

# INJUNCTIVE RELIEF AS A REMEDY UNDER ARBITRATION LAW IN ZAMBIA

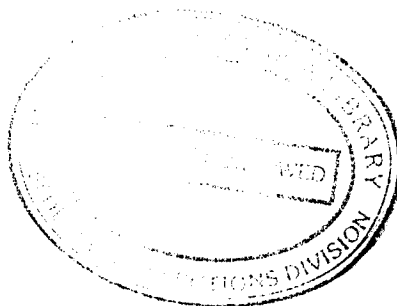
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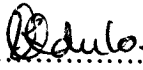
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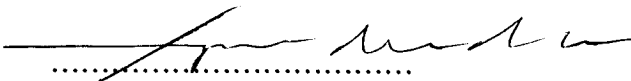
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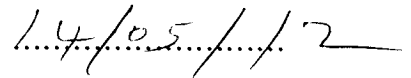
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## ABSTRACT

The concept of arbitration is not a new occurrence; its genesis can be traced as far back as the medieval times and has carefully evolved for the proper administration of justice. Arbitration is a method of Alternative Dispute Resolution (ADR) and is highly preferred to other forms of dispute resolution. Under the law on arbitration, there a number of remedies available to the parties to an arbitral process. One of the remedies available to the parties is the remedy of injunctive relief. The purpose of this research was to illustrate the effects of the court's power to grant injunctive relief during arbitration. This research primarily involved desk research and field research which entailed interviews with judges, advocates and scholars. This paper first introduced the concept of arbitration and brought the problem of court ordered injunctions into perspective. The granting of injunctions in both arbitration and litigation was discussed and this paper further illustrated that the principles of granting injunctions under both methods of dispute resolution are the same. This research further analysed the legislation on arbitration from different jurisdictions and a comparison was made with Zambia. From the analysis and comparison made it was shown that most of the jurisdictions analysed allow for court intervention in the arbitral process with the exception of Sweden which leans towards non-judicial participation in the arbitral process until after the arbitral process is done.

In addition, the case of *Friday Mwamba v Derrick Chekwe* and case law from other jurisdictions was analysed thereby illustrating the effects of giving the courts power to grant injunctive relief. It was found that these effects include; the courts treading into the main issue, the lack of confidentiality once the court interferes as rulings on injunctions are made available without need for consent from the parties and the delays in arbitration due to the numerous applications to court. The research concluded by illustrating that there is need to adhere to the rationale of arbitration by restricting court intervention to the end of the arbitral process. This research further outlined some recommendations which can prevent the courts from intervening in the arbitral process by way of injunctive relief. These recommendations include; the creation of a legal infrastructure which clearly spells out the arbitrators powers, the restriction of the courts powers to the end of the arbitral process, the introduction of a supervisory judge to give guidance during the proceedings, education and training of arbitrators and the inclusion of the arbitrators powers to grant injunctions in the arbitration agreement.

## **DEDICATION**

“This is dedicated to my beloved parents, Manenga Ndulo and Maria Ndulo. Your unconditional love, your unending sacrifices and your exceptional belief and confidence in me are what make it possible for me to look forward to each day. I love you both so much!”

## ACKNOWLEDGEMENTS

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

I would also like to sincerely thank Mr. Frederick Mudenda, my supervisor who gracefully took the meticulous task of reading, correcting and offering valuable critic and suggestions on the content of the research. I hope his excellence is reflected on every page of this paper though I remain responsible for any errors.

I am eternally grateful to my father and mother who have been nothing but a great pillar of strength and have nurtured me into what I am today. Dad, your advice and confidence in me made it all possible and mum, your strength, prayers and faith in me have continued to keep me going. You are the best parents in the world. I would also like to thank my three siblings; Chilyapa, Moonga and Namwiinga who I always look up to, you guys have been a true inspiration. Sometimes the journey has been rough but in all our experiences we have stayed together, growing and learning to love and care for each other. I would like to thank my uncle, Muna Ndulo for all the love and support during my academic life. My grandmother, uncles, aunts, cousins, nephews and nieces, I have not forgotten you all as you have been a source of love and laughter and a part of precious family moments through this journey.

I thank my great friends who I have come to treat as part of my own family; Choolwe Mwanakulanga, Diana Majokwe, Likando Makala, Chewa Mhango, Lily Brown, Precious Tembo and Lweendo Hangaala. My gratitude is also extended to every member of the 2012 Law School graduating class for the friendship and scholarship during this long journey. My thanks go to Layeni Phiri, Chisuwo Hamwela, Joshua Kabwe, Tinta Mwendalubi, Choonga Simulyamana and Milimo Moonga; you all have been of great help. Special thanks to my beloved friend Katongo Yamba. You really are a great friend whom I have come to treat like my very own sister.

I also thank my best friend Christopher Mundia Jr. You have been a true inspiration over the years we have known each other. You really helped strengthen me especially at my weakest points of my academic life when the end seemed so far. I would also like to extend my gratitude to all those I have not mentioned who helped me with making this dissertation a reality and through the pursuance of my Bachelor of Laws Degree, I am extremely grateful.

## **TABLE OF STATUTES**

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## CHAPTER ONE

### 1.0 INTRODUCTORY CHAPTER

#### 1.1 INTRODUCTION

The concept of Alternative Dispute Resolution (hereinafter referred to as ADR) is from time immemorial. There are references to dispute resolution practices by the Phoenicians, the Greeks, the Indians and the Irish.<sup>1</sup> In ancient Greece, the Greek legal culture in dispute resolution had its roots almost 3,000 years ago, when perhaps the first alternative dispute resolution was addressed in ancient Greece.<sup>2</sup> The system was one of dispute settlement through other methods as opposed to litigation and justice was based on retaliation or reciprocity. Early advocates of ADR include Abraham Lincoln, a gifted lawyer, to whom he attributed to his law students to discourage litigation and persuade neighbors to compromise whenever they can.<sup>3</sup> There are various techniques of ADR and this is as a result of the increased and continuous search for quicker and cheaper alternatives to litigation.

These various techniques of ADR include arbitration, mediation, conciliation, negotiation, mini-trial and med-arb. Arbitration refers to the determination of a dispute by one or more independent third parties rather than by a court.<sup>4</sup> Mediation refers to a process wherein an impartial third party known as a mediator assists disputants in finding a mutually acceptable solution to the conflict.<sup>5</sup> Conciliation is a process whereby the parties to a dispute agree to utilise the services of a conciliator, who then meets with the parties separately in an attempt to resolve their differences.<sup>6</sup> They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing

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<sup>1</sup> L. Boulle, "A History of Alternative Dispute Resolution" *ADR Bulletin* Vol. 7:No. 7(2005), 1.

<sup>2</sup> Surridge and Beecheno, "Arbitration/ ADR Versus Litigation" *Hg.Org Worldwide Legal Directories* (2006), 1.

<sup>3</sup> Baster P. Roy, "*The Collected Works of Abraham Lincoln*": accessed October 17, 2011, <http://home.att.net-norton/lincoln>.

<sup>4</sup> A.S. Hornby, *Oxford Advanced Learners Dictionary* (Oxford: At the University Press, 2000), 36.

<sup>5</sup> Surridge and Beecheno, 2.

<sup>6</sup> Paul Newman, *Alternative Dispute Resolution* (New York: CLT Professional Publishing Limited, 1999), 9.

about a negotiated settlement. Conciliation differs from mediation in that the main goal is to conciliate, most of the time by seeking concessions.<sup>7</sup> In mediation, the mediator tries to guide the discussion in a way that optimizes party's needs, takes feelings into account and reframes representations. In conciliation the parties seldom, if ever, actually face each other across the table in the presence of the conciliator. The conciliator usually proposes some settlement.

Negotiation is a process whereby parties to a dispute hold discussions or dealings about a matter with a view to reconciling differences and establishing areas of agreement, settlement or compromise.<sup>8</sup> Mini-trial is an ADR technique developed by some imaginative litigants in the Federal District Court in California to aid in the settlement of a complex and protracted patent and trademark infringement case.<sup>9</sup> Med-Arb, on the other hand refers to a combination of mediation and arbitration. In med-arb the parties try to reach an agreement through mediation and when that fails, the mediator or another third party makes a binding decision.<sup>10</sup> However of concern to this paper is the law relating to arbitration. Arbitration is an important part of commercial life and every legal system must in some degree be concerned with it.<sup>11</sup> Arbitration has been one of the most desired methods of alternative dispute resolution and has been used in a number of diverse contexts to resolve many types of disputes. The essence of arbitration is to reach a final decision rapidly and confidentially without intervention from the courts of law. It is for this reason that the procedure chosen by the parties should be adhered to by minimising court intervention as much as possible.

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

Arbitration law in Zambia is not a new subject and has been there since pre-colonial times. In pre-colonial Zambia, dispute resolution mechanisms were based on the indigenous or

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<sup>7</sup> Newman, 10.

