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**THE EFFECTIVENESS OF ARBITRATION AS ALTERNATIVE FORM OF
ALTERNATIVE DISPUTE RESOLUTION IN ZAMBIA**

By

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**A directed research essay submitted to the University of Zambia Law Faculty in
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Abstract

This essay examines the effectiveness of Arbitration as an alternative form of dispute resolution to litigation in Zambia. It focuses specifically on the practical impact of arbitration law in Zambia and thoroughly discusses the provisions of the Arbitration Act No. 19 of 2000, to expose its inadequacy.

Arbitration as a form of ADR offers a means to resolve cases more expeditiously and more economically. However, its practical impact on the Zambian community has reflected that arbitration does not necessarily have a legal mechanism in place addresses which effectively avoids the expense and time of litigation. This is owing to the fact that in certain situations the intervention of courts becomes necessary with due regard to the setting aside of awards in certain instances. Consequently, the pursuit of resolving disputes using a means that is more expeditious and more economical than litigation is defeated.

On the findings, the dissertation gives recommendations that ultimately focus on how best arbitration can reduce the expense and time of litigation by having a viable legal system that achieves this purpose. It has been highly recommended that the court rules should make adequate provision for applications to court arising from arbitration proceedings, so that such applications should not cause unnecessary delay and expenses.

Dedication

To my awesome mother Mrs Mirriam Kunda, who likes the spirit of this essay. I love you mum.

Acknowledgements

This is the thankyou page and as such, it's really the most important page to the author, though many readers just skip through to the text. Without the help of these people, this work would not have taken its final form.

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Case Cited

Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd SCZ/34/2008 (unreported)

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Investment Disputes Convention Act ,Cap.42

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CHAPTER ONE: GENERAL INTRODUCTION AND DEFINITION OF TERMS

1.0 Definition of Terms

Alternative Dispute Resolution (ADR)

ADR may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party.¹

Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a legal technique for the resolution of disputes outside the courts, wherein the parties to a dispute refer it to one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal"), by whose decision (the "award") they agree to be bound.

Litigation

A controversy before a court or a lawsuit is referred to as litigation. It is one way that people and companies resolve disputes arising out of an infinite variety of circumstances.²

Dispute

A dispute may be defined as a class of conflict that manifests itself in distinct justiceable issues. It is an expression of peoples' differences and by airing those, opportunities are provided to better understand one another so as peaceably resolve the conflicts.³

1.1 Background of the Study

Alternative Dispute Resolution (ADR) may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally

¹ P Mitchard, A Summary of Dispute Resolution Options, Min West Group, St Paul, 2002. Page 5

² A Allot, The Limits of the Law, S. Chand and Company Limited, New Delhi. 1980. Page 10

³ J Pirrie, Alternative Dispute Resolution: Skills, Science and the Law, Stevens and Sons Limited, London, 2000. Page 3

involving the intercession and assistance of a neutral and impartial third party.⁴ Litigation on the other hand is a controversy before a court or a lawsuit. It is one way that people and companies resolve disputes arising out of an infinite variety of circumstances.⁵ ADR has a long tradition in many parts of the world societies dating back to 12th Century in China, England and America.⁶ Early advocates of ADR include Abraham Lincoln, a gifted trial lawyer to whom it is attributed the following words: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the loser in fees, expenses and waste of time”.⁷

The modern growth of ADR processes can be attributed to at least two different animating concerns. Firstly, scholars, practitioners, consumers, and advocates for justice in the 1960s and 1970s noted the lack of responsiveness of litigation to the interests of the disputants. The conduct of litigation in the common law system of dispute resolution was and is still governed by formal and rigid rules of civil or criminal procedures which do not allow parties to a dispute to bargain in their respective cases. As a result, litigation denies the parties a chance to settle their disputes with creative solutions that take into account the underlying needs and interests of the parties. On this basis, more flexible and party-controlled processes were believed to encourage consensual problem solving and empower individuals by enabling them to control the outcome of their dispute and to also preserve personal and business relationships.⁸

