute, ADR can prove to be more costly and time consuming.¹⁴

1.4 FORMS OF ALTERNATIVE DISPUTE RESOLUTION

There are various forms of ADR and these are referred to as techniques.¹⁵ Some of the ADR techniques are negotiation, mediation, neutral fact-finding, conciliation and arbitration.¹⁶ However, the most commonly used techniques in Zambia are arbitration, mediation and conciliation.¹⁷

¹¹Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, 26

¹²Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, 25

¹³Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, 25

¹⁴Mwenda, *Principles of Arbitration Law*, 12

¹⁵Mwenda, *Principles of Arbitration Law*, 12

¹⁶A. Tweeddale and K. Tweddale, *Arbitration of Commercial Disputes* (New York: Oxford University Press, 2005), 3-6

¹⁷Mwenda, *Principles of Arbitration Law*, 12

1.4.1 NEGOTIATION

Negotiation is a process by which the parties to a dispute bargain in order to resolve the dispute.¹⁸ It is argued that negotiation differs from other ADR techniques in that the degree of autonomy experienced by the disputing parties is greater in negotiation than other ADR techniques because the disputants attempt to reach an agreement without the intervention of third parties such as arbitrators and mediators.¹⁹

1.4.2 MEDIATION

Another ADR technique is mediation in which the parties unanimously choose a third party referred to as a mediator who facilitates communication and negotiation between the parties so as to enable them to resolve the dispute.²⁰ It can also be defined as a process by means of which a neutral third party facilitates negotiations between the parties so as to assist them to reach a settlement.²¹ The procedure of conducting mediation is generally flexible as the mediator determines the conduct of proceedings.²² Normally, the parties set out a summary of their respective case and present the documents they wish to rely on. Documents that are privileged can be kept confidential if the party that presents them so requests.²³

1.4.3 NEUTRAL FACT-FINDING

Neutral fact-finding is another ADR technique. Under this technique, a neutral person who is an expert in the subject matter of the dispute is appointed by the parties to the dispute and the task

¹⁸International Court of Arbitration, “ADR International Applications Special Supplement.” *ICC International Court of Arbitration Bulletin* (2001), 76

¹⁹*ICC International Court of Arbitration Bulletin*, 76

²⁰*ICC International Court of Arbitration Bulletin*, 76

²¹*ICC International Court of Arbitration Bulletin*, 76

²²*ICC International Court of Arbitration Bulletin*, 76

²³*ICC International Court of Arbitration Bulletin*, 77

of the neutral person or evaluator is to consider the issues in dispute and render a non-binding assessment of the respective parties' merits.²⁴

1.4.4 CONCILIATION

Conciliation does not differ much from mediation.²⁵ As a matter of fact, the only difference between mediation and conciliation is that in proceedings under conciliation, the facilitator of the negotiation gives a recommendation at the end of the negotiations.²⁶ However, this is not the case under mediation as the facilitator does not give a recommendation.²⁷

As arbitration is the main area of concern of this paper, it will suffice at this point to merely state that arbitration is one of the ADR techniques as it will be discussed in depth in subsequent chapters.

1.4.5 ARBITRATION

ADR techniques are of two types namely, those that are aimed at persuading the parties to settle the dispute and those that provide a decision that is binding or a recommendation which when adopted becomes binding on the parties.²⁸ Arbitration is one of the ADR techniques that provide a decision that is binding on the parties.²⁹

²⁴*ICC International Court of Arbitration Bulletin (2001)*, 77
²⁵*ICC International Court of Arbitration Bulletin (2001)*, 77
²⁶*ICC International Court of Arbitration Bulletin (2001)*, 77
²⁷Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,7
²⁸Tweeddale and Tweeddale *Arbitration of Commercial Disputes*,3-6
²⁹Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,3-6

Arbitration can be defined as the reference of a dispute by voluntary agreement of the parties to an impartial person for determination on the basis of evidence and argument presented by such parties, who agree in advance to accept the decision of the arbitrator as final and binding.³⁰

Arbitration can also be defined as a process which is carried out pursuant to an agreement to arbitrate.³¹ Therefore, where there is an agreement to refer a dispute to arbitration, any process carried out in accordance with that agreement will qualify to be arbitration provided its characteristics are in concordance with those of arbitration.³²

Arbitration is the most formalised of all ADR techniques. Not only is arbitration adversarial in nature but the decision rendered in an arbitral matter is binding.³³ Additionally, the parties in an arbitral matter have the discretion whether or not to employ the services of legal counsel to represent them. All this accounts for the formalised nature of arbitration.³⁴

It is argued that at times it is difficult to determine whether a particular process can be appropriately referred to as arbitration.³⁵ Due to this, some authors have come up with certain criteria to determine whether any process purporting to be arbitration indeed is arbitration. For any process to qualify to be arbitration it should have several features. One of these features is that the arbitrator or arbitral tribunal must be chosen unanimously by both parties to the

³⁰C.K. Wehringer, *Arbitration: Precept and Principles* (New York: Oceana Publications Inc. 1969), 1

³¹*ICC International Court of Arbitration Bulletin*, 40

³²*ICC International Court of Arbitration Bulletin*, 40

³³*ICC International Court of Arbitration Bulletin*, 40

³⁴*ICC International Court of Arbitration Bulletin*, 40

³⁵M.J. Mustill, and S.C. Boyd, 2nd ed., *The Law and Practice of Commercial Arbitration in England* (London: Butterworths, 1989), 41-45

dispute.³⁶ If the parties decide not to choose the parties, they should at least consent to the way in which the choice of the arbitrator is made.³⁷

That there must be a dispute between the parties is another important feature of arbitration as it is the distinguishing feature between arbitration and other processes which merely declare the rights of the parties which can be done without a dispute being in existence such as valuation.³⁸ In the case of *Collins v. Collins*³⁹, Romilly MR stated that “...unless a difference has actually arisen, it does not appear to me that there can be an arbitration.”

Another important feature of arbitration is that the resolution of the dispute and therefore the power of the arbitrator’s decision to bind the parties stems from the consent of the disputants and not any other source.⁴⁰ This merely reinforces the consensual nature of arbitration.⁴¹

Some authors argue that arbitration is a judicial process and this is another feature of arbitration.⁴² This entails that the arbitral tribunal is obliged to arrive at a decision not only in accordance with the law chosen by the disputants but also in accordance with the arbitration procedure applicable to the dispute.⁴³ Furthermore, the tribunal is similarly required to act in a manner which is fair and impartial as between the disputants.⁴⁴

³⁶Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 41-45

³⁷Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 41-45

³⁸Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 41-45

³⁹(1958) 26 Beav 306 at 312

⁴⁰Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,34

⁴¹Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,34

⁴²Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,34

⁴³Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,34

⁴⁴Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*,34

Finally, the decision of the arbitrator which is referred to as an award must be intended to be binding.⁴⁵ Where the decision is merely advisory or it is at the discretion of the parties whether or not to be bound by the decision, the process will not qualify to be arbitration.⁴⁶

The attributes of arbitration discussed herein merely demonstrate why arbitration is the most commonly used form of alternative dispute resolution in Zambia. These attributes also reiterate the importance of arbitration and its uniqueness.

1.5 STATEMENT OF THE PROBLEM

Alternative dispute resolution mechanisms such as mediation, conciliation and arbitration have emerged as a significant means of resolving disputes in the Zambian judicial system.⁴⁷ It suffices to state that of all forms of alternative dispute resolution mechanisms, arbitration is the most formalised and commonly used.⁴⁸

Due to the formalised nature of arbitration, the courts inevitably have a role to play in the arbitral process.⁴⁹ For instance, the courts have jurisdiction in setting aside and enforcement of an award, and in appeals pertaining to the misconduct of an arbitrator.⁵⁰ However, the conferring of authority on the courts to participate in the arbitral process may create problems such as the courts interfering in arbitral matters as opposed to playing a complementary role.⁵¹

In order to maintain the character of arbitration as an alternative to litigation, it is imperative to clearly define the role that the courts play in arbitration lest the whole essence of arbitration be

⁴⁵Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 34

⁴⁶Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 34

⁴⁷Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁴⁸Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁴⁹Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁵⁰Mwenda, "Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia", 25

⁵¹Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, 5

defeated. As the learned Mr. S. Malama, State Counsel rightly put it in the case of *Konkola Copper Mines Plc v. Copperfields Mining Services Limited*,⁵² the court must guard itself against interfering in the arbitral process.

This study is therefore undertaken in order to determine the role that the court plays in the arbitral process and the negative consequences that result from the interaction between the court and the arbitral process. Particularly, it is undertaken to determine in what ways the court can interfere in the arbitral process.

This paper will thus attempt to find a solution to the problem of the court interfering in the arbitral process, if at all it does, as well as to offer a viable solution to the negative consequences that may result from the interaction between the courts and the arbitral process.