<sup>8</sup> H. Brown and A. Marriot, *ADR Principles and Practice* (London: Sweet & Maxwell, 1993), 422.

<sup>9</sup> Brown and Marriot, 262.

<sup>10</sup> Tom Arnold, "Vocabulary of ADR Procedures" *Dispute Resolution* Part 2 (January-March 1996), 62.

<sup>11</sup> Micheal Mustill and Stewart Boyd, *Commercial Arbitration* (London: Butterworths, 1989), 4.

customary laws of the various ethnic groups.<sup>12</sup>Harmony in the family setting and among members of the village was of great importance thus conflicts were to be resolved immediately they arose. Dispute resolution mechanisms included mechanisms such as conciliation, mediation and arbitration.<sup>13</sup>During colonial times alternative dispute resolution methods continued and the first arbitration statute to be enacted was the Arbitration Ordinance of 1933.<sup>14</sup>

The original source of the Arbitration Ordinance of 1933 was the English Arbitration Act of 1889.<sup>15</sup>The Zambian Statute of 1933 showed some departures from the English Statute of 1889, although the English common law of arbitration applied to Zambia from the time colonialism was introduced in Zambia.<sup>16</sup>The Arbitration Act of 1933 continued to apply until it was repealed and replaced by the Arbitration Act No. 19 of 2000. English common law has continued to apply to this date together with the Arbitration Act of 2000.<sup>17</sup>

### **1.3 STATEMENT OF PROBLEM**

The law pertaining to arbitration can strictly be summed up to be in the pieces of legislation enacted by a particular country. Other sources of the law on arbitration include the New York Convention on the Recognition of Foreign Arbitral Awards<sup>18</sup>and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.<sup>19</sup> The main building blocks of the legal framework for arbitration in Zambia include public policy, creative problem solving, legislation, common law, doctrines

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<sup>12</sup>Carlson Anyangwe, "The Whittling Away of African Indigenous Legal and Judicial Systems" *Zambia Law Journal Special Edition*. (1998), 49.

<sup>13</sup> Kenneth Mwenda, *Principles of Arbitration Law* (Parkland: Brown Walker Press, 2003), 9.

<sup>14</sup> Mwenda, 9.

<sup>15</sup> Mwenda, 9.

<sup>16</sup> Mwenda, 10.

<sup>17</sup> Patrick Matibini, *Access to Justice Paper*, 2003.

<sup>18</sup> Done at New York on 10<sup>th</sup> June 1958.

<sup>19</sup> As Adopted by the United Nations Commission on International Trade Law on 21 June 1985.

of equity, African customary law and principles of public international law.<sup>20</sup> Generally speaking, the law on arbitration has its genesis in the common law of England. In Zambia the legislation relating to arbitration includes the Arbitration Act,<sup>21</sup> the UNICTRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which are the first schedule and second schedule to the Arbitration Act respectively. The rationale for arbitration is for the simple reason that parties to a dispute prefer a private, quicker and cheaper method of dispute resolution as opposed to going through litigation. Therefore, it is important to note that once parties have chosen arbitration as a way of resolving their disputes courts are ousted from intervening in the dispute. However, the Arbitration Act in Zambia gives the court authority to intervene in the process of arbitration particularly under section 11 which provides as follows;

“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 interim order; or

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

(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 a 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 urgent;

(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;

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<sup>20</sup>Mwenda, 24.

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

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 thereof.”

It therefore follows as provided under section 11 that the court does intervene in the arbitration process but only under the conditions laid out under section 11(4) of the Act. It is of utmost importance to note that any intervention by the courts whether minimal or not defeats the whole purpose of arbitration as a form of ADR. There is thus a need to consider the legislation on arbitration in order to adhere to the rationale and purpose of arbitration.

#### **1.4 GENERAL OBJECTIVE**

This paper intends to show whether there is need for the courts in Zambia to continue to grant injunctive relief under arbitration despite the arbitral tribunal having such powers under the Arbitration Act.

##### **1.4.1 SPECIFIC OBJECTIVES**

1. To clearly illustrate the effects of the court intervening in the arbitration process and bring to the fore the need to observe the rationale of arbitration being the quick and easy dispensation of justice.
2. To advocate for a change to the law pertaining to arbitration in Zambia so as to completely do away with court intervention during the process of arbitration and reserve it for once the arbitration process is done.

#### **1.5 RATIONALE AND JUSTIFICATION OF RESEARCH**

As aforementioned the rationale for arbitration is to evade the costly and lengthy process of litigation. Legislation, however gives the courts authority to intervene with the process of arbitration by granting the parties to the arbitral proceedings interim measures. Consequently,

even though court decisions, national legislations and commentators favor the support of interim measures from the courts, critics have put forward some arguments to restrict the court's authority to order interim relief.<sup>22</sup> One such argument that has some merit to it is that when deciding the interim issue, courts invariably tread on to the main issue, which should be decided by the arbitrator.<sup>23</sup> The courts in most countries look to the possibility of success on merits as a major factor in their decisions on interim injunctions and critics feel that if the courts decide on the possibility of success on the merits in the final issue it would undermine the work of the arbitrators.

In addition, one of the purposes of arbitration is privacy in the determination of the dispute. For instance, if the dispute is between companies, the parties involved will look at preserving their company names and reputations that come with the name.<sup>24</sup> However, this privacy cannot be achieved in instances where a party has to request for the granting of an injunction from the courts as the order of an injunction will be accessed by the public and not only the parties to the dispute. In this regard, this paper will suggest a change in the law to embody a mechanism where the arbitral tribunal will have absolute power to grant interim measures.

## 1.6 RESEARCH QUESTIONS

1. Does the authority of the courts of law to grant interim measures defeat the rationale of arbitration?
2. In what instances and to what extent should the court be allowed to intervene with the arbitral process?

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<sup>22</sup> Sandeep Adhipathi, *Interim Measures in International Commercial Arbitration: Past, Present and Future* (Master of Laws Thesis, University of Georgia, Georgia, 2003) , 33.

<sup>23</sup> Allison Wauk. "Preliminary Injunctions in Arbitrable Disputes: The Case for Limited Jurisdiction" 44 *UCLA L. Rev.* (1997), 2061.

<sup>24</sup> Wauk, 2073.

## **1.7 METHODOLOGY**

This research will primarily rely on desk research and field research of which the latter will entail the conducting of interviews with judges, advocates and scholars on the subject matter of this research paper. Secondary data in the form of books, journals, scholarly articles as well as the use of the internet will be consulted in order to attain the most recent information on the subject matter.

## **1.8 ANALYSIS OF CONCEPTS**

### **1.8.1 ARBITRATION**

Dispute resolution is as old as civilization and is not a new concept. Dispute resolution can either be by means of litigation or any method of ADR. Litigation refers to the process of making or defending a claim in a court of law.<sup>25</sup> ADR on the other hand refers to the various methods of resolving civil disputes otherwise than through the normal trial process.<sup>26</sup> As aforementioned, arbitration refers to the determination of a dispute by one or more independent third parties rather than by a court.<sup>27</sup> It is one of the most widely known forms of ADR and has been one of the most desired methods. Arbitration has been used in a number of diverse contexts to resolve many types of disputes, usually commercial disputes, in particular, international commercial disputes. The use of arbitration is also frequently employed in consumer and employment matters where arbitration may be mandated by the terms of employment or commercial contracts.<sup>28</sup>

### **1.8.2 TYPES OF ARBITRATION**

Essentially there are two types of arbitration namely; domestic arbitration and international arbitration.

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<sup>25</sup> Hornby, 782.

<sup>26</sup> Elizabeth Martin and John Law, *Oxford Dictionary of Law* (Oxford: Oxford University Press, 2006), 28.

<sup>27</sup> Hornby, 36.

<sup>28</sup> R. Bradgate and F. White, *Commercial Law: LPC Guide* (Oxford: Oxford University Press, 2011), 49.

### **a) Domestic Arbitration**

Domestic arbitration refers to arbitration where all the relevant factors in the dispute such as subject matter, domicile of the parties, place of arbitration and applicable law converge in one single place.<sup>29</sup>

### **b) International Arbitration**

International arbitration refers to arbitration where all the relevant factors of subject matter, place of arbitration, domicile of the parties and the applicable law are divergent. International arbitration is the most diverse as the more varied the connecting factors, the more likely the arbitration will be international.<sup>30</sup>

## **1.8.3 FORMS OF ARBITRATION**

Arbitration can be classified according to the form that it will take and it can be voluntary or compulsory and institutional or ad hoc.