A second strand of argument contributing to the development of ADR was more quantitatively or efficiency-based. Judicial officers argued that the excessive cost and delay in the litigation system required devices that would divert cases from courts and reduce caseloads, as well as provide other and more efficient ways of providing access to justice. This efficiency-based impetus behind ADR encouraged both court-mandated programs such as court-annexed arbitration for cases with lower economic stakes, and

⁴P Mitchard, A Summary of Dispute Resolution Options, Min West Group, St Paul, 2002. Page 5

⁵ A Allot, The Limits of the Law, S. Chand and Company Limited, New Delhi, 1980. Page 10

⁶ A Jayachandra, Alternative Dispute Resolution: What it is and how it works, Sweet and Maxwell Limited, London, 1997. Page 79

⁷ <http://www.spectator.se>

⁸ M Palmer, Alternative Dispute Resolution and the Primary Processes of Decision Making, Little, Brown & Company, 1998. Page 7

encouraged contractual requirements to arbitrate any and all disputes arising from services and products provided in banking, health care, consumer, securities, educational, and communication-based industries.⁹

Arbitration had its origins in private commercial arbitrations, outside the formal court structure, and was used principally by merchants in disputes with each other. Labor arbitration developed in order to secure “labor peace” as well as to develop a specialized substantive law of the “shop floor.” Early use of mediation or conciliation occurred in some courts and communities seeking to both reduce caseloads and provide more consensual agreements in ethnically or religiously homogeneous areas.¹⁰

Over a number of years, the endless search for quicker and cheaper alternatives to litigation, has led to the development of a wide variety of ADR processes. Some of these ADR processes include the following: Arbitration, Mediation, Med/Arb, Mini-Trial, Negotiation, Summary-Jury trial, Early Neutral Evaluation, Private Judging, Last Offer Arbitration, Mediation with Last Offer Arbitration, Fact – Finding and Partnering. These techniques have been developed along scientific lines by some leading Universities and ADR centers in the United States, Great Britain, Canada and Australia.¹¹

Since the introduction of ADR, its usage has been recognized internationally with both common law and civil law countries following suit.¹² Being faced with similar problems associated with litigation, Zambia has also adopted some ADR mechanisms. The most commonly used ADR mechanisms in Zambia are Mediation, Arbitration and Negotiation. The legal and institutional frameworks for ADR in Zambia are firmly in place.

⁹<http://www.redcritique.org>

¹⁰D Roebeck, *The Prehistory of Dispute Resolution*, Stevens and Sons Limited, London, 2006. Page 94

¹¹<http://www.redcritique.org>

¹²K Mwenda, *Principles of Arbitration Law*, Brown Walker Press, London, (2003). Page 3

1.2 Statement of the Problem

The ideal purpose of arbitration is to avoid the time and expense of litigation and to obtain a higher level of expertise of the triers of fact.¹³ Frequent and long adjournments of cases in litigation lead to lengthy delays in disposing of cases. Thus, the delays in disposing of cases coupled with the high costs of legal representation make litigation more expensive.

Typically, many businesses use arbitration as a means of rectifying outstanding business disputes, however, for individuals embroiled in a dispute, the need for an arbitrator may not prove necessary, efficient, or cost effective. In arbitration, an award is final except in cases of corruption, fraud, or other circumstances that would affect an arbitrator's ability to remain impartial.¹⁴ Where an application is made to the High Court on the grounds mentioned above, litigation is obviously used for dispute resolution. In essence, an attempt made to avoid the inadequacies of litigation which include the time and expense of litigation is defeated. An illustration of this is in the case of *Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd*, where an arbitral award delivered on 28th May 2004 was set aside in the High court judgment of 10th March 2005 upon an application by the dissatisfied party. The matter did not end here: on appeal to the Supreme Court, judgment was given on 14th May 2008.¹⁵

Arbitration leaves no room for an appeals process in the overwhelming majority of instances unless in cases of corruption, fraud, or other circumstances that would affect an arbitrator's ability to remain impartial. Most individuals would like the option for an appeal in the event a ruling is not in their favor. This option for an appeal is more than probable in the course of litigation, however, with arbitration, the options for appeals are virtually nil¹⁶. On the one hand, one or both parties may be dissatisfied with the result and thus opt for new arbitration proceedings before a different arbitrator, thereby incurring more costs.