1.6 OBJECTIVES OF THE STUDY

- a. To examine the various forms of alternative dispute resolution mechanisms with emphasis on arbitration

- b. To examine the instances when recourse can be had to the courts in arbitral matters vis-à-vis the Arbitration Act No. 19 of 2000 and the United Nations Commission of International Trade Law (UNCITRAL) Model Law

- c. To determine the negative consequences that flow from the relationship between the court and the arbitral process

- d. To ascertain what amounts to interference by the courts in the arbitral process

⁵²2010/HP/ARB/No.002

e. To provide a viable solution to the interference of the courts in arbitral matters, if, any and other negative consequences that may flow from the relationship between the courts and the arbitral process

1.7 SIGNIFICANCE OF THE STUDY

This research is timely as it is undertaken when most disputants, predominantly commercial entities are opting for arbitration as an alternative to litigation.⁵³ This is merely evident of the fact that the importance and viability of arbitration as an alternative to litigation is gradually being appreciated.⁵⁴

Therefore, there is need to clearly define the role of the courts in the arbitral process so as to avert a situation where arbitration takes on the character of litigation rather than that of ADR thus defeating the rationale behind the introduction of ADR in the Zambian legal system.

1.8 METHODOLOGY

Regard being had to the nature of the subject matter of the research, this research is primarily qualitative, in that it will focus on substantive matter rather than mathematical or quantitative matter. Therefore, the research will mainly be in the form of desk research and field investigation. The desk research will be conducted through the collection of data in form of text books, law reports, journals, obligatory essays and dissertations whereas the field investigation will be conducted through interviews with appropriate persons and institutions.

⁵³Wehringer, *Arbitration: Precepts and Principles*, 1

⁵⁴Wehringer, *Arbitration: Precepts and Principles*, 1

1.9 CONCLUSION

This chapter gave an introduction to ADR in an effort to lay a foundation for the analysis of the role of the court in the arbitral process in Zambia. This was achieved by evaluating the advantages and disadvantages of ADR, with special emphasis on arbitration. From what has been discussed in this chapter, it can be concluded that ADR and particularly arbitration, is a vital component of Zambia's legal system and therefore measures should be put in place by the legislature to encourage its development and utilisation by disputants so as to decongest the courts.

In the next chapter, the law governing arbitration in Zambia, which is not only the most important form of alternative dispute resolution mechanism but also the most formalised, will be discussed. This will include the repealed Arbitration Act of 1933, the Arbitration Act No.19 of 2000 and the United Nations Model Law on Commercial Arbitration.

CHAPTER TWO

2.0 THE LAW GOVERNING ARBITRATION IN ZAMBIA

2.1 INTRODUCTION

This chapter will focus on the law that governs arbitration in Zambia. As the history of any legal system is important not only in determining its future but also its success, this chapter will begin with a discussion on the first piece of legislation which governed arbitration in Zambia namely the Arbitration Act of 1933. It will then proceed to look at the current legal framework governing arbitration in Zambia which is the Arbitration Act of 2000 and the UNCITRAL model rules.

2.2 THE ARBITRATION ACT OF 1933

The law of arbitration was introduced into the Zambian legal system in 1933 through the enactment of the Arbitration Act of 1933.¹ However, this Act was repealed and replaced by the Arbitration Act of 2000.²

Some of the salient provisions of the Arbitration Act of 1933 were sections 3, 5, 7, 8 and 15. Section 3 provided that as a general rule, a submission, unless a different intention was expressed in the submission, was irrevocable.³ It could only be revoked by leave of the High Court. A

¹K.K. Mwenda, *Principles of Arbitration Law* (Florida: Brown Walker Press, 2003), 28-35

²Mwenda, *Principles of Arbitration Law*, 28-35

³Mwenda, *Principles of Arbitration Law*, 28-35

submission was defined as a written agreement to submit present or future differences to arbitration, whether an arbitrator was named or not.⁴

Another salient provision in the 1933 Act was section 5 which provided that the parties to a dispute could agree that the dispute between them be referred to an arbitrator or arbitrators for settlement. Section 5 further provided that the arbitrator or arbitrators could be appointed by a person designated or chosen by the parties to the dispute, in accordance with their intentions. This designation was to be contained in a submission which has already been defined.

Section 7 was another striking provision in the Act of 1933. Due to its elaborate nature, it is necessary to reproduce the section. It provided as follows;

Section 7(1) any party can serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment of an arbitrator, umpire or third arbitrator if

- (a) Where a submission provides that the reference shall be to a single arbitrator and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator.
- (b) If an appointed arbitrator neglects or refuses to act or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy.
- (c) Where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, do not appoint him.

⁴The Arbitration Act of 1933

(d) Where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrator do not supply the vacancy.

(2) If the appointment is not made within seven clear days after service of notice, the Court may, on application by the third party who gave the notice, and after giving other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference, and to make an award as if he had been appointed by consent of all the parties.

On the other hand, section 8 provided that where a submission provided that the dispute would be settled by two arbitrators, each appointed by the disputing parties respectively, if either of the arbitrators refused to act or died or was removed, the party who appointed that arbitrator could replace the arbitrator.

If however, the party failed to appoint an arbitrator for seven clear days, the other party who appointed an arbitrator could appoint that arbitrator as sole arbitrator, provided that he served the defaulting party with a notice to make the appointment. The decision of the sole arbitrator would be binding on both parties as if he had been appointed by consent.

Finally, another striking section of the 1933 Act was section 15 which provided that the High Court could set aside the award of an arbitrator or umpire who had misconducted himself or an arbitration or arbitral award which had been improperly obtained.

As earlier stated, the Arbitration Act of 1933 was repealed and replaced by the Arbitration Act No. 19 of 2000. The repeal was necessitated by several reasons, the most significant being the

lacunas in the Act.⁵ One of the lacunas in the Act was that it was silent on the qualifications for one to be eligible to hold the office of arbitrator.⁶ This was problematic in that there was no certainty in the qualifications of an arbitrator, therefore the Act being inadequate in this respect.⁷

Another gap in the Act was that it did not provide whether the disputing parties could designate the power to appoint an arbitrator to a body corporate or an individual. Furthermore, the Act did not provide any penalty on persons who, when their mandate as arbitrators had expired or been withdrawn or where never appointed as arbitrators, purported to hold the office of arbitrator. This was therefore another inadequacy of the Act which necessitated its repeal.⁸

2.3 THE ARBITRATION ACT OF 2000

The Arbitration Act No. 19 of 2000 is the Act which repealed and replaced the Arbitration Act of 1933. It came into force on 23 December, 2000 and the enactment of this Act was prompted by the need to address the weaknesses of the 1933 Act which have already been discussed.

The salient provisions of the Act include sections 2, 3, 6, 9, 11, 12, 17, 23, 28 and 30.⁹ Section 2(3) of the Act provides that an arbitral tribunal or a court may refer to the documents relating to the Model Law on International Commercial Arbitration or the UNCITRAL Model Law.

Another noticeable provision of the Act is section 3 which provides that the Act is to apply to every arbitration award agreement and arbitral award whether made before or after the commencement of the Act.

⁵Mwenda, *Principles of Arbitration Law*, 7

⁶Mwenda, *Principles of Arbitration Law*, 7

⁷Mwenda, *Principles of Arbitration Law*, 7

⁸Mwenda, *Principles of Arbitration Law*, 7

⁹Mwenda, *Principles of Arbitration Law*, 7

Section 11 (1) A party may, before or during arbitral proceedings, request from a court an interim measure of protection and, subject to subsections (2), (3) and (4), the court may grant such measure.

(2) Upon a request in terms of subsection (1), the court may grant-

(a) an order for the preservation, interim custody, sale or inspection of any goods which are the subject matter of the dispute;

(b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;

(c) an interim injunction or other order; or

(d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.

However, these interim measures of protection are granted subject to certain conditions and these are provided in Section 11 subsections (3) and (4) of the Arbitration Act of 2000. These conditions are as follows;

(3) Where the court intends to grant an order or an injunction requested under subsection (2), and an arbitral tribunal has already ruled or made a finding of fact on the matter relevant to the request, the court shall treat the ruling or finding made in the course of the arbitral proceedings as conclusive for the purpose of the request.

(4) The court shall not grant an order or injunction under this section unless-

(a) the arbitral tribunal has not yet been appointed and the matter is agent;

(b) the arbitral tribunal is not competent to grant the order or injunction; or

(c) the urgency of the matter makes it impracticable to seek such order or injunction from the arbitral tribunal;

and the court shall not grant any order or injunction where the arbitral tribunal, being competent to grant the order or injunction, has already determined an application therefore.

Section 12(2) of the Act merely buttresses the consensual nature of arbitration. It provides that the parties are free to agree on a procedure of appointing the arbitrator or arbitrators. Another important provision is section 17(1) which states that recourse to a court against an arbitral award may be made only by an application for setting aside of the award. This provision also buttresses the fact that the decision of an arbitral tribunal or institution is binding which is another feature of arbitration.