### **a) Voluntary Arbitration**

Voluntary arbitration implies that the two contending parties, unable to compromise their differences by themselves or with the help of mediator or conciliator, agree to submit the conflict or dispute to an impartial authority, whose decisions they are ready to accept.<sup>31</sup> The essential elements in voluntary arbitration are; the voluntary submission of the dispute to an arbitrator, the subsequent attendance of witnesses and investigations and the enforcement of

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<sup>29</sup> Bradgate and White, 49.

<sup>30</sup> John Murray, Allan Rau and Edward Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (New York: Foundation Press Inc, 1996), 528.

<sup>31</sup> Murray, Rau and Sherman, 529.

an award which may not be necessary and binding because there is no compulsion. Voluntary arbitration may be specially needed for disputes arising under agreements.<sup>32</sup>

### **b) Compulsory Arbitration**

Compulsory arbitration is one where the parties are required to accept arbitration without any willingness on their part.<sup>33</sup> For instance when one of the parties to an industrial dispute feels aggrieved by an act of the other, it may apply to the appropriate authorities to refer the dispute to adjudication machinery. Under compulsory arbitration, the parties are forced to arbitration by the state when the parties fail to arrive at a settlement by a voluntary method or when there is a national emergency which requires that the wheels of production should not be obstructed by frequent work-stoppages.<sup>34</sup> Compulsory arbitration can also be forced on the parties when a country is passing through a grave economic crisis or when public interest has to be safeguarded and regulated by the state.<sup>35</sup>

### **c) Institutional Arbitration**

Institutional Arbitration is the type administered by one of the many specialized arbitration agencies. These agencies include the London Court of International Arbitration (LCIA) in the United Kingdom, the International Chamber of Commerce (ICC) in Paris, the American Arbitration Association (AAA) in the United States of America and the Zambia Association of Arbitrators (ZAA) in Zambia.

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<sup>32</sup> Murray, Rau and Sherman, 528.

<sup>33</sup> Murray, Rau and Sherman, 528.

<sup>34</sup> Bradgate and White, 50.

<sup>35</sup> Bradgate and White, 50.

#### **d) Ad Hoc Arbitration**

Ad hoc arbitration is arbitration conducted under rules of procedure that are adopted for the specific dispute.<sup>36</sup> These rules of procedure can be drawn from an international organisation such as UNICITRAL Arbitration Rules 2010 or drafted by the parties and the arbitral tribunal thus meeting the exact needs of the dispute.

### **1.9 ADVANTAGES OF ARBITRATION**

It is important to note that arbitration has numerous advantages and thus is the most desirous form of alternative dispute resolution. One such advantage of arbitration is that it is suitable for disputes in where the subject matter of the dispute is of a highly specialised nature.<sup>37</sup> In an instance where the dispute is of a highly specialised nature, persons with the knowledge in the subject matter will be appointed as arbitrators unlike in litigation where one cannot choose a judge.<sup>38</sup> This advantage is tied with another advantage which is, the process of arbitration being a quick form of resolving disputes as arbitrators with the knowledge in the subject matter need not learn about the subject matter which is usually the case in litigation.<sup>39</sup> In addition, the huge backlog of cases in the courts and the long delays of waiting for a trial date, extensive trial discovery and long trials are a reality that courts have to constantly battle with leaving arbitration the quicker means of dealing with the dispute as such factors are not present.<sup>40</sup> Another advantage of arbitration is that it is less formal and inexpensive unlike litigation where fees are paid for lodging documents.<sup>41</sup>

In arbitral proceedings the language of arbitration maybe chosen whereas in judicial proceedings, the official language of the country of the competent court will automatically

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<sup>36</sup> Murray, Rau and Sherman, 529.

<sup>37</sup> Brown and Marriot, 288.

<sup>38</sup> Brown and Marriot, 288.

<sup>39</sup> Murray, Rau and Sherman, 530.

<sup>40</sup> L, Riskin and J, Westbrook, *Dispute Resolution and Lawyers: American Case Book Series* (New York: West Publishing Company, 1987), 141.

<sup>41</sup> Surridge and Beecheno, 2.

apply.<sup>42</sup> Another merit of arbitration is that arbitral awards are generally easier to enforce in other nations than court judgments because of the provisions of the New York Convention, 1958 which provides for an easier method of enforcement of awards.<sup>43</sup> A merit of great importance in arbitration is that it is a confidential and private process as not only the proceedings are non-public but the awards are also non-public because only parties receive the awards and have control over who has access to the awards.

In Zambia, section 27 of the Arbitration Act guarantees the confidentiality of the arbitral process. Section 27 in relevant part states that an arbitration agreement is deemed to provide that the parties shall not publish, disclose or communicate any information relating to arbitral proceedings.<sup>44</sup> Another advantage of arbitration is party autonomy which is guaranteed in sections 7, 12, 13 and 14 of the Arbitration Act in Zambia. Party autonomy refers to the ability of the parties to arbitration to freely decide on matters relating to the arbitration proceedings. For example; the parties are free to agree on a procedure of appointing the arbitrators,<sup>45</sup> the parties may agree on whether or not any hearing previously held shall be held afresh.<sup>46</sup> The parties to arbitration can also agree that an arbitration agreement shall not be discharged by death of a party.<sup>47</sup>

## **1.10 DISADVANTAGES OF ARBITRATION**

The disadvantages of arbitration include the fact that there are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned. Another disadvantage of arbitration is that they may be procedural limitations, for example, discovery

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<sup>42</sup> Surridge and Beecheno, 2.

<sup>43</sup> Article I, The New York Convention.

<sup>44</sup> Section 27, Arbitration Act No. 19 of 2000.

<sup>45</sup> Section 12, Arbitration Act No. 19 of 2000.

<sup>46</sup> Section 13, Arbitration Act No. 19 of 2000.

<sup>47</sup> Section 7, Arbitration Act No. 19 of 2000.

may be more limited in arbitration or entirely non-existent.<sup>48</sup> Furthermore, where arbitration is mandatory, the parties waive their right to access the courts. The grounds for attacking an arbitral award are limited but despite these efforts to confirm the award can be fiercely fought, thus necessitating huge legal expenses that negate the perceived economic incentive to arbitrate the dispute in the first place.<sup>49</sup>

A further disadvantage of arbitration is that arbitral awards are not directly enforceable as a party seeking to enforce an arbitral award has to resort to judicial remedy known as an action to confirm an award.<sup>50</sup> This in turn may delay the enjoyment of the fruits of the arbitral award granted. Although arbitration is cheaper method of dispute resolution it may also be expensive in comparison to the normal court process.

## 1.11 CONCLUSION

This chapter has endeavored to introduce the contents of this research paper. To this effect, this chapter has given a brief introduction of ADR and has explained the various types of ADR techniques. It has also been shown that arbitration is the most commonly used branch of ADR and why it is the most desired form by laying out the advantages and disadvantages of arbitration. This chapter has also looked at the development of arbitration law in Zambia. In addition, an illustration of the need to adhere to the rationale of arbitration so as to resolve matters as quick as possible and in a private manner has been given. This chapter has further illustrated the need to minimize court intervention as much as possible because it is the procedure that is chosen by the parties. The next chapter looks at the remedy of injunctive relief in general and illustrate whether there is a difference in granting injunctive relief under arbitration and litigation.

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<sup>48</sup> Anonymous "*Multi-jurisdictional Guide to Arbitration: Zambia*". <http://www.practicallaw.com/arbitrationlaw>: accessed October 30, 2011.

<sup>49</sup> Anonymous "*Multi-jurisdictional Guide to Arbitration: Zambia*", <http://www.practicallaw.com/arbitrationlaw>.

<sup>50</sup> Mustill and Boyd, 425.

## CHAPTER TWO

### 2.0 THE REMEDY OF INJUNCTIVE RELIEF UNDER LITIGATION AND ARBITRATION

#### 2.1 INTRODUCTION

This chapter addresses the remedy of injunctive relief under arbitration and litigation, thereby giving a comparison between the two. Section 11 of the Arbitration Act under subsection 4 allows the courts in Zambia to grant an injunction to a party to an arbitration proceeding under prescribed conditions. An injunction is an equitable remedy in the form of a court order which requires a party to do or refrain from doing a particular act or thing.<sup>1</sup> Injunctive relief derives from the term injunction and is basically a stipulation or measure put in place by a court of law that either requires the halt of a specific action or act, or requires a certain act.<sup>2</sup> The rationale for granting injunctions is to maintain the status quo which is an essential concept of equity. An injunction may be granted even though the plaintiff's legal rights have not as yet been infringed.<sup>3</sup> In such a case the plaintiff is described as having obtained the injunction *quia timet* because he fears that wrong will be done to him if the order is not made. Once an injunction is granted or undertaking given, it remains in force and must be obeyed until it is discharged by the court, however stale the litigation and even if the order should not have been made in the first place.<sup>4</sup> If an injunction is violated, the violator can be held in contempt of court and will be punished accordingly.