¹³P Mitchard, A Summary of Dispute Resolution Options, Min West Group, St Paul, 2002. Page 7

¹⁴A Marriot, Mandatory ADR and Access to Justice, Foundation Press, Westbury, 2002. Page 50

¹⁵SCZ/34/2008 (Unreported)

¹⁶ A Marriot, Mandatory ADR and Access to Justice, Foundation Press, Westbury, 2002. Page 54

Furthermore, the preliminary investigation at the Zambia Centre for Dispute Resolution carried out by the writer revealed that arbitration is mostly used by big commercial businesses as opposed to small commercial businesses because they find the costs for the process of arbitration expensive.¹⁷ In the face of these problems associated with arbitration, the author raises apprehension as to whether arbitration has effectively served its purpose of avoiding the expense and the time of litigation in Zambia. It is for this reason that the study is based on the hypothesis that arbitration as a form of ADR does not have an effective mechanism for avoiding the expense and time of litigation.

1.3 Purpose of the Study

The ultimate objective of this study is to determine whether the introduction of arbitration as an alternative to the court adjudication of disputes has achieved its purpose in the administration of justice.

The specific objectives are: to review the provisions of the Arbitration Act No 19 of 2000; to examine the performance of arbitration to date; to make recommendations and measures for improvement where appropriate

1.4 Rationale and Justification of the Research

The study is pertinent and timely considering how ADR has developed in Zambia. The concept of ADR in Zambia since 1998 has prompted the writer to deem it necessary to consider whether there has been any change in the manner in which ADR, in particular, arbitration is administered in Zambia. Determining the efficacy of arbitration as a form of dispute resolution cannot be limited to looking at its principles and the provisions of the Act in place. There is a need to go a step further by evaluating its performance in order to decide whether it befits the purpose of its existence. This study therefore seeks to

¹⁷ Interview: J. Chipeta, 27/09/10

evaluate the performance of arbitration in Zambia in order to determine the extent to which it has been of benefit to the *Zambian* community in the administration of justice.

1.5 Research Methodology

This study was based on both primary and secondary information. The primary information include interviews with Zambia Association of Arbitrators(ZAA), Zambia Centre for Dispute Resolution (ZCDR) and some practicing arbitrators. Secondary sources included Statutes, Judicial decisions, textbooks, articles and reports.

1.6 Conclusion

The concept behind the introduction of ADR methods, *inter alia*, was to reduce the delays and costs associated with litigation, to introduce relatively formal methods of dispute resolution, to introduce consensual problem solving and empower individuals by enabling them to control the outcome of their dispute and develop dispute resolution mechanisms that would preserve personal and business relationships. In other words, litigation could not provide proper access to justice: access to justice is based on the creation of an efficient and effective system for delivering legal services.¹⁸ Thus, ADR was created to divert cases from courts and reduce caseloads, as well as provide other and more efficient ways of providing access to justice. The aim of ADR is to reach an accommodation which may not necessarily reflect the legal standing of the parties but is a solution for the resolution of legal problems which the parties can accept. ADR is therefore, a process for finding a solution that the parties can live with.

Chapter 1 has given an overview of the historical development to ADR. In so doing, it has laid the foundation for chapter 2 which will look at the advantages of ADR over litigation, the introduction of ADR in Zambia and the ADR mechanisms at use in Zambia.

¹⁸ Matibini, P. Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission on

Legal Empowerment of the Poor 2003

CHAPTER TWO: IMPORTANCE OF ADR, INTRODUCTION OF ADR IN ZAMBIA AND AN OVERVIEW OF ADR MECHANISMS AT USE IN ZAMBIA

2.0 Introduction

ADR has gained widespread acceptance among both the general public and the legal profession in recent years. Its rising popularity can be explained by its importance and perceived advantages over litigation. Chapter two discusses the importance of ADR, advantages of ADR, introduction of ADR into the Zambian legal system and the ADR methods currently at use in Zambia.