Section 23 accords professional bodies or organisations in Zambia or elsewhere an opportunity to be arbitral institutions by providing that a professional body or organisation in Zambia or elsewhere may apply to the Minister, which Minister can be construed as the Minister of Justice seeing that the Act does not define the word Minister, for a recognition order declaring the body or organisation to be an arbitral institution for the purposes of the Act.

The Act also recognises the fact that the justice system is not flawless. It therefore provides in section 28 that an arbitrator, arbitral institution or any other person authorised by or under the Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge of that function. The section further provides that a witness in arbitral proceedings shall have the like protection from liability as a witness before the court.

Finally, the Act further provides in section 30 that an award given under a New York Convention shall be recognised as binding, in the manner provided for in the Act, on persons to whom it was made and shall be enforceable in Zambia. This is pursuant to the Model Law on International Commercial Arbitration which was adopted by the United Nations Commission on International Trade Law on 21 June, 1985 which was adopted in Zambia with the enactment of the Arbitration Act of 2000. The adoption of this instrument by Zambia entails that both domestic and international arbitration are to be recognised in Zambia.¹¹

According to Mwenda, there are several improvements that have been made in the Act. Some of the improvements are that efforts have been made to provide for an arbitral procedure that is not only fair and efficient but which is also suitable for the specific needs of each arbitral hearing.¹² The Act has also redefined the role of the judiciary in the arbitral process and has adopted the UNCITRAL Model Rules which shall be discussed in greater detail at a later stage in this chapter.¹³

However, Mwenda recommends that the legal framework on arbitration in Zambia can further be improved by setting up an institutional framework for the licensing and regulation of arbitrators certified as being qualified to be arbitrators.¹⁴ The licensing and regulation of qualified arbitrators will result in an arbitral process which is efficient and effective thereby fostering justice.¹⁵

¹¹Mwenda, *Principles of Arbitration Law*, 7

¹²Mwenda, *Principles of Arbitration Law*, 7

¹³Mwenda, *Principles of Arbitration Law*, 7

¹⁴Mwenda, *Principles of Arbitration Law*, 7

¹⁵Mwenda, *Principles of Arbitration Law*, 7

2.4 THE UNCITRAL MODEL LAW

The UNCITRAL Model law was adopted by the United Nations Commission on International Trade Law on 21 June 1985.¹⁶ In Zambia, the Model Law was domesticated at the time when the Arbitration Act of 2000 came into force; the Act made provision for the Model Law.¹⁷

The adoption of the UNCITRAL Model law in Zambia entails that both domestic and international arbitration are to be recognised in Zambia.¹⁸ Therefore, an arbitral award rendered in another state which is party to the model law rules shall have effect in Zambia as if it was rendered in Zambia.¹⁹ The outstanding provisions of the model law rules include Articles 1, 4, 5, 7, 11, 12, 17, 19 and 35. Article 1 of the Model Law provides the scope of application of the Model Law and it provides that the law shall apply to international commercial arbitration. However, the application of the model law shall be subject to any agreement in force between Zambia and any other state or states.

Article 4 provides that where a party who knows that any provision of the law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet that party proceeds with the arbitration without stating his objection to the non-compliance without undue delay or within such period of time as provided shall be deemed to have waived his right to object.

Another striking provision is Article 5 which provides the extent to which the court can intervene in arbitral matters. It provides that in matters governed by the Model Law, no court shall

¹⁶Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 498

¹⁷Mwenda, *Principles of Arbitration Law*, 7

¹⁸Justice Nigel K. Mutuna, High Court Judge, January 12, 2012

¹⁹Justice Nigel K. Mutuna, January 12, 2012

intervene except where the Model Law so provides. An interesting provision is Article 7 whose definition of an arbitration agreement is noticeably the same as that of section 2(1) of the Arbitration Act of 2000. Similarly, Article 11 of the UNCITRAL Model Law contains the same provisions as Section 12 of the Arbitration Act No. 19 of 2000 regarding the appointment of arbitrators.

Article 12 emphasises the independence and neutrality of the arbitrator by providing that when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances which are likely to give rise to justifiable doubts as to his impartiality or independence. It further provides that an arbitrator shall without delay disclose any such circumstances that are likely to give rise to justifiable doubts about his impartiality to the parties, from the time of his appointment and throughout the proceedings unless the parties have already been informed by him.

Article 12 also provides that an arbitrator can only be challenged if the circumstances that exist give rise to justifiable doubts as to his impartiality or independence, or if he does not possess the qualifications agreed to by the parties. It also provides that a party may challenge an arbitrator appointed by him or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 17 of the UNCITRAL Model Law confers power on the arbitral tribunal to order any party to take such interim measures of protection as the tribunal may consider necessary and the arbitral tribunal may require any party to provide appropriate security in connection with any such measure.

Another salient provision is Article 19 which buttresses the autonomous nature of arbitration by providing that subject to the provisions of the Model Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. It however provides that where the parties fail to agree on the procedure, the arbitral tribunal may conduct the arbitration in such manner as deems appropriate, although this is subject to the other provisions of the Model Law.

Finally, the Model Law provides for the application of international arbitration by providing in Article 35 that an arbitral award shall be recognised as binding and upon application in writing to the competent court, shall be enforced subject to the other provisions of the Article and Article 36, irrespective of the country in which the award was made.

2.5 EVALUATION OF THE LAW GOVERNING ARBITRATION IN ZAMBIA

An evaluation of the law that governs arbitration in Zambia calls for close scrutiny of the Arbitration Act 2000. As already stated, the Arbitration Act of 2000 was enacted in order to meet the shortcomings of the Arbitration Act of 1933, whose main weakness was its lacunas.²⁰ The Arbitration Act of 2000 has, on the whole, made tremendous improvements to the 1933 Act by filling the gaps that were in the repealed Act.²¹ For instance, the Act of 2000 now provides in section 12(6) that the qualifications of the arbitrator are to be determined by the parties to the dispute, which the Act of 1933 did not provide.²²

²⁰Winnie Sithole Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, Thesis, University of South Africa, 2006, 25 to 26

²¹Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, 25-26

²²Mwenda, “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*”, 25-26

Another quality of the Arbitration Act of 2000 is that it adheres to the principles of arbitration such as the fact that the decision of the arbitrator is binding on the parties as provided in section 17(1), that the decision of the arbitrator is supposed to be fair and impartial in as provided in Article 12 of the UNCITRAL Model Law and that the arbitral process is consensual as per section 12(2) of the Arbitration Act.²³

Furthermore, the redefining of the supervisory role of the judiciary in arbitral matters is a tremendous improvement as it ensures the efficiency and effectiveness of arbitration as an alternative to litigation.²⁴ Finally, the recognition of international awards through the domestication of the UNCITRAL Model Law is a step in the right direction seeing that globalisation is having a far reaching effect the world over and hence the importance of the unification of Zambian legislation with that of the international community.²⁵

Despite these successes, there is need to further improve the Arbitration Act because it still has deficiencies for instance, the Act does not provide the minimum qualifications that an arbitrator should hold and neither does it provide for the licensing and regulation of arbitrators.²⁶

2.6 CONCLUSION

This chapter examined the law governing arbitration in Zambia. From the examination, it can be concluded that tremendous efforts have been made to not only improve the legal framework on arbitration in Zambia but to also bring it in conformity with international standards. In spite of this, more needs to be done in order to ensure the efficiency and effectiveness of the legislation governing arbitration in Zambia as has been elucidated in this chapter. It can only be hoped that

²³K.K. Mwenda, *Principles of Arbitration Law*, 57

²⁴K.K. Mwenda, *Principles of Arbitration Law*, 57

²⁵K.K. Mwenda, *Principles of Arbitration Law*, 57

²⁶K.K. Mwenda, *Principles of Arbitration Law*, 57

the law makers will revise the Arbitration Act as frequently as needed in order to bring it up to par with international standards. For instance, the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law in 1985 but was only domesticated in Zambia in 2000 which shows a defect in the area of law reform in Zambia.

Having examined the law governing arbitration in Zambia, the next chapter shall analyse the role of the court in the arbitral process in Zambia. The chapter is particularly important as the court has a role to play in arbitration despite arbitration being distinct and separate from litigation.

CHAPTER THREE

3.0 THE ROLE OF THE COURT IN THE ARBITRAL PROCESS

3.1 INTRODUCTION

This chapter will focus on the role of the court in the arbitral process. It is important to discuss the role of the court in arbitration because despite arbitration being separate and distinct from litigation, there is a correlation between the two processes. In recognition of the fact that these two processes are connected, this chapter will endeavour to elucidate how they are connected thereby addressing the issue of the court's role in the arbitral process.