#### 2.2 TYPES OF INJUNCTIONS

There are several types of injunctions which are generally classified by the requisite that is demanded or enforced and the speed at which it is required. The most common types of

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<sup>1</sup> Lord Hailsham, *Halsburys Laws of England* Volume 21 (London: Sweet & Maxwell, 1969) 343.

<sup>2</sup> *Halsburys Laws of England* Volume 21, 343.

<sup>3</sup> David Bean, *Injunctions* (London: Longman Group Limited, 1994), 3.

<sup>4</sup> Bean, 4.

injunctions are temporary injunctions, preventive injunctions, permanent injunctions and mandatory injunctions.

### **2.2.1 TEMPORARY INJUNCTIONS**

These are also known as preliminary injunctions, interim injunctions or interlocutory injunctions and are used to obtain immediate relief. This type of injunction can be invoked as a provisional remedy to preserve the subject matter and is the most commonly used. In the case of the *Republic of Botswana, Ministry of Works, Transport and Communications and Rinceau Design Consultants (sued as a firm previously t/a Kz Architects) v Mitre Limited*,<sup>5</sup> Judge Muzyamba stated that an interim or interlocutory injunction is by its nature and name a temporary order granted pending the determination of a matter or an issue and terminates upon such determination. In this case the respondent obtained an interim injunction pending arbitration proceedings. The proceedings concluded and an award made before the *inter parte* hearing for an interlocutory injunction. That being the case the court ought not to have entertained the application and dissolved the injunction.

### **2.2.2 PREVENTIVE INJUNCTIONS**

This type of injunction requires that an individual refrains from performing a certain act. They are also referred to as prohibitory or negative injunctions. Preventive injunctions preserve the status quo and restrain a party from committing injury or wrong.<sup>6</sup> This type of injunction cannot be used to address a completed act.

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<sup>5</sup> (1995) ZR 113

<sup>6</sup> I.C.F Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (United Kingdom: Sweet and Maxwell, 1997), 321.

### 2.2.3 MANDATORY INJUNCTIONS

This type of injunction can either prevent an injurious action or mandate or demand an action. A mandatory injunction requires a positive act or performance of some kind and is rarely granted by the courts. Due to the extraordinary nature of this remedy, mandatory injunctions are restricted to those cases where there is no other way to remedy a past wrong and restore things to their former condition.<sup>7</sup> In order to obtain an order for a mandatory injunction, the plaintiff must show that it has a strong *prima facie* case, that irreparable harm will be done to the plaintiff if the injunction is not granted and the inconvenience to the defendant will not outweigh the positive effects to the plaintiff. In *A.G. Man v. Campbell*,<sup>8</sup> a mandatory injunction was granted requiring a farmer to dismantle a tower which was disrupting flights from an adjoining airport. The Manitoba Court of Queens Bench found that the public right to airline flights and medical emergency evacuation services prevailed over the rights of the disgruntled individual landowner. Every injunction ought to be granted with care and caution but the power of granting mandatory injunctions must be exercised with the greatest possible care.<sup>9</sup>

### 2.2.4 PERMANENT INJUNCTIONS

A permanent injunction is also known as a perpetual injunction. It is an injunction of final relief and is therefore granted at the time of the final court decision. This type of injunction is usually ordered for cases involving ethical laws or standards.<sup>10</sup> A perpetual injunction is based on a final determination of the rights of the parties, and is intended permanently to prevent infringement of those rights and obviate the necessity of bringing action after action

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<sup>7</sup> *Shindelka v. Rosten*, [1982] 5 W.W.R. 395.

<sup>8</sup> [1983] 26 C.C.L.T. 168

<sup>9</sup> *Halsburys Laws of England* Volume 21, 361.

<sup>10</sup> *Halsburys Laws of England* Volume 21, 343.

in respect of every such infringement.<sup>11</sup> In *Steeves Dairy Ltd. v Twin City Co-op Milk Producers Association*,<sup>12</sup> the British Columbia Supreme Court held that where a plaintiff has established a legal right and the fact of its violation, he or she is generally entitled to a permanent injunction to prevent the recurrence of the wrong unless there are special circumstances.

### **2.3 PRINCIPLES OF GRANTING INJUNCTIONS UNDER LITIGATION**

The leading authority relating to the principles of granting injunctions is the House of Lords decision of *American Cyanamid Co. v Ethicon Ltd.*<sup>13</sup> The decision of the House of Lords in this case revolutionised the approach of the courts to injunctions. This case related to American Cyanamid's patent for synthetic absorbable surgical sutures manufactured from homopolymeric polyhydroxyacetic ester. The principles laid down by Lord Diplock are regarded as the leading source of law on the subject.<sup>14</sup> The principles may be expediently discussed under four headings, namely; a serious question to be tried, inadequacy of damages, balance of convenience and special cases.

#### **(a) A Serious Question to be Tried**

The plaintiff does not need to show a *prima facie* case in the sense of convincing the court that on the evidence before it, the plaintiff is more likely than not to obtain an injunction at trial.<sup>15</sup> Where the plaintiff is asserting a right, he should show a strong *prima facie* case at least in support of the right he asserts.<sup>16</sup> However, the mere fact that there is doubt as to the existence of such a right is not sufficient to prevent the court from granting an injunction

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<sup>11</sup> *Halsbury's Laws of England* Volume 21, 343.

<sup>12</sup> [1926] 1 W.W.R. 25

<sup>13</sup> [1975] A.C 396

<sup>14</sup> Bean, 29.

<sup>15</sup> Bean, 29.

<sup>16</sup> *Halsbury's Laws of England* Volume 21, 365.

although it is a matter of serious attention.<sup>17</sup> The plaintiff, must also as a rule be able to show that an injunction until the hearing is necessary to protect him against irreparable injury. A mere inconvenience is not enough.

### **(b) Inadequacy of Damages**

If damages would not adequately compensate the plaintiff for the damage and the plaintiff is in a financial position to give a satisfactory undertaking as to damages, an injunction may be granted. In the case of *Cambridge Nutrition Limited v British Broadcasting Corporation*<sup>18</sup> the Court of Appeal held that the BBC could not be usefully compensated in damages if an interlocutory injunction delayed the broadcasting of a topical programme.

### **(c) The Balance of Convenience**

Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the court in determining whether or not an injunction should be granted takes into consideration the balance of convenience to the parties.<sup>19</sup> The court will take into consideration the nature of the injury which the defendant on one hand will suffer if the injunction was granted and that which the plaintiff on the other hand might sustain if the injunction is refused. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff.<sup>20</sup>

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<sup>17</sup> *Halsburys Laws of England* Volume 21, 366.

<sup>18</sup> [1990] 3 ALL ER 523.

<sup>19</sup> Bean, 31.

<sup>20</sup> *Halsburys Laws of England* Volume 21, 366.

#### (d) Special Cases

Lord Diplock concluded his discussion of the principles in *American Cyanamid v Ethicon* by adding that there may be many other special factors to be taken into consideration in the particular circumstances of individual cases. Since the *American Cyanamid* decision, a number of special categories of cases have been formulated by the Court of Appeal and judges of first instance.<sup>21</sup> Special cases include; trade dispute defence, actions against a public authority, defamation and matrimonial and domestic proceedings.

In the United Kingdom and indeed in some other jurisdictions such as Australia, Canada and Zambia, the courts will normally follow the principles laid down in *American Cyanamid Co. v Ethicon Ltd* in assessing whether to grant an interim injunction. An illustration of adherence to these principles in Zambia is in the Supreme Court decision of *Turnkey Properties v Lusaka West Development Company Ltd, B.S.K. Chiti (sued as receiver), and Zambia State Insurance Corporation Ltd*.<sup>22</sup> In this case, the appellant applied in the High Court for an interlocutory injunction to restrain the respondents from selling or damaging property and to restrain them from entering upon land or interfering with the appellant's possession pending the settlement of a dispute concerning a sub-sale. The appellant sought to continue in possession of the disputed buildings and to continue building during the injunction if granted. The appeal was dismissed.

In the *Turnkey Properties v Lusaka West Development Company* the Supreme Court held that an interlocutory injunction is appropriate for the preservation or restoration of a particular situation pending trial; but it cannot, in our considered view, be regarded as a device by which the applicant can attain or create new conditions, favourable only to himself, which tip

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<sup>21</sup>Bean, 34.

<sup>22</sup> (1984) ZR 85

the balance of the contending interests in such a way that he is able, or more likely, to influence the final outcome by bringing about an alteration to the prevailing situation which may weaken the opponents' case and strengthen his own.<sup>23</sup> In order to succeed, the appellant should have demonstrated that, not only was their right to the relief sought clear, but above all, that the injunction is necessary to protect them from irreparable injury thus damages being inadequate.