2.1 Importance of ADR

The introduction of ADR into the legal system is considered to have been critical to improving the accessibility of justice. In chapter one, we spelt out some of the animating reasons that led to the introduction of ADR and these included excessive costs and delay in the litigation system, formal and rigid rules of civil or criminal procedure which did not give parties control over their disputes. These inadequacies of litigation which bordered on the efficiency of the legal system pointed to the reality that there was need to introduce into the legal system devices that would provide other and more efficient ways of accessing justice. It is beyond serious dispute that the main focus on access to justice is the creation of an efficient, effective system for delivering legal services. Matibini explains access to justice as follows:

Access to justice rests on three foundations: substantive law, legal institutions and legal services. Firstly, the substantive law must advance appropriate norms that promote productivity, efficiency and social justice. If they do not, then improving access to the legal system cannot be counted as improving access to justice. Secondly, the institutions that develop, apply and enforce the law-especially, but not exclusively the courts- must be competent, impartial, efficient and effective. Access to an unjust legal system is not access to legal justice, no matter how fine the laws on the books. Thirdly, potential users

of the legal system must be able to rely on an efficient and equitable system for producing and allocating legal services.¹⁹

In the first chapter, we defined ADR as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a neutral and impartial third party. Effective impartial third party intercession can help to overcome blocks to settlement: by expediting and facilitating resolution, it can save costs and avoid the delays and risks of litigation. Sometimes, but not necessarily, it can help to heal or provide the conditions for healing underlying conflicts between parties.²⁰ As Singer suggests, even if the legal system of justice were more efficient, it would not satisfy some participants' most crucial interests:

²¹The emphasis of courts and other traditional forums on pronouncing right and wrong and naming winners and losers necessarily destroys almost any pre existing relationship between the people involved. Whether the parties are a divorcing husband and wife who must continue to share the parenting of their children, businesses that want to keep their jobs, it is virtually impossible to maintain a civil relationship once people have confronted one another across a court room.

Robert Carlson as president of the American Arbitration Association wrote:

²²Lawyers are in a bind when it comes to managing their clients' disputes if they are locked into the courts. Litigation has not kept up with modern, fast moving society.....there have been revolutionary changes in business practices since the basic court structure was adopted from English common law....Compared to modern business, civil courts have changed very little...Alternative Dispute Resolution gives lawyers an opportunity to use new processes, encourages a problem solving attitude and an openness to compromise.

¹⁹ Matibini, P. Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission on

Legal Empowerment of the Poor

²⁰ Goldberg et al Dispute Resolution, Little Brown & Co, 1985. Page 7

²¹ Singer, L. Settling Disputes 2nd Edition, West view Press Boulder, 1994. Page 4

²² Cited in The Lawyer's Role in Dispute Management, 1989.

Once litigation is commenced, there will be little conciliatory compromise between the parties. Indeed many relationships, businesses or otherwise have suffered a breakdown as a result of litigation. Kovach argues that it is more beneficial for parties to resolve their differences by negotiated agreements rather than through the contentious proceedings because the most effective system of dispute resolution consists of a method which increases the reconciliation of interests.²³

We made it clear in chapter one that it is the principal purpose of ADR to encourage parties to reach a fair and timely resolution and that ADR has a crucial role to play in providing access to justice. The case for that seems stronger than ever: ADR has a role to play in facilitating the resolution of civil and commercial disputes, family issues and community disputes. There are also encouraging signs that ADR has a significant role to play in dealing with environmental and social issues, and that it can have a beneficial effect in easing of tensions between the victims and perpetrators of crime. Its long standing role in relation to employment disputes has been revived and developed in recent years.²⁴

ADR complements litigation and other adjudicatory forms, providing processes which can either stand in their own right or be used as an adjunct to litigation.²⁵ This enables practitioners to select procedures appropriate to individual disputes. The term appropriate dispute resolution is used to express the idea that different kinds of disputes may require different kinds of processes: there is no one legal or dispute resolution process that serves for all kinds of human disputing.