3.2 THE ROLE OF THE COURT IN THE ARBITRAL PROCESS

Arbitration offers an alternative forum for parties to resolve their disputes; it provides an alternative to litigation.¹ Does this therefore mean that the court does not play any role in arbitration? The answer to this question is in the negative because the court does play a role and a very important one in the arbitral process.²

The court's role in arbitration has been described by some authors as the 'court's necessary intervention' while others argue that the jurisdiction of the arbitral tribunal and the court in arbitration is concurrent.³ According to Honourable Justice Kajimanga, the court performs several functions in arbitration and the several roles played by the court in the arbitral process

¹ A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice* (New York: At the Oxford University Press, 2005), 498

² Tweeddale and Tweeddale, *Arbitration of Commercial Disputes*, 498

³ Arthur Marzirow, "Advantages and Disadvantages of Arbitration as Compared to Litigation", A Paper Presented to The Counselors of Real Estate, Chicago, Illinois, April 13, 2008, [http://: www.Marzirow.com](http://www.Marzirow.com) (assessed February 27, 2012)

can be summed up in one word, that is, ‘complementary’.⁴ Thus, the role of the court in the arbitral process is to complement the arbitral process.⁵

Another question that can be asked is why is it necessary for the court to complement the arbitral process? As was stated in the first chapter, one of the features of arbitration is that it is a judicial process.⁶ Therefore, in arbitration, the arbitrator is clothed with adjudicative powers.⁷ However, because an arbitrator is not a judge, he does not have the machinery to perform the adjudicative functions which he has been clothed with.⁸ It is due to this lack of machinery that it becomes necessary for the court to complement the arbitral process.⁹

3.3 THE COMPLEMENTARY ROLE OF THE COURT

There are several functions that the court performs to complement the arbitral process.¹⁰ As already stated, arbitration is anchored on the consensus and autonomy of the parties to the dispute.¹¹ As such, the arbitrator or arbitrators are appointed by the parties or at least with the consent of the parties to the dispute.¹² However, where the parties fail to appoint the arbitrator or arbitrators, the parties can apply to court to have the arbitrator or arbitrators appointed by the court.¹³

⁴Honourable Justice Charles Kajimanga, High Court Judge, “*The Complementary Role of the Court in the Arbitral Process*”, A Paper Presented at the Seminar on Arbitration for the Law Association of Zambia, Pamodzi Hotel (March 19, 2010), 1

⁵Justice Kajimanga, “*The Complementary Role of the Court in the Arbitral Process*”,1

⁶Justice Nigel K. Mutuna, High Court Judge, January 12, 2012

⁷Justice Nigel K. Mutuna, January 12, 2012

⁸Justice Nigel K. Mutuna, January 12, 2012

⁹Justice Nigel K. Mutuna, January 12, 2012

¹⁰Justice Nigel K. Mutuna, January 12, 2012

¹¹Justice Nigel K. Mutuna, January 12, 2012

¹²Justice Nigel K. Mutuna, January 12, 2012

¹³The Arbitration Act No. 19 of 2000, Section 12(4)(c)

In addition, where the arbitral tribunal is to be constituted by three arbitrators, each of the disputants is supposed to appoint one arbitrator.¹⁴ The third arbitrator is to be appointed by the other arbitrators appointed by the parties to the dispute.¹⁵ As with the situation where the parties fail to appoint the arbitrator or arbitrators, the court can also appoint the third arbitrator in this case.¹⁶

This provision is found in section 12(4) of the Arbitration Act of 2000 which provides that where, under an appointment procedure agreed upon by the parties-

(a) party fails to act as required under such procedure; or

(b) the parties, or two arbitrators are unable to reach an agreement expected of them under such procedure; or

(c) a third party, including an arbitral institution, fails to perform any functions entrusted to it under such procedure, any party may request the court to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.

Another role the court plays in the arbitral process is to award interim measures of protection such as an injunction in order to preserve property from destruction or being disposed of by the party in whose custody it is. This provision is found in Section 11 of the Arbitration Act of 2000.

Thus, where a party reasonably believes that property which is the subject of arbitration is in danger of being disposed of or destroyed, that party can apply to the court for an interim measure of protection in order to safeguard the property.¹⁷ Therefore, recourse against the destruction or sale of property which is the subject of arbitration can be had to the court.¹⁸

¹⁴Justice Nigel K. Mutuna, January 12, 2012

¹⁵Justice Nigel K. Mutuna, January 12, 2012

¹⁶Justice Nigel K. Mutuna, January 12, 2012

¹⁷Justice Nigel K. Mutuna, January 12, 2012

¹⁸Justice Nigel K. Mutuna, January 12, 2012

Section 11(1) provides that a party may, before or during arbitral proceedings, request from a court an interim measure of protection and, subject to subsections (2), (3) and (4), the court may grant such measure. Subsection (2) of the same section provides that upon a request in terms of subsection (1), the court may grant-

(a) an order for the preservation, interim custody, sale or inspection of any goods, which are the subject matter of the dispute.

(b) an order securing the amount in dispute or the costs and expenses of the arbitral proceedings;

(c) an interim injunction or other interim order; or

(d) any other order to ensure that an award which maybe made in the arbitral proceedings is not rendered ineffectual.

An important benefit of arbitration is that it is confidential.¹⁹ This is in contrast to litigation which is held in open court.²⁰ Therefore, when an arbitral matter is referred to court, there is need to preserve the confidentiality of arbitration and this is one of the roles played by the court.²¹ Therefore, when an arbitral matter is referred to court for one reason or the other, the court will treat the matter with the confidentiality which is due to it.²²

Part IX of The Arbitration (Court Proceeding) Rules²³, which consists of Rules 25 to 31, has provisions to ensure the confidentiality of arbitration. However, only the relevant sections, viz; Rules 25, 26, 27, 28, 29 and 30 will be considered. Rule 25 provides that applications made to a court in relation to arbitral proceedings shall be treated with utmost confidentiality. Rule 26 complements Rule 25 by stating that all records, registers and other documents relating to legal

¹⁹Justice Nigel K. Mutuna, January 12, 2012

²⁰Justice Nigel K. Mutuna, January 12, 2012

²¹Justice Nigel K. Mutuna, January 12, 2012

²²Justice Nigel K. Mutuna, January 12, 2012

²³S.I. No. 75 of 2001

proceedings under the Act shall, while they are in the custody of the court, be confidential and shall be kept in a place of special security.

Rule 27(1) goes on to state that except as is required or authorised by or under the Act, any law or by these Rules, or with the leave of the court, no document or order held by or lodged with the court in legal proceedings under the Act shall be open to inspection or search by any person, except the parties, their representatives; and no copy of any such document or order, or of an extract from any such document or order, shall be taken.

Furthermore, Rule 28 states that all legal proceedings under these Rules shall be held in camera.

Rule 29 provides that any person, who in contravention of Rules 25, 26 and 27 publishes, communicates or discloses any information relating to proceedings under the Act commits contempt of court and will be liable on conviction, to the same penalties prescribed in section one hundred and sixteen of the Penal Code.²⁴ Therefore, in accordance with Section 116(1) (i) of the Penal Code, a person who commits the offence alluded to above commits a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding seven hundred and fifty penalty units.

Finally, Rule 30 provides that all legal proceedings under the Act shall be recorded in a separate register to be called the register of arbitral proceedings, which shall be maintained at the Principal Registry and all District Registries of the High Court.

Another vital role played by the court which is referred to as executory assistance is to ensure that an arbitral award is enforced.²⁵ Unlike a judgment rendered by the judge, an arbitral award does not have the stamp of approval which shows that the judgment has the authority of the

²⁴The Penal Code, Chapter 87 of the Laws of Zambia

²⁵Justice Nigel K. Mutuna, January 12, 2012

Republic of Zambia.²⁶ This therefore entails that an award rendered by an arbitrator, unlike a judgment rendered by a judge, does not have *imperium* or coercive power.²⁷

Furthermore, once the tribunal renders the award, it becomes *functus officio*. By *functus officio*, it means that the mandate of the tribunal ends when it renders the award. The implication of this is that after rendering an award, the tribunal no longer has authority in the arbitral matter and is therefore unable to enforce it.²⁸

Due to this lack of authority, a party to a dispute against whom the award is rendered can disregard the award and the arbitrator has no authority to enforce the award.²⁹ To avert such a situation, the court has been conferred with authority to enforce an arbitral award.³⁰ Therefore, where a party fails to adhere to an arbitral award, the party in whose favour the award was rendered can apply to court to have the award enforced and in such a circumstance, the party in default can even be cited for contempt of court. Contempt proceedings are one of the ways in which an arbitral award can be enforced.³¹

The relevant section of the Arbitration Act is section 14(4) which provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court executory assistance in the exercise of any power conferred upon the arbitral tribunal under this section.

However, before an award can be enforced, it is imperative to have it recognised and registered.

Hence, another function of the court in the arbitral process is the recognition and registration of arbitral awards.³²

²⁶Justice Nigel K. Mutuna, January 12, 2012

²⁷Arthur Mazirow, “*Advantages and Disadvantages of Arbitration as Compared to Litigation.*”

²⁸Justice Nigel K. Mutuna, January 12, 2012

²⁹Justice Nigel K. Mutuna, January 12, 2012

³⁰Justice Nigel K. Mutuna, January 12, 2012

³¹Justice Nigel K. Mutuna, January 12, 2012

³²Justice Nigel K. Mutuna, January 12, 2012

The recognition and registration of an award is essentially an official confirmation by the court that the award is binding and can therefore be enforced against the losing party, if that party is reluctant to comply with the award.³³ Therefore, the recognition and registration of an arbitral award signifies the binding nature of an arbitral award.