The major criticism of the learned High Court judge's determination concerned the holding that damages appeared to be available as an adequate alternative remedy in this case. It was the Supreme Court's considered opinion that the learned judge was on firm ground bearing in mind the stage of the action namely, an interlocutory application for an injunction pending trial in circumstances and on facts where it was necessary to weigh the contending rights and to find where the balance of convenience to the parties lay.<sup>24</sup> In *Shell and BP Zambia Limited v Conidaris and Others*<sup>25</sup>, the Supreme Court reaffirmed the principles underlying the grant of an interlocutory injunction and the learned judge could only be faulted if it had been shown that the appellant would suffer a substantial injury which could never be adequately remedied or atoned for by damages.

## **2.4 PRINCIPLES OF GRANTING INJUNCTIONS UNDER ARBITRATION**

The principles of granting injunctions under arbitration are not distinct from those granted under arbitration as disconcerted among scholars. This was discussed in the case of *Friday Mwamba v Derrick Chekwe*.<sup>26</sup> In this case, the applicant was granted an *ex parte* injunction pursuant to section 11 of the Arbitration Act. The applicant held 48.5% shares in the capital of Necor Zambia Limited while the respondent held 1.5% shares. Necor Zambia Limited in

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<sup>23</sup> Turnkey Properties v Lusaka West Development Company (1984) ZR 85 at p 2.

<sup>24</sup> Turnkey Properties v Lusaka West Development Company (1984) ZR 85 at p 2.

<sup>25</sup> (1975) Z.R 174

<sup>26</sup> 2010/HPC/0107 (unreported)

turn held shares in Application Solutions Zambia Limited which is a private company limited by shares wherein the respondent and applicant hold 0.18% and 17.82% shares respectively. The applicant and the respondent were parties to shareholders agreements in respect of the two companies. The shareholders agreement did not allow joining an entity that directly or indirectly engaged in any competitive activity with Necor Zambia Limited. The respondent was in breach of the shareholders agreement and thus the applicant sought an injunction to refrain the respondent from attending any shareholders meetings. This application for an injunction was made in aid of an intended arbitration.

In this case counsel for the applicant submitted that principles for granting injunctions for an action pending before the High Court ought to be distinguished from principles for granting an injunction under arbitration. According to counsel for the applicant, the rationale is that, unlike in injunctive relief pending before the court, the courts or arbitrators do not have the benefit of the full issues of the substantive relief because these are only deployed before the arbitrator in the arbitration proceedings. Judge Wood in the *Friday Mwamba v Derrick Chekwe* stated that the principles for a refusal or grant of an injunction are not different. The basic principles such as there being a serious question to be tried, damages being an adequate remedy and where the balance of convenience lies are sacrosanct and cannot be waived even in an application for an injunction under arbitration.<sup>27</sup> Section 11 of the Arbitration Act must therefore be considered with the principles relating to the grant or refusal of injunctions. It therefore follows that meeting the criteria under section 11 does not qualify a party to an injunction.

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<sup>27</sup> 2010/HPC/0107 (unreported)

## 2.5 CONCLUSION

This chapter has given an overview of the types of injunctions that can be obtained from a court of law, namely; permanent, temporary, mandatory and preventive injunctions. A clear and detailed account of the principles of granting injunctions as laid out in the *American Cyanamid Co. v Ethicon Limited* was given. Furthermore, this chapter discussed the case of *Friday Mwamba v Derrick Chekwe* in relation to injunctions under the law on arbitration in Zambia. It becomes evident from this chapter that the principles relating to the grant of injunctions under litigation and arbitration are not distinct. This is because the basic principles for granting injunctions are sacrosanct and cannot be waived even in an application for an injunction under arbitration. Therefore, section 11 of the Arbitration Act must be considered with the principles relating to the grant or refusal of injunctions. The next chapter looks at the law relating to arbitration under statute in other jurisdictions and in so doing gives a comparison with Zambia.

## **CHAPTER THREE**

### **3.0 THE LAW RELATING TO INJUNCTIVE RELIEF UNDER ARBITRATION IN OTHER JURISDICTIONS AS COMPARED TO ZAMBIA.**

#### **3.1 INTRODUCTION**

Arbitration is governed by different pieces of legislation in various jurisdictions. For instance, in Zambia these pieces of legislation include the Arbitration Act No. 19 of 2000, the UNICTRAL Model Law and the New York Convention on the Recognition and Enforcement of Arbitral Awards. This chapter attempts to analyse the provisions of legislation that governs arbitration, in particular injunctive relief under arbitration in various jurisdictions. This chapter will first analyse the legislation in six jurisdictions and then proceed further to give comparison of the jurisdictions analysed with Zambia.

#### **3.2 ENGLAND**

Courts in England rely on the English Arbitration Act of 1996, Chapter 23 to give them power to award injunctive relief in the arbitration context.<sup>1</sup> Section 44 of the English Arbitration Act of 1996 states:

“44 (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are -

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

(c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings -

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<sup>1</sup> N, Andrew, *The Three Paths of Justice: Court Proceedings, Arbitration and Mediation in England* (London: Cambridge Press, 2011), 220.

(i) for the inspection, photographing, preservation, custody or detention of the property, or

(ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;

and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.

(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.

(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.

(7) The leave of the court is required for any appeal from a decision of the court under this section.”<sup>2</sup>

From the aforementioned section of the Arbitration Act of England, it is clear that the courts intervene in the arbitral proceedings because the courts have the power to make orders for the matters listed under section 44 subsection 2. One of these orders listed under subsection 2 includes the grant of an interim injunction. The courts in England have the power to grant an interim injunction whether the matter is of urgency or not as per the conditions laid down under section 44 subsections 3, 4 and 5.

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<sup>2</sup> Arbitration Act of England, 2006.Chapter 23 (17th June 1996) .

### 3.3 UNITED STATES OF AMERICA

The framework for arbitration in the United States derives from the Federal Arbitration Act<sup>3</sup> of 1925, a statute of ancient vintage that might be called either venerable or antiquated depending on perspective.<sup>4</sup> The Federal Arbitration Act has no provisions concerning provisional relief, therefore when provisional measures are sought in a federal court, the Federal Rules of Civil Procedure are employed.<sup>5</sup> Rule 64 of the Federal Rules of Civil Procedure provides that the relief sought shall be available under the conditions specified in the law of the state where the federal court is sitting. For instance, in the state of New York, article 75 of the New York Civil Practice Law and Rules (CPLR) provides for interim measures under section 7502(c). Section 7502(c) of the CPLR provides that:-

“(c)Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”

Rule 65 of the Federal Rules of Civil Procedure further provides that:-

**“Rule 65. Injunctions and Restraining Orders**

(a) Preliminary Injunction.

(1) Notice. The court may issue a preliminary injunction only on notice to the adverse party.

(2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes

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<sup>3</sup> United States Code Title 9(enacted 12th February 1925)

<sup>4</sup> William Park, “Arbitral Jurisdiction in the United States: Who Decides What?” *International A.L.R* Issue 1 (2008), 33.

<sup>5</sup> William Park, 34.

part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial."<sup>6</sup>

It therefore follows that the courts in the United States of America do intervene in the arbitration process when it comes to the granting of provisional measures. It is important to note that the provision of conditions to allow intervention from the courts is not a bar to court intervention completely as once the conditions are met the court still intervenes in the arbitral process.

### 3.4 INDIA

The legal framework governing the law of arbitration in India is the Indian Arbitration and Conciliation Act<sup>7</sup> of 1996 which is modeled on the UNICITRAL model law.<sup>8</sup> The Indian Arbitration and Conciliation Act of 1996 has a provision for court intervention for purposes of interim measures. Section 9 of the Act provides that:-

“9. A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any part or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

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<sup>6</sup> Rule 65, Federal Rules of Civil Procedure

<sup>7</sup> Act No. 26 of 1996

<sup>8</sup> Krishna Sarma and Momota Oinam, “Development and Practice of Arbitration in India- Has it evolved as an effective legal institution?” CDDRL Working Papers Number 103(2008), 103.

- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to any proceedings before it.”<sup>9</sup>

The Indian Arbitration and Conciliation Act as provided in the aforementioned section gives a party the right to apply to a court for interim measures before, during and after arbitral proceedings. This right given to parties to an arbitration proceeding defeats one of the purposes of arbitration which is to be an alternative dispute forum.

### 3.5 FRANCE

A new arbitration law was adopted in France by decree number 2011-48 of 13th January 2011 which replaced the 1980 and 1981 texts of Book IV of the French Civil Code of Procedure.<sup>10</sup> The new law determines the scope of the French state courts’ power to intervene in the arbitral process. The scope of possible intervention by French courts is limited to areas in which the arbitral tribunal does not have the necessary power, namely; measures of inquiry or interim or protective measures sought by a party before the constitution of an arbitral tribunal, interim attachments or interim and provisional charges on property and a party’s application at the instance of the tribunal for public or notarised documents.<sup>11</sup> Insofar as the arbitral tribunal has not yet been constituted, the new law allows the parties to apply to the French courts for measures relating to the taking of evidence or for provisional or conservatory measures.<sup>12</sup>

Upon constitution of the arbitral tribunal, the arbitral tribunal has the authority to order such measures and to attach penalties to its orders.<sup>13</sup> The state courts also have the power to grant

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<sup>9</sup> Act No. 26 of 1996.