2.3 Advantages of ADR over Litigation

The benefits of ADR are perceived to go beyond the mere savings of costs and time, although these are significant factors. Given the problems mentioned earlier of the judicial system, it seems clear that ADR processes and techniques are vital for dispute

²³K Kovach, *Mediation Principles and Practice*, West Publishing Co, St Paul Minn, 1994. Page 5

²⁴K Goldberg et al *Dispute Resolution*, Little Brown & Co, London, 1985 .Page 7

²⁵ L Singer, *Settling Disputes 2nd Edition*, West view Press Boulder 1994. Page 15

resolution, particularly in light of the many advantages inherent in ADR processes. Briefly outlined, these advantages may be considered as follows²⁶:

Flexibility

The flexibility of ADR is a major reason for its acceptability .It allows the parties to choose the kind of technique that will govern their meeting. They can choose any relevant industry standards, or any kind of law be it domestic or of a foreign country. This kind of flexibility makes it a standing point that can be easily worked between the parties to put the problem's nature and it's result on the parties involved. This certainly departs from the formal and rigid modes of processing disputes in litigation.

Accessibility

ADR is more informal than court proceedings, without complicated rules of evidence and the adversarial nature. The process can therefore be less intimidating and less stressful.

Expertise Involved

The parties involved in the dispute can have their dispute arbitrated or mediated by a person who is an expert in the relevant field. In an ordinary trial, problems involving technical knowledge or procedures that many people cannot understand can make a trial go on for a long time. Also the calling of expert evidence on the basis of providing the necessary information to the judge can cost a lot of money. Not to mention the time spent educating and explaining to the judge about the complex and detailed points of fact that are involved. But if the mediator or arbitrator has a background on the relevant field, it will take a lot less time and money and the parties can easily jump to the core of the subject to easily and swiftly put an end to their discord.

Conciliation of the Parties

ADR allows the conciliation of the parties to take place and help negate future disputes amongst the involving parties.

²⁶ Process of Dispute Resolution: The Role of Lawyers. Foundation Press, 1989. Pages 69-73

Closed Meetings

One of the advantages of ADR is its closed door meetings. Court trials are open and do not offer privacy. This may be undesirable in business disputes, where the parties might not want to disclose information of their companies or high profile cases where publicity can cause mental and physical harm to the parties involved.

Customer Satisfaction

In ADR both the parties involved have a high probability of leaving with a high level of customer satisfaction. The reason being that the parties get to set up the terms on the grounds upon their dispute is to be settled.

Confidentiality Of Results

The results of an ADR meeting can be kept confidential. Thus making it virtually impossible to cause any type of scandals or scoops on newspaper headlines. The parties can agree that information disclosed during negotiations cannot be used in later.

2.3 Introduction of ADR into the Zambian Legal System

The Zambian situation has more or less conformed to the situation discussed in chapter 1 on the inadequacies of litigation as a means of resolving disputes. For a very long time, courts have played a vital and leading role in justice delivery. However, they have been unable to meet the needs not only of the business community, employees, etc, but also those of the ordinary citizens.²⁷ The inability of the formal system of justice or the courts to meet the needs of society has been inter alia, due to the time it takes for a case to be disposed, prohibitive costs, and procedural requirements of the courts. Furthermore, litigation is adversarial and not concerned with future relationships between or amongst parties. It is outside the control of litigants and judges have little room for creativity when issuing judgments. Frequent and long adjournments of cases in court lead to lengthy

²⁷ Matibini, P. Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission on

delays in disposing of cases. The result has been a huge backlog of cases dating back to years.

In the face of all these problems, the spirit of reform is in the air: the judiciary has made a bold move and taken measures to reduce the backlog. One such measure has been the creation of a Commercial list at the High Court of Zambia in which commercial actions are entered. A commercial list registry has been created where commercial actions are filed and some High Court judges with special training have been assigned to these actions. Commercial actions filed in the Commercial List Registry are meant to be disposed of at a much faster pace through the rules that ensure that cases are disposed of in the shortest possible time and imposition of penalties on defaulting parties and counsel to ensure compliance.²⁸ However, despite the laudable measures, the problem of backlog of cases is far from over.

Admittedly, ADR is a relatively new concept in Zambia. Significant strides have been made in the promotion of ADR mechanisms in the country. The initiative to introduce ADR was spearheaded by the Judiciary, LAZ and the Zambia Chamber of Commerce and Industry (ZACCI). The initiative that began in earnest in 1997 was supported by the United States Agency for International Development (USAID) and the Swedish International Agency