Rule 18(1) of the Arbitration (Court Proceeding) Rules, 2001 provides for the registration of arbitral awards. It states that there shall be kept at every Registry at the High Court a register of arbitration awards ordered to be registered under these rules.

On the other hand, sections 18 and 19 of the Arbitration Act provide for the enforcement and recognition of arbitral awards. Section 18(1) provides that 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 section nineteen.

Furthermore, section 19 (1) (a) of the Arbitration Act of 2000 provides that the recognition of an arbitral award, irrespective of the country in which it was made, may be refused only at the request of the party against whom it was invoked, if that party furnishes to the competent court where the recognition or enforcement is sought, proof which would warrant the refusal of the court to recognise and enforce an arbitral award. The section goes on to enumerate grounds under which the recognition and enforcement of an award can be refused and these are set out as follows;

Section 19(1) (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that-

³³Justice Kajimanga, “*The Complementary Role of the Court in the Arbitral Process*”, 9-11

- (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that award was made.

Furthermore, Section 19 (1) (b) of the Arbitration Act of 2000 provides the court may refuse to enforce an arbitral award where the subject matter of the dispute is not capable of settlement by arbitration under the law of Zambia³⁴ or the recognition or enforcement of the award would be contrary to public policy³⁵ and finally, where the making of the award was induced or effected by fraud, corruption or misrepresentation.³⁶

An award rendered by an arbitral tribunal is final and therefore cannot be appealed against. Needless to say, arbitration, just like any other process through which disputes are resolved like

³⁴Section 19(1)(b)(i)
³⁵Section 19(1)(b)(ii)
³⁶Section 19(1)(b)(iii)

litigation, is not flawless. There is always a possibility of errors being made and the disputants having grievances against an arbitral award. In recognition of this fact, the court offers an avenue for an aggrieved person to take a complaint against an award by applying to have it set aside.³⁷

Therefore, despite the absence of a provision for appealing against an arbitral award, recourse against an award can be had to the court via an application for setting aside. Accordingly, the only recourse against an arbitral award is an application to the court, the High Court in particular, to have the award set aside.³⁸

This provision is found in section 17(1) of the Arbitration Act of 2000 which provides that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) of that section. Subsection (2) of section 17 provides the only grounds under which an arbitral award can be set aside by the court. It provides that an arbitral award may be set aside by the court only if;

(a) the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law which the parties have subjected it or, failing indication thereon, under the law of Zambia;

(ii) the party making the application was not given proper notice of the appointment of an arbitral tribunal or of proceedings or was otherwise unable to present his case;

(iii) the award deals with a dispute not contemplated by, or not falling within the terms of the submission to arbitration, or contains a decision on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated

³⁷Mazirow, *“Advantages and Disadvantages of Arbitration as Compared to Litigation”*

³⁸Justice Kajimanga, *“The Complementary Role of the Court in the Arbitral Process”*, 5

from those not submitted, only that part of the award which contains the decision on matters not submitted to arbitration may be set aside;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the laws of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zambia;³⁹ or the award is in conflict with public policy;⁴⁰ or the making of the award was induced, effected by fraud, corruption or misrepresentation.⁴¹

Furthermore, subsection (3) of section 17 provides that an application for setting aside may not be made after three months have lapsed from the date on which the party making that application had received the award or if a request has been made under Article 33 of the First Schedule, from the date on which that request had been disposed of by the arbitral tribunal. Article 33 of the First Schedule of the Arbitration Act No. 19 of 2000 provides for the correction and interpretation of arbitral awards.

The use of the word ‘may’ in section 17 subsection (2) suggests that despite a party proving the grounds enumerated above, it is not mandatory for the court to set aside the arbitral award but rather that it is at the court’s discretion to do so. Therefore, the court has complete discretion whether or not to set aside an arbitral award.⁴²

³⁹Section 17(2)(b)(i)

⁴⁰Section 17(2)(b)(ii)

⁴¹Section 12(2)(b)(iii)

⁴² Blanco White, 5th ed., *Russel on the Law of Arbitration*, (London: Stevens & Sons Limited, 1952), 264

Finally, another important role played by the court in the arbitral process is the staying of proceedings. When parties agree to refer their dispute to arbitration, that agreement is binding on the parties. The parties are therefore obligated to refer their dispute to arbitration once a dispute erupts. They cannot then refer their dispute to litigation because this will be in breach of the arbitration agreement.⁴³

When a party, in disregard of the arbitration agreement, decides to commence legal proceedings in the court, the court is obligated to stay the legal proceedings and refer the parties to arbitration. This provision is found in section 10(1) of the Arbitration Act which provides that,

A court before which legal proceedings are brought in a matter which is a 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.

From the wording of this section, it is clear that it is obligatory for the court to stay proceedings that are the subject of an arbitral agreement as well as to refer such proceedings to arbitration when a party so requests, unless there are extenuating circumstances such as the agreement being null and void, inoperative or incapable of being performed.⁴⁴ This can be inferred from the use of the word 'shall' rather than 'may' in the section aforementioned.

3.4 CONCLUSION

This chapter has examined the role of the court in the arbitral process. From the discussion, it can be concluded that the role of the court in the arbitral process is to merely complement the arbitral process and not to supervise it or interfere in it. The court can neither supervise the arbitral

⁴³M.J. Mustill and Stewart C. Boyd, 2nd ed., *The Law and Practice of Commercial Arbitration in England* (London: At Butterworths, 1989), 14

⁴⁴Justice Kajimanga, "*The Complementary Role of the Court in the Arbitral Process*", 1

process nor interfere in it because arbitration is a private agreement between the parties to oust the jurisdiction of the court by electing to refer their dispute to arbitration rather than the court.

As the parties have elected to refer their dispute to arbitration rather than the court, it is imperative for the court to respect the wishes of the parties. Supervising the arbitral process or interfering in it would render the arbitration agreement between the parties redundant and would essentially mean the ouster of the parties' autonomy by the courts.⁴⁵ It is therefore essential that the court upholds its complementary role in the arbitral process so as to preserve the parties' autonomy which is the core of arbitration⁴⁶. Failure to guard against interference by the court will result in arbitration losing its character of ADR and adopting that of litigation.⁴⁷

Having discussed the role of the court in the arbitral process, the following chapter will discuss the Zambian jurisprudence as regards arbitration. This chapter is important as it buttresses the issues discussed in the preceding chapters.

⁴⁵Toby T. Landau, "*International Arbitration and Pakistan's State Responsibility: Redefining the Role of the Court*", A Paper at Essex Court Chambers, London, 3-4. [http://: www.Google.com](http://www.Google.com) (assessed March 2, 2012)

⁴⁶Winnie Sithole Mwenda, "*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*", University of South Africa, Thesis ,164

⁴⁷Toby T. Landau, "*International Arbitration*",4

CHAPTER FOUR

4.0 CASE LAW AS REGARDS ARBITRATION IN ZAMBIA

4.1 INTRODUCTION

This chapter discusses the Zambian jurisprudence that has been developed with regards to arbitration in general. It discusses the various principles that govern arbitration in general as espoused by the cases that will be considered. Therefore, the objective of this chapter is to create a clear understanding of the principles that govern arbitration as regards its conduct, with the aid of case law. However, this chapter first discusses the case of *Konkola Copper Mines V. Copperfields Mining Services Limited*¹ which is the basis upon which the research topic was drawn.

4.2 CASE LAW

a) *Konkola Copper Mines V. Copperfields Mining Services Limited*²

The facts of this case are that the plaintiff made an application to the High Court to set aside an arbitral award. However, the application to set aside the arbitral award was dismissed. The plaintiff therefore filed a notice of appeal in the High Court and applied for a stay of execution of the judgment dismissing the application and a stay of sale pending the determination of the appeal. However, the defendant raised a preliminary issue challenging the jurisdiction of the court to grant the stay of execution and sale.

The court held that, as the case before the court was an arbitral matter, it had no jurisdiction to entertain the two orders sought by the plaintiff and therefore the preliminary issue was upheld. The *ratio decidendi* or principle of law upon which the court relied in coming to this conclusion

¹2010/ HP/ARB/NO.002

²2010/ HP/ARB/NO.002

is that the Arbitration Act No. 19 of 2000 and the United Nations Commercial and International Trade Law Model Law which was domesticated in Zambia upon the coming into force of the Arbitration Act of 2000 set out the roles played by the court in the arbitral process and that staying of execution of an arbitral award is not one of the roles enumerated by the Act and the Model Law. The court could therefore not hear the application as attempting to do so would amount to interfering in the arbitral process thus defeating the intention of the legislature to cure the defect in the repealed Arbitration Act Chapter 40 of the Laws of Zambia in so far as it allowed the court to interfere in the arbitral process and thus disregarding party autonomy.