<sup>10</sup> Herbert Smith, “The New French Arbitration Law” Japan Dispute Avoidance Newsletter Number 102 (2011), 1.

<sup>11</sup> Smith, 1.

<sup>12</sup> Article 1449 of Civil Code of Procedure.

<sup>13</sup> Article 1467 of Civil Code of Procedure.

interim measures upon constitution of the arbitral tribunal. Whilst the new law reaffirms the independence of the arbitral process from the courts influence, it also recognizes and reinforces the role and powers of French courts to take measures in aid of arbitration.<sup>14</sup>

### 3.6 SWEDEN

For a longtime now, arbitration has established itself as the preferred method of resolving commercial disputes in Sweden.<sup>15</sup> The arbitration law in Sweden is modern with the Arbitration Act being formally enacted in 1999. While the Arbitration Act does not directly apply the UNICITRAL Model Law, it does not deviate from it substantially either, reflecting the significant role that the Model Law played when the Act was drafted.<sup>16</sup> Courts in Sweden have certain functions which can be used to assist arbitration proceedings. These functions include the courts ability to appoint or remove an arbitrator (following a successful application by a party), order disclosure of documents and decide on the jurisdiction of arbitrators (following an application by a party).<sup>17</sup>

It is important to note that apart from these functions, the Swedish courts will not intervene with arbitration proceedings. The powers to grant interim relief in Sweden are vested in the arbitration tribunal. Section 25(2) of the Swedish Arbitration Act states:-

“Unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that, during the proceedings, the opposing party must undertake a certain interim measure to secure the claim which is to be adjudicated by the arbitrators. The arbitrators may prescribe that the party requesting the interim measure must provide reasonable security for the damage which may be incurred by the opposing party as a result of the interim measure.”<sup>18</sup>

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<sup>14</sup> Smith, 3.

<sup>15</sup> Hans Wesslau and Sten Gisselberg, “Arbitration in Sweden.” GWA Articles (2003), 5.

<sup>16</sup> Wesslau and Gisselberg, 5.

<sup>17</sup> Wesslau and Gisselberg, 5.

<sup>18</sup> The Swedish Arbitration Act (SFS:1999:1)

The general practice in Sweden is for courts not to interfere with the arbitration process as issues of interim measures are to be adjudicated by the arbitrators as illustrated in the aforementioned section of the Swedish Arbitration Act. This is in line with the main philosophy that arbitration is and has always been that of freedom of contract, trust in the arbitrators and recognition of the advantages of a single, privately administered dispute settlement mechanism.

### **3.7 SOUTH AFRICA**

In South Africa, arbitration is governed by the Arbitration Act of 1965.<sup>19</sup> Section 21 of the Arbitration Act of South Africa provides for the general powers of the court in relation to arbitration. The section provides that:-

“(1) For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of-

- (a) security for costs;
- (b) discovery of documents and interrogatories;
- (c) the examination of any witness before a commissioner in the Republic or abroad and the issue of a commission or a request for such examination;
- (d) the giving of evidence by affidavit;
- (e) the inspection or the interim custody or the preservation or the sale of goods or property;
- (f) an interim interdict or similar relief;
- (g) securing the amount in dispute in the reference;
- (h) substituted service of notices required by this Act or of summonses; and
- (i) the appointment of a receiver,

as it has for the purposes of and in relation to any action or matter in that court.”<sup>20</sup>

The South African Arbitration Act gives the courts powers to grant interim relief in relation to arbitration proceedings as provided above in section 21(1)(f).

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<sup>19</sup> Act No. 42 of 1965

<sup>20</sup> Section 21 of Arbitration Act of South Africa.

### 3.8 COMPARISON WITH THE JURISDICTIONS ANALYSED

Following the analysis given above of how different jurisdictions treat the remedy of injunctive relief under the law of arbitration, a comparison with Zambia can be given. In Zambia, the Arbitration Act provides for the grant of injunctive relief under section 11.

Section 11 provides that:-

- “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 interim order; or
  - (d) any other order to ensure that an award which may be made in the arbitral proceedings is not rendered ineffectual.
- (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 a 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 urgent;
  - (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 thereof.”

This section gives the courts power to grant injunctive relief to the parties to the arbitral proceedings subject to certain conditions listed under subsection 4 of the same section. Common law jurisdictions such as England, the United States and India as analysed above

follow the same technique as Zambia in that the courts in these jurisdictions also have the authority to grant injunctive relief before or during arbitration proceedings.

When one looks at the civil law jurisdictions analysed, France pursues the same practice as Zambia because this jurisdiction also gives the courts power to grant injunctive relief under article 1449 of their Arbitration Act. In addition, South Africa which follows the Roman Dutch Law grants courts the authority to grant injunctive relief before and during arbitration proceedings which is not a departure from what transpires in Zambia. Sweden on the other hand inclines towards non-judicial participation of the arbitral process. Sweden leaves the adjudication of interim measures to the arbitrators.<sup>21</sup> The only instances when the courts in Sweden intervene in the arbitral process are; when the award granted by the arbitral tribunal needs enforcement or when one of the parties wants to challenge the award granted.<sup>22</sup>

The purpose of arbitration is to resolve a dispute through a quick process other than going through the lengthy court process.<sup>23</sup> This is usually preferred in order for companies to get back to business as soon as possible thus not losing out in their business. Furthermore, the arbitral process is confidential and this cannot be achieved with applications to court for interim measures.<sup>24</sup> For example, it is a known fact that arbitral awards are confidential and are only granted to the parties to the arbitral proceedings but where an application for an injunction is made, the ruling of the court concerning the injunction is available to the public.

### **3.9 CONCLUSION**

This chapter has examined provisions relating to injunctive relief in the legislation of different jurisdictions and has further given a comparison of the legislation in these

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<sup>21</sup>Wesslau and Gisselberg, 5.

<sup>22</sup> Section 36, The Swedish Arbitration Act (SFS:1999:1)

<sup>23</sup> Brown and Marriot, 262.

<sup>24</sup> Adhipathi, 49.

jurisdictions with Zambia. Sweden seems to be the ideal system as court intervention is limited to after the arbitration proceedings have been finalised, that is, challenging of an award and enforcement of an award. The courts in Sweden value the method of dispute resolution chosen by the parties. The next chapter will examine case law on arbitration from different jurisdictions in instances where injunctive relief has been sought or granted from the courts and determine the effects, if any on the arbitral process.

## **CHAPTER FOUR**

### **4.0 CASE LAW ON GRANTING INJUNCTIVE RELIEF UNDER ARBITRATION.**

#### **4.1 INTRODUCTION**

This chapter attempts to analyse the case law that has been generated on the grant of injunctive relief before or during arbitral proceedings in Zambia and in other jurisdictions. Section 11 of the *Zambian Arbitration Act of 2000* confers the court with powers to grant interim measures before or during arbitral proceedings subject to the conditions laid down in subsection 4 of the same section. According to subsection 4 the court will only grant an injunction in three instances, namely; where the arbitral tribunal has not yet been appointed and the matter is urgent, where the arbitral tribunal is not competent to grant the order or injunction and where the urgency of the matter makes it impracticable to seek such order or injunction from the arbitral tribunal. This chapter therefore firstly analyses the case of *Friday Mwamba v Derrick Chekwe*<sup>1</sup> and then further analyses case law from different jurisdictions in order to illustrate the effects of court intervention in the arbitral process.

#### **4.2 FRIDAY MWAMBA v DERRICK CHEKWE**

In this case an injunction was sought by the applicant in aid of intended arbitration proceedings. The applicant held 48.5% shares in the capital of *Necor Zambia Limited* while the respondent held 1.5% shares in the same company. *Necor Zambia* in turn held 51% shares in the capital of *Application Solutions Zambia Limited*, a private company limited by shares where the respondent and the applicant held 0.18% and 17.2% shares respectively. The applicant and the respondent were parties to shareholder agreements in respect of the two companies. Clauses 18.2 and 18.2.1 of the shareholders agreements on which the application

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<sup>1</sup> 2010/HPC/0107 (unreported)

for an injunction was based provided that, in consideration for the shareholders participation in the company they were not to be interested or engaged, directly or indirectly in any capacity in any entity which is in competitive activity with the company. The shareholders agreement further stated that if the shareholders were to engage in such an entity full and regular disclosure was needed with the knowledge and prior approval of the board of directors of Necor Zambia Limited.

The applicant stated that in breach of the shareholders agreement, the respondent took up employment as general manager of Smartnet Networks Limited which was a competitor company to Necor Zambia Limited. In terms of the shareholders agreements, all disputes arising from the agreements were to be referred to arbitration. The applicant desired to have his disputes or differences with the respondent referred to arbitration and believed that unless the respondent was restrained by an injunction, he would continue violating the terms of the shareholders agreement in question. The court refused to grant the injunction as the reason for seeking the injunction did not have the sense of urgency required by section 11(4) (a) of the Arbitration Act of 2000.

In the case of Derrick Chekwe v Friday Mwamba as aforementioned, the applicant sought an injunction from the High Court on 25<sup>th</sup> February, 2010 and the ruling on the grant of an injunction was delivered on the 9<sup>th</sup> of March, 2010. When an injunction is sought from the High Court pending or during arbitration proceedings, the liberty of the party to apply to the court will act as a “stay” on the arbitration proceedings until the application for an injunction is disposed of.<sup>2</sup> The issue of the injunction hearing acting as a “stay” is however not explicitly stated in the Arbitration Act No. 17 of 2000. One major advantage of arbitration is that the process is a quick form of resolving disputes so that the parties get back to their

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<sup>2</sup> Murray, Rau and Sherman ,623.

business and enjoy the fruits of the arbitral awards.<sup>3</sup> Injunctions have sometimes been used by parties as a form of delay mechanism because parties make several injunction applications before and during arbitration proceedings thereby delaying the process of arbitration.<sup>4</sup> In analysing the *Derrick Chekwe v Friday Mwamba* case, the period in between which the application for an injunction was made and when the judge delivered his ruling on the injunction is not at par with the concept of the quick resolution of disputes.

The essence of an injunction is to restrain a person from continuing to do a certain act or refrain a person from doing an act.<sup>5</sup> In an instance where a party to an arbitration proceeding is restrained from acting as a director or company from continuing to supply goods and there is a delay in concluding the arbitration proceedings, it may lead to loss of business between companies. One of the main reasons companies decide to resolve disputes by way of arbitration is because it is the quickest method of resolving disputes and thus will not lose a lot of income as compared to taking it to litigation which may drag on for years. Furthermore, companies want to enjoy the fruits of their awards immediately. The case of *Derrick Chekwe v Friday Mwamba* has not been resolved to this date as a result of numerous applications to court.<sup>6</sup> Therefore, the issue of the respondent in this case continuing to be an employee for Smartnet Networks Limited while determining whether the injunction should be granted or not would have a negative impact on the respondent and the companies as his rights of participation in the running of Necor Zambia Limited and Application Solutions Limited would have been uncertain.

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<sup>3</sup> Murray, Rau and Sherman ,530.

<sup>4</sup> S, Adhipathi, 33.

<sup>5</sup> *Halsburys Laws of England* Volume 21, 343.

<sup>6</sup> Nchima Nchito, interview by Kaumbi Ndulo, January 23, 2012 .

### 4.3 CASE LAW FROM OTHER JURISDICTIONS

#### 4.3.1 INTERMET FCZO v ANSOL LIMITED<sup>7</sup>

In this English case, an application was made during arbitration proceedings for an interim injunction to restrain the respondents from proceeding with the arbitration proceedings. The respondent lent money to the applicant who had defaulted on the repayments and owed a very large sum. In order to postpone repayment, the applicant agreed to transfer to the respondent the sole share in a company that allegedly owned valuable property in Moscow. However, the applicant failed to repay the debts and the company was said to be worthless. The respondent claimed that at the time the agreement was made, the applicant knew that the company did not own the property so the respondent was deceived into believing that the company had the rights to and interest in the property and was induced to enter the agreement on that basis. Pursuant to the arbitration clause in the agreement, the respondent began arbitration proceedings and claimed damages for breach of contractual obligations set out in the agreement.

The applicant applied for an injunction from the High Court to restrain the respondent from continuing with the arbitration proceedings as injustice will be caused and the continuing of such proceedings would be prejudicial to the applicant. The injunction was refused as there was no alleged fraud in the arbitration proceedings and further the application was made late. One of the reasons why parties choose arbitration over litigation is because of the confidentiality that comes with the process.<sup>8</sup> Confidentiality includes; the proceedings being

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<sup>7</sup> [2007]EWHC (Comm) 226.

<sup>8</sup> Surridge and Beecheno, 2.

non-public, the awards being non-public and only parties to the arbitration receive the awards having control over who has access to the awards.<sup>9</sup>

In this case it can be illustrated that the attribute of confidentiality in arbitration was not adhered to. Firstly, the court in trying to understand the facts in order to determine whether an injunction should be granted or not disclosed to the public some issues to do with the companies in question. The court disclosed the fact that the applicant company had acted fraudulently by deceiving the respondent company into entering the agreement between them. The court also disclosed that the applicant company was a worthless company as it failed to repay its debts. Parties usually choose arbitration so that their companies are not allegedly labeled fraudulent, negligent or worthless to the public because they want clients to continue *doing business with them*. Generally, *clientele will not want to continue doing business with companies or persons judged on that basis which is unfair especially if what has been disclosed are mere allegations*. As to whether the information disclosed is a mere allegation will never be known to the public because the decision of the arbitral tribunal will be contained in an award which will never be made available to the public.

Secondly, the rulings on the application for an injunction are always made available to the public unlike in arbitration proceedings where the parties to arbitration have control over the arbitral awards and decide who can have access to the arbitral awards. In the case at hand, the fact that this ruling on the application for an injunction is found in the law reports illustrates that the public can have access to the ruling thus negating the attribute of confidentiality.

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<sup>9</sup> Surridge and Beecheno, 2.

#### **4.3.2 BREMER VULKAN SCHIFFBAU UND MASCHINEFABRIK v SOUTH INDIA SHIPPING CORPORATION<sup>10</sup>**

In August 1964, a German shipbuilding company agreed to build five bulk carriers for an Indian ship owning company. The contract, although governed by German law, provided for disputes or differences to be referred to arbitration in London. Delivery of the vessels was completed in December 1966 and disputes arose between the parties both shortly after delivery and later regarding alleged defects in the construction of the vessels. The parties attempted to reach an amicable settlement up until April 1971 when the ship owners gave notice to the builders that they intended to refer the disputes to arbitration. In January 1972 the parties appointed a London arbitrator and in April agreed a procedure by which the owners were to deliver a full statement of claim to which the builders would reply raising specific defences. When further alleged defects were raised in 1973 and 1975, the parties agreed that they should be included in the owners' claim.

The owners delivered long and detailed points of claim in April 1976. Neither party applied to the arbitrator for directions and nothing further happened until the builders issued a writ in 1977 seeking an injunction restraining the owners from proceeding with the arbitration because of their alleged slowness from the time the arbitrator was appointed. The judge found that the owners had been guilty of delay making it impossible for the builders to organise the evidence necessary for a proper hearing, and held that the court had power to grant an injunction restraining a claimant from proceeding further with an arbitration if his conduct was such that if the case was an action at law the action would be dismissed for want of prosecution, since such conduct amounted to a repudiatory breach of an implied term in

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<sup>10</sup> [1981] 1 ALL ER 290

the arbitration agreement that each party would reasonably endeavour to bring the matter to a speedy conclusion. The judge granted the injunction sought.

On appeal, the Court of Appeal affirmed that decision on the ground that a term was to be implied in the arbitration agreement imposing a duty on a claimant not to be so dilatory that a fair hearing or just result could no longer be obtained thus causing the whole purpose of the agreement to be frustrated. The ship owners appealed to the House of Lords. The House of Lords held that a court did not have jurisdiction to dismiss a claim in arbitration for want of prosecution or to grant an injunction restraining a claimant from proceeding with the arbitration if he has been guilty of inordinate and inexcusable delay. Arbitration was not sufficiently equivalent to an action at law for the jurisdiction to dismiss an action for want of prosecution to be applied *mutatis mutandis* to an arbitration, since the court's jurisdiction to dismiss an action was derived from its inherent jurisdiction whereas the jurisdiction to supervise the conduct of an arbitration was confined to the statutory powers contained in Arbitration Acts. The appeal in this case was allowed.

An evaluation about the courts having authority to grant injunctive relief before or during arbitration proceedings is that when courts are dealing with injunctive relief, they invariably tread into the main issue.<sup>11</sup> The courts will thus decide on whether to grant an injunction or not depending on the merits of the case. In the case of *Bremer Vulkan Schiffbau Und Maschinefabrik v South India Shipping Corporation*, though not apparent, it can be shown how the courts will tread into the main issue when deciding whether or not to grant an injunction. In this case, the builders sought an injunction to restrain the ship owners from proceeding with arbitration as they had made delays in the arbitration to ask the arbitrator for

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<sup>11</sup> Adhipathi, 33.

orders for directions. The court in this case looked at the default that had been caused by both parties such as the late deliveries of the vessels, the defects in the vessels and the delay by both parties to seek an order for directions from the arbitrator. By doing so the courts had gone into the main issue in determining whether to grant an injunction or not.