ANALYSIS OF THE CASE

This case clearly sets out the law on arbitration as it not only sets out the instances in which the court can intervene in the arbitral process as provided by the Arbitration Act No. 19 of 2000 and the UNCITRAL Model Law but also reiterates the fact that the court should not intervene in the arbitral process unless in the instances enumerated by the Arbitration Act of 2000 and the UNCITRAL Model Law.

b) EFFECT OF AN ARBITRAL AWARD

*Mobil Oil (Z) Ltd v. Malawi Petroleum Control Commission*³

The facts of this case were that an award was made by an arbitrator in which he awarded the respondent 248, 924 litres of diesel and 35, 744 litres of petrol. He awarded the respondent a further 220, 976 litres but it did not specify whether it was diesel or petrol and also awarded interest for the parties to agree, in default of which the parties were to make submissions to the arbitrator. The parties, by consent Notice of Motion sought for verification and clarification of the award in respect of the 220, 976 litres. The parties wanted this figure to be calculated and also to specify what product this was; whether it was diesel or petrol.

³ SCZ Judgment No. 25 of 2004

The motion was heard but the ruling was reserved. Unfortunately, before the ruling could be delivered, the arbitrator died and the parties neither agreed on a new arbitrator nor did they go to court to ask for one. However, one of the parties registered the award in the High Court. The respondent then wrote letters of demand to the appellant but the appellant did not respond favourably.

Therefore, the respondent issued a *writ of fieri facias* to try and enforce the judgment. A stay of execution was discharged at the inter-party hearing by the Deputy Registrar, holding that he had no jurisdiction to issue an order to stay execution of the judgment as only a High Court judge could do that.

The High Court became seized of the matter by Originating Summons in which the court was asked to determine the following:-

- (1) That an arbitrator’s findings of fact in an award could not be altered by either party by way of Notice of Motion.
- (2) That an award once delivered and registered in the judgment book of the High Court is of binding force upon the parties in accordance with Section 16(1) and Rule 8 of the Arbitration Act, Cap 40.
- (3) That the appellant not having appealed against the award dated 13th September 1999, the respondent was entitled to enforce and enjoy the fruits of the award without further hindrance.
- (4) That the award having provided for either replacement of the products or payment in United States dollars would be sufficient to buy those quantities and that the respondent was at liberty to demand payments in United States dollars.

After considering submissions by counsel, the learned judge made it clear in his ruling that as there was no appeal against the award, he was not sitting as an appellate court and he gave the following answers:-

1. On question one, an Arbitrator's findings of facts in an award were binding on the parties and could not be altered by either party without the consent of the other.
2. An award of the Arbitrator once delivered and registered in the High Court is as good as a judgment of the High Court and can be enforced in the same manner as a judgment of the High Court.
3. That under Section 16(2) of the Arbitration Act, the Arbitrator was at liberty to make an award in the alternative and therefore the respondent could choose which one to enforce.

It was against this ruling that the appellant appealed to the Supreme Court. There were three grounds of appeal and these were that the court below erred in law and fact when it failed to take account Judicial Notice of the proceedings in Cause No. 2000/HP/0398 in which the arbitration award was originally registered. It was argued that the court below ought to, in the circumstances have regarded as an abuse of court process, the commencement of fresh proceedings in Originating Summons in Cause No. 2001/HP/0059 when all issues could have been amply dealt with in the original cause.

The second ground of appeal was that the court below erred in law by making a finding that it could not deal with the issues arising out of the arbitration in the absence of an appeal in view of the provisions of Sections 7(1) (b); 14(1); and 16(1) of the Arbitration Act, Chapter 40 of the Laws of Zambia, which is now repealed.

The final ground of appeal was that the enforcement of the arbitral award in Cause No. 2000/HP/0398 was premature in that issues had not been exhaustively dealt with following the death of the Arbitrator.

The Supreme court held that the award was null and void on two grounds: (a) the award was not complete as the arbitrator had yet to determine the 220, 976 litres and the type of product and (b) the registration or filing was not done by the arbitrator but by a party to the arbitration which is contrary to section 11 (2) of the Arbitration Act Chapter 40, which is now repealed. The court further stated that any attempt to execute or enforce an incomplete award was null and void. The court accordingly allowed the appeal.

This case therefore espouses the principle that once an award is delivered and registered, it is binding upon the parties. It also espouses the principle that it is the arbitrator to register an award and not the parties.

c) STAYING OF PROCEEDINGS

*Yougo Limited and Pegasus Energy Limited*⁴

The facts of the case were that the plaintiff and defendant entered into a contract in which they included a clause which provided that in the event that any dispute or difference arose between the parties as regards the construction of the contract or any matter arising there under or in connection therewith, such dispute or difference would be referred to an arbitrator. However, when a dispute arose between the parties, the plaintiff issued proceedings in the High Court, disregarding the Arbitration Agreement.

Therefore, the defendant made an application to stay proceedings pursuant to Section 10 of the Arbitration Act of 2000 and for an Order that the matter be referred to arbitration. In opposing

⁴2004/HPC/0299

the application, counsel for the plaintiff contended that the matter was simply that of debt collection and did not amount to a dispute therefore any referral to arbitration would be a waste of time. He also contended that the purported Arbitration Agreement was not valid.

The High Court held that the clause under the contract was a valid Arbitration Agreement and therefore it was obliged to refer the matter to arbitration unless the defendant proved that the agreement was null and void, inoperative or incapable of being performed. As the defendant had not proved any of these grounds, the court was obliged to refer the matter to arbitration.

The High Court also observed that the application by the defendant to stay proceedings and to refer the matter to arbitration was in accordance with what the parties agreed upon in their contract and therefore did not amount to ousting the jurisdiction of the courts in terms of the Arbitration Act No. 19 of 2000 and in terms of the decision in *Akashambatwa Mbikusita Lewanika and Others V. NIKUV Computers Limited* where the Supreme Court held that it was never the intention of the legislature to oust the jurisdiction of the court under the Arbitration Act.

The High Court further observed that by giving effect to the intention of the parties as agreed in their contract, they would be enhancing the principle of freedom of contract. The grant was accordingly granted.

From this case, it is clear that before a matter can be referred to arbitration, there has to be a dispute and a valid arbitration agreement. It also espouses the principle that it is mandatory for the court to refer a matter in which there is an arbitration agreement to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed and therefore, in this regard, emphasises the sanctity of the parties' agreement.

(d) EFFECT OF A COURT ORDER STAYING PROCEEDINGS AND REFERRING A MATTER TO ARBITRATION

*Leopard Ridge Safaris Limited and Zambia Wildlife Authority*⁵

The facts of the case were that the appellant and the respondent entered into a Hunting Concession Agreement. However, the respondent was of the view that the appellant had not complied with the agreement due to the manner in which the agreement was being administered and therefore terminated the agreement. Consequently, the appellant commenced an action in the High Court by way of *ex parte* application for leave to apply for judicial review pursuant to Order 53 of the Supreme Court.

The learned trial judge ordered that the application be heard *inter partes* and on the hearing of the application *inter partes*, the respondent raised a preliminary application to stay the proceedings pursuant to Section 10 of the Arbitration Act of 2000. The respondent contended that by clause 12 of the Hunting Concession Agreement, the mode of settlement of the dispute was by arbitration. It was further contended by the respondent that the action should therefore be stayed to enable the parties to seek the resolution of the dispute through their own choice of forum.

In response, counsel for the appellant submitted that the respondent had rendered the lease agreement inoperative or incapable of being performed under Section 10 of the Arbitration Act of 2000 through the act of termination as the agreement required either party to give notice in writing at least six months before termination.

The learned trial judge in his ruling held that the parties were bound by the arbitration clause in the agreement and that there were no grounds upon which the action could not be referred to arbitration. It was against this ruling that the appellant appealed.

⁵ S.C.Z Judgment No. 43 of 2008

There were two grounds of appeal and these were that firstly, the Court below misdirected itself in law when it held that there was an action to refer to arbitration and to stay such action when there was no action at this stage. The second ground of appeal was that the court below misdirected itself in law and fact when it purported to stay the action and refer the same to arbitration under clause 12 of the Hunting Concession Agreement, when the clause was not a blanket arbitration clause and the parties had not complied with procedure under clause 12 of the Agreement.

The sum total of counsel for the appellant's submission was that due to the stay of the action before the court and the reference of the matter to arbitration, the application for leave to apply for judicial review was never determined. He submitted that in consequence thereof, the application for leave was neither refused nor granted in accordance with the provisions of Order 53, Rule 3 of the Rules of the Supreme Court and that an action was deemed to commence in judicial review matters only when the trial Court had heard the application for leave and granted or refused to grant it. He therefore submitted that before the application for leave was granted or refused, there were no proceedings before the trial Court to stay.

On the other hand, counsel for respondent contended that Section 10 of the Arbitration Act No. 19 of 2000 gave power to the High Court to stay the action at any stage of the proceedings and refer the dispute to arbitration. The action or proceedings could be an application for leave to apply for judicial review or an action or proceeding begun by a writ. He submitted that there was no distinction between a matter begun by an application for leave to apply for judicial review and a matter commenced by a writ as all were proceedings before the Court. He submitted that there were proceedings before the court below in form of an application for leave to apply for judicial

review to warrant the trial court, upon being requested by the respondent, to refer the parties to arbitration.

The Supreme Court agreed with the respondent that in terms of Section 10 of the Arbitration Act No. 19 of 2000, there were proceedings before the learned trial judge in form of an *ex parte* application for leave to apply for judicial review. The court also stated that as soon as the application for leave was filed at the Principal Registry, it became a proceeding before the High Court.

Furthermore, the court stated that an action that has been referred to arbitration may pend before the court while arbitral proceedings are commenced and continued leading to an award being made. The Supreme Court was of the view that if an award is made and the parties are happy with the award, the pended action in court can later be discontinued. On the other hand, if a party is not happy with the award he may, for example, apply to set it aside under Section 17 of the Arbitration Act by resurrecting the pending action. The court, therefore held that ground one of the appeal had no merit and was accordingly dismissed.

On ground two, the Supreme Court held that from the documents before the court, it was clear that an initial attempt at good faith negotiations and mediation in compliance with clause 12 of the Hunting Concession Agreement had been made and that since the application for leave was before the court and in consideration of the respondent's application for stay of the proceedings under Section 10 of the Arbitration Act No. 19 of 2000, the learned trial judge had no choice but to refer the dispute to arbitration as provided for in the Hunting Concession Agreement. The appeal was accordingly dismissed in its totality.

From this case, it is clear that the word ‘proceeding’ under Section 10 of the Arbitration Act of 2000 is all encompassing as it includes any matter which is before the court. Further, this case espouses the principle that the effect of staying a court proceeding and referring the matter to arbitration is that the proceedings before the court remain pending while the arbitral proceedings commence and continue, and can be continued in an instance where a party is not happy with the award of the arbitrator by way of an application for setting aside. However, where the parties are happy with the arbitral award, the matter before the court can be discounted.

e) SETTING ASIDE AN ARBITRAL AWARD

*Techpro Zambia Limited and NFC Africa Mining Plc*⁶

NFC Africa Mining PLC, the defendant applied by way of an originating summons for the following orders.

- a) That the arbitration award made therein against the defendant NFC Mining PLC be set aside under the provisions of Section 17(2) of the Arbitration Act No. 19 of 2000 on the ground that the making of the award was induced or effected by misrepresentation on the part of the plaintiff hereto as set out in the supporting affidavit.
- b) That the application was within three months of the date on which the Defendant received the award, namely 11 June, 2004.

The court stated that according to Section 15 of the Arbitration Act Chapter 40 of the Laws of Zambia, which is now repealed, an award might be set aside where an arbitrator or umpire has misconducted himself or an arbitration award has been improperly procured. Further, the court stated that in accordance with Rule 13 of 45 of the High Court Rules, no award shall be liable to be set aside except on the ground of perverseness or misconduct of the arbitrator or umpire, and that any application to set aside an award shall be made within fifteen days after the publication.

⁶ 2004/HN/ARB 1

The court further stated that from the provisions of the law, an arbitration award can only be set aside on the grounds provided and that the court would have to determine whether the defendant had proved any of the grounds provided in Section 15 of the Arbitration Act and Rule 13 of Order 45 of the High Court Rules.

After considering the affidavit evidence and the submissions, the court concluded that the defendant had proved that the award had been improperly procured and perverse in accordance with Section 13 of the Arbitration Act No. 19 of 2000 and accordingly found that there were merits in the application.

This case espouses the principle that an arbitral award can only be set aside on the grounds provided by the Arbitration Act. This case, unfortunately, appears to advance the position that when applying to set aside an award, a party may rely on Section 17 of the Arbitration Act of 2000 or Section 15 of the repealed Arbitration Act, Chapter 40 of the Laws of Zambia. However, the position of the law is that an arbitral award can only be set aside on the grounds provided in Section 17 of the Arbitration Act No. 19 of 2000 which has already been discussed.

4.3 CONCLUSION

This chapter has discussed some of the jurisprudence that has developed in the area of arbitration in Zambia. From the discussion, it can be concluded that Zambia's jurisprudence on arbitration is slowly increasing and thus contributing to the increase in knowledge of the law governing arbitration. It can only be hoped that an efficient system of reporting of arbitral matters will be put in place by the Zambia Association of Arbitrators which is currently the body charged with the responsibility of reporting on arbitral matters in Zambia.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This paper endeavoured to analyse the role of the court in the arbitral process in Zambia. A brief account of what was discussed in the preceding chapters and the findings thereto are highlighted below.

5.2 OBJECTIVES OF THE STUDY

- a. To examine the various forms of alternative dispute resolution mechanisms with emphasis on arbitration
- b. To examine the instances when recourse can be had to the courts in arbitral matters vis-à-vis the Arbitration Act No. 19 of 2000 and the United Nations Commission of International Trade Law (UNCITRAL) Model Law
- c. To determine the negative consequences that flow from the relationship between the court and the arbitral process
- d. To ascertain what amounts to interference by the courts in the arbitral process
- e. To provide a viable solution to the interference of the courts in arbitral matters, if, any and other negative consequences that may flow from the relationship between the courts and the arbitral process

5.3 FINDINGS

a) In chapter one, it was observed that alternative dispute resolution is virtually any process whose objective is to facilitate the resolution of disputes by the consensus of the parties to the dispute in a non-adjudicative manner and that it offers an alternative for parties to resolve their disputes to litigation¹. It was also noted that in Zambia, arbitration is the most formalised and important form of alternative dispute resolution. The other forms of alternative dispute resolution are mediation, conciliation, negotiation and neutral fact-finding.²

b) In chapter two, it was observed that currently, the legal regime governing arbitration in Zambia is the Arbitration Act No. 19 of 2000 and the United Nations Commission on International Trade Law Model Law which was domesticated at the time the Arbitration Act of 2000 came into force. It was further observed that the Arbitration Act of 2000 repealed and replaced the Arbitration Act, Chapter 40 of the Laws of Zambia and that its repeal and replacement was necessitated by several reasons, the major one being the lacunas in that Act.

The repealed Arbitration Act mainly suffered from short comings in its drafting. For instance, Section 7(1) (d) provided that, where an arbitrator or umpire appointed by the parties was incapable of acting, the court could appoint an arbitrator or umpire. However, the Act did not clearly indicate the circumstances in which an arbitrator would be considered as being incapable of acting. Further, the Act provided in Section 8(b) that the court could set aside the appointment of a sole arbitrator, that is, an arbitrator appointed by one party where the other defaulted in appointing an arbitrator. However, it did not provide the circumstances in which such an appointment could be set aside.

¹ C.K. Wehringer, *Arbitration: Precept and Principles* (New York: Oceana Publications Inc.,1969), 1

²International Court of Arbitration, “ADR International Applications Special Supplement.” *ICC International Court of Arbitration Bulletin* (2001),76

Among the lacunas of the Act of 1933 are that it was silent on the qualifications for one to eligible to hold the office of arbitrator.³ It was also silent on the penalties on a person who, when his mandate had expired or was never appointed as an arbitrator purported to hold the office of arbitrator.⁴ Finally, the Act did not provide whether or not the parties to the arbitration could designate their power to appoint arbitrators to an individual or body corporate.⁵

It was observed that the enactment of the Arbitration Act No. 19 of 2000 has made tremendous improvements to the law of arbitration in Zambia. For instance, it redefined the supervisory role of the courts in the arbitral and also adopted the UNCITRAL Model Law.

c) In chapter three, it was observed that the court performs a complementary role in the arbitral process.⁶ It should be noted that the word court refers to the High Court. Among the roles the court performs to complement the arbitral process is that it is the only forum a party can use to set aside an arbitral award.⁷ The court also recognises and enforces arbitral awards.⁸ Furthermore, the court assists in the appointment of arbitrators where the parties fail to do so.⁹ Finally, the court also grants interim measures of protection.¹⁰

d) In chapter four, it was observed from the case of *Konkola Copper Mines V. Copperfields Mining Services Limited*¹¹ that the repeal and replacement of the Arbitration Act, Chapter 40 of the Laws of Zambia by the Arbitration Act of 2000 cured the defects of the former Act in so far

³K.K. Mwenda, *Principles of Arbitration Law* (Florida: Brown Walker Press, 2003), 7

⁴Mwenda, *Principles of Arbitration Law*, 7

⁵Mwenda, *Principles of Arbitration Law*, 7

⁶Honourable Justice Charles Kajimanga, High Court Judge, “*The Complementary Role of the Court in the Arbitral Process*”, A Paper Presented at the Seminar on Arbitration for the Law Association of Zambia, Pamodzi Hotel, 19th March, 2010.