In addition, this case has illustrated that the attributes of confidentiality and the quickness of arbitration have not been achieved. There is no confidentiality because the ruling on whether to grant an injunction or not has been published in the law reports and due to it being published other persons apart from the parties to the arbitration have had access to it. Furthermore, outsiders have knowledge of the alleged happenings between the parties and will inevitably judge the parties based on those happenings. When one seeks an injunction, arbitration proceedings cannot either start or continue until the matter on injunctive relief has been heard.<sup>12</sup> As a result of the arbitration proceedings not being able to commence, it brings about delay in the resolution of the dispute. In this case the builders sought an injunction in 1977 and it passed through appeals before the final decision on the grant of an injunction was passed by the House of Lords in 1981. This illustrates how the purpose of arbitration being a quick form of resolving disputes is defeated. If arbitrators are given the absolute power to grant injunctions, the issue of appeals will not arise as illustrated in this case because arbitration does not provide for appeals. Appeals in arbitration are not allowed because it defeats the whole purpose of arbitration as parties will be subjected to the long process of litigation which they were trying to avoid.

#### **4.4 CONCLUSION**

This chapter has analysed judicial pronouncements where injunctive relief has been sought before or during arbitration proceedings. The main effects as illustrated above of having such

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<sup>12</sup> Murray, Rau and Sherman, 623.

court intervention include; the arbitration proceedings becoming non-confidential, delays in having the arbitration proceedings concluded in timely manner and the courts invariably treading into the main issue. These effects in turn will have an impact on the parties such as loss of business or income and loss of business ties. The next chapter will give a conclusion of this research and advance a number of recommendations as to the instances when the courts should intervene in the arbitral process.

## CHAPTER FIVE

### 5.0 CONCLUSION AND RECOMMENDATIONS

#### 5.1 GENERAL CONCLUSION

This research introduced the concept of arbitration in the first chapter as one of the various methods of alternative dispute resolution. It further looked at the development of arbitration law in Zambia and outlined the advantages and disadvantages of arbitration. The first chapter concluded by illustrating the need to adhere to the rationale of arbitration by minimising court intervention as much as possible. The second chapter gave an overview of the types of injunctions that can be obtained from a court and further stated the principles used when granting injunctions under arbitration and litigation. The second chapter concluded by demonstrating that the principles of granting injunctions under litigation and arbitration are not distinct.

Chapter three examined legislative provisions on the granting of interim relief under arbitration in various jurisdictions. Furthermore, a comparison was made with Zambia and from the analysis and comparison made, it was ascertained that Sweden has the ideal system in place as the law in Sweden does not allow for court intervention in the arbitral process. The fourth chapter examined the case of *Friday Mwamba V Derrick Chekwe* and case law from other jurisdictions on the grant of injunctive relief before or during arbitration. In examining the case law, the effects of the court intervening in the arbitral process by way of injunctive relief were illustrated.

The ultimate objective of this research has been to determine how court intervention through injunctive relief can have an effect on the arbitral process and how best the reduction of such court intervention in the arbitral process can achieve the purpose of arbitration being a quick alternative form of dispute resolution. Arbitration appears to be the most effective form of

dispute resolution due to the number of international conventions and laws which have been widely adopted such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards which has been adopted by a large number of countries including Zambia.<sup>1</sup> This research paper has thus endeavored to introduce the concept of arbitration and has illustrated why there is need to minimize court intervention as much as possible so as to give effect to the method of ADR chosen by the parties. It is important that court intervention is limited to a minimum especially in commercial disputes so that trade and commerce are not affected on account of court intervention.

One of the ways in which the courts intervene in the arbitration process is by way of granting injunctive relief as was illustrated in chapter two. Parties to arbitration can make applications to court for injunctive relief before or during arbitration proceedings. It is important to note as was discussed in chapter two that the principles of granting injunctive relief under arbitration are not distinct from the principles of granting injunctive relief under litigation. The High Court in the case of *Friday Mwamba v Derrick Chekwe* stated that the principles for a refusal or grant of an injunction are not different. The basic principles such as there being a serious question to be tried, damages being an adequate remedy to compensate the plaintiff and where the balance of convenience lies are sacrosanct and cannot be waived even in an application for an injunction under arbitration. Most legislation on arbitration in different jurisdictions provides the court with the authority to grant injunctive relief.

As was illustrated in chapter three, jurisdictions such as Zambia, England, United States of America, India and France confer their courts with authority to grant injunctive relief. Sweden on the other hand inclines towards non-judicial participation of the arbitral process as court intervention is limited to after the arbitration proceedings have been finalised, that is,

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<sup>1</sup> Mwenda.,24.

challenging of an award and enforcement of an award. The courts in Sweden value the method chosen by the parties thereby adhering to the rationale of arbitration. As a result of courts being given the authority to grant injunctive relief in particular jurisdictions, there will be certain effects on the arbitral process. The main effects of such court intervention include; the arbitration proceedings becoming non-confidential, delays in having the arbitration proceedings concluded in timely manner and the courts invariably treading into the main issue. These effects in turn will have an impact on the parties such as loss of business or income and loss of business ties.

Therefore, as maintained throughout the course of this paper, the observance of the rationale of arbitration must be adhered to as clients are often attracted to this method of ADR because they know that they can control the process. Furthermore, the attractiveness of arbitration lies in the cost and time that can be saved in dispute resolution. Court intervention can sometimes complicate the arbitral procedure and may constitute a potential shortcoming to arbitration because courts experience a significant backlog of cases and thus result in substantial delays. Court intervention must therefore be restricted to after the arbitral proceedings have been completed in order for arbitral proceedings to be done expeditiously.

## **5.2 RECOMMENDATIONS**

This Chapter in part seeks to advance recommendations in order to give the powers of granting injunctive relief to the arbitrators. These recommendations include; a legal infrastructure which spells out the arbitrators competence, restriction of the courts powers to being used as an enforcement machinery once the arbitral proceedings have been finalized, the education and training of arbitrators and the provision of a supervisory judge. Another recommendation which can be viewed as a short term recommendation is the inclusion of the

arbitrators powers in the arbitration agreement. These recommendations will all be discussed under separate headings.

#### **a) Legal Infrastructure**

In order for the grant of injunctive relief to be placed at the realm of arbitration, it calls for a legal infrastructure that requires the arbitrator's competence to be fully spelled out. There is need to have laws that explicitly give the arbitrator absolute power to grant injunctive relief thereby keeping the proceedings private. It is important to give effect to the method of dispute settlement chosen by the parties by adhering to the rationale of arbitration. Furthermore, where the arbitrators are granted such powers, frivolous and constant applications to court will be minimised thus there will be no delay tactics by the parties to the arbitral process.

#### **b) Restriction of the Courts Powers to the End of the Arbitral Process**

As has been adopted in Sweden, the courts should only be allowed to use their powers once the arbitral proceedings have been finalised. The courts must only be used as an enforcement machinery. The courts assistance must therefore be restricted to the enforcement of an award and the challenging or setting aside of an award. When the courts assistance is restricted to once the arbitral proceedings have been finalised, the attributes of arbitration will be adhered to such as; confidentiality and the matter being dealt with expeditiously. Parties to the arbitral proceedings will thus have control over the proceedings and the awards as was desired by the parties in choosing this form of dispute resolution.

#### **c) Education and Training**

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

issues required of arbitration such as the grant of injunctive relief. As was established in chapter two that the principles of granting injunctions under arbitration are not distinct from litigation, arbitrators will thus need to be educated on these principles. Once arbitrators are trained on how and when to grant injunctive relief, there will be no need for court intervention. Professionally trained arbitrators are essential as they promote confidence in the ADR system especially in the business community.

#### **d) Supervisory Judge**

Arbitrators faced with heightened judicial scrutiny might ultimately come to focus less on the merits of the particular dispute and more on the task of producing opinions.<sup>2</sup> Therefore, in addition to the change in the legal infrastructure which clearly spells out the powers of the arbitrators, the law should make a provision for a supervisory judge. The role of this supervisory judge will be to provide guidance during the proceedings. This may be necessary to protect wider social interests that may be ignored or jeopardised by private arbitrators. The provision of a supervisory judge will minimize the judicialisation of the arbitral process.

#### **e) Arbitrators Powers to be Included in the Arbitration Agreement**

As a short term recommendation, the parties to an arbitration agreement should include a provision in the agreement that where a dispute arises and there is need for the protection of property, interim measures should be exclusively obtained from the arbitrators. This is to allow for time to change the legal infrastructure to one where the powers to grant interim measures are given exclusively to the arbitrators.

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<sup>2</sup>Murray, J, Rau, A and Sherman, 623.

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