⁷The Arbitration Act No. 19 of 2000, Section 17

⁸The Arbitration Act No. 19 of 2000, Section 18

⁹The Arbitration Act No. 19 of 2000, Section 12

¹⁰The Arbitration Act No. 19 of 2000, Section 11

¹¹2010/ HP/ARB/NO.002

as they permitted the court to interfere in the arbitral process. For instance, in Section 13 of the Act, the court could enlarge the time in which the arbitrator was to render an award, whether the time for making the award had expired or not and in Section 14, the court could remit an award for reconsideration by the arbitrator or umpire, without enumerating under what grounds this could be done. Finally, in Section 8 (b) of the Act, the court could also set aside the appointment of a sole arbitrator but similarly, it did not provide the grounds under which this could be done. Therefore, the court could dictate how long the arbitral process took, which is a matter for the parties to determine. From the wording of Sections 14 and 8 (b), the court could also interfere with the decision of the arbitrator as well as that of a party to the dispute.

Furthermore, it was observed that the Arbitration Act of 2000 and the UNCITRAL Model Law set out the instances in which the court can intervene in the arbitral process; they enumerate the specific roles played by the court in the arbitral process. Thus, if the court performed a function not set out in the Act or the Model Law, this would amount to the court interfering in the arbitral process. Therefore, the provisions of Act and the Model Law are tailored in such a way as to prevent the court from interfering in the arbitral process.

5.4 CONCLUSION

This research has analysed the role of the court in the arbitral process in Zambia. It is evident that the court plays a vital role in the arbitral process, which is to complement the arbitral process. Furthermore, the rationale behind the introduction of arbitration was to reduce the backlog of cases before the courts and to offer the parties with an alternative forum to settle their disputes other than litigation as arbitration has several advantages over litigation.

It is therefore imperative for the court to intervene in the arbitral process only in instances provided by the Arbitration Act of 2000 and the UNCITRAL Model Law. It is also of the essence for the judiciary to devise a system where the cases from arbitration do not have to join the backlog of cases before the courts as this will defeat the whole purpose of alternative dispute resolution and arbitration in particular. Finally, the law governing arbitration should be revised on a regular basis so as to ensure its effectiveness and there is also need for training in the legal fraternity as regards arbitration as not much is known by most lawyers and judges regarding arbitration. Once the lawyers are trained in this field, it will even be easy for them to encourage their clients to use arbitration as a means of resolving disputes as they will be fully aware of its pros and cons and this will also enhance the reporting of cases in this field.

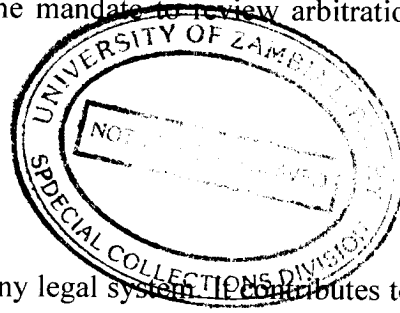
5.5 RECOMMENDATIONS

5.5.1 LAW REFORM IN THE AREA OF ARBITRATION

For any legal system to operate effectively, it is imperative for laws to be amended or improved upon as often as is necessary to ensure that they respond to the prevailing social needs and conform to international standards. For instance, since 1933, the Arbitration Act which was introduced on the statute books in the colonial era was the law that governed arbitration in Zambia until its repeal in 2000. Therefore, it took approximately sixty seven years to repeal a law which evidently could not effectively govern the law of arbitration in Zambia due to its flaws.

Another illustration is that the UNCITRAL Model Law was adopted by the United Nations in 1985 but was only domesticated in Zambia in 2000 with the coming into force of the Arbitration Act of 2000 which merely buttresses the fact that the area of law reform needs tremendous

improvements if the law of arbitration in Zambia is to be effective. This could be achieved by giving the Zambia Association of Arbitrators the mandate to review arbitration legislation on regular intervals, for instance, every five years.



5.5.2 REPORTING OF CASES

Reporting of cases is also a vital component of any legal system. It contributes to the knowledge of the law as cases usually clarify the position of the law on a particular subject. However, despite the fact that arbitration has been part of Zambia's legal system since 1933, there has been no system for the reporting of cases. In fact, it is only now that the Zambia Association of Arbitrators (ZAA) has formally launched its journal which is a compilation of the cases handed down by the courts.

Ordinarily, the cases are confidential but it is possible for ZAA to obtain the consent of the parties so as to allow the association to publish these cases. For instance, the association was able to obtain the consent of the parties in the publication of the association's first ever journal of arbitral cases.

One of the reasons for the failure of the Association to report cases is that not many cases are presented to arbitration; most cases are presented to the courts in contravention of arbitration agreements. It is therefore of vital importance for legal practitioners to encourage their clients to refer their cases to arbitration if the reporting of cases in the area of arbitration is to improve.

5.5.3 TRAINING OF LAWYERS AND JUDGES

From my research, it was evident that arbitration is not widely known not only among lawyers but also among judges. If arbitration is to take root in Zambia, it is imperative that lawyers and

judges are trained in the field of arbitration. This can be achieved through the holding of regular seminars and workshops on arbitration.

One sustainable way of ensuring the training of lawyers in the field of arbitration is through the introduction of arbitration as a course at the University of Zambia, School of Law so as to ensure that by the time students enter the practice, they will be fully equipped with the knowledge of arbitration and thereby be able to advise their clients to use arbitration. Later on, this course can then be introduced in other institutions that offer legal training. If this is done, arbitration will be able to take root in Zambia and it will also enhance the efficiency and effectiveness of arbitration as a method of resolving disputes in Zambia as the legal fraternity will be fully knowledgeable of this form of alternative dispute resolution.

5.5.4 THE COURT AND THE ARBITRAL PROCESS

As already stated in the fourth chapter, the Arbitration Act No. 19 of 2000 and the UNCITRAL Model Law are tailored in such a way as to prevent the court from interfering in the arbitral process and therefore the court can no longer interfere in the arbitral process. Despite the fact that the court cannot interfere in the arbitral process, the fact that the court plays a role in the arbitral process may pose a challenge for those who opt to use arbitration as a forum for resolving their disputes.

As was stated in the first chapter, the rationale behind the introduction of arbitration was to relieve the courts of the heavy load of cases and to afford the parties a quicker and cheaper method of resolving their disputes. However, the fact that the parties have to apply to court in order to set aside an arbitral award or enforce it defeats the whole rationale behind arbitration

because when these cases are brought before the courts, they join the backlog of cases that are already before the courts. This, therefore, defeats the whole purpose of arbitration.

In light of this, the courts should devise a system whereby arbitral matters that are taken to the courts via an application for setting aside or enforcement of an arbitral award or by any other method do not have to join the backlog of cases so as not to defeat the whole rationale behind arbitration. For instance, the High court can make it mandatory for any matter taken before it, which is the subject of an arbitration agreement to be registered in the commercial registry as most arbitral matters in Zambia are commercial in nature or such matters should be heard in chambers.

BIBLIOGRAPHY

BOOKS

Mustill, M.J. and S.C. Boyd, 2nd ed. *The Law and Practice of Commercial Arbitration in England*. London: Butterworths, 1989.

Mwenda, K.K. *Principles of Arbitration Law*. Florida: Brown Walker Press, 2003.

Tweeddale, A. and K. Tweddale. *Arbitration of Commercial Disputes*. New York: Oxford University Press, 2005.

Wehringer, C.K. *Arbitration: Precept and Principles*. New York: Oceana Publications Inc., 1969.

White, Blanco, 15th ed. *Russel on the Law of Arbitration*. London: Stevens & Sons Limited, 1952.

JOURNAL ARTICLES

Bor, Harris. “ADR Possibilities in Investor-State Disputes.” *The International Journal of Arbitration, Mediation and Dispute Management* 73, no. 1 (February 2007): 97.

DISSERTATIONS

Mwenda, Winnie Sithole. “*Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*.” Thesis, University of South Africa, 2006.

INTERVIEWS

Justice Nigel K. Mutuna, High Court Judge, January 12, 2012.

INTERNET SOURCES

Landau, Toby. “*International Arbitration and Pakistan’s State Responsibility: Redefining Role of the Court.*” A Paper at Essex Court Chambers, London. [http://: www.Google.com](http://www.Google.com) (assessed on March 2, 2012).

Marzirow, Arthur. “*Advantages and Disadvantages of Arbitration as Compared to Litigation.*” Paper Presented to The Counselors of Real Estate, Chicago, Illinois, April 13, 2008. <http://www.Marzirow.com> (assessed on February 27, 2012).

PUBLICATIONS

International Court of Arbitration. “ADR International Applications Special Supplement.” *IC International Court of Arbitration Bulletin* (2001).

PAPERS

Honourable Justice Kajimanga Charles, High Court Judge. “*The Complementary Role of the Court in the Arbitral Process.*” A Paper Presented at the Seminar on Arbitration for the Law Association of Zambia, Pamodzi Hotel, March 19, 2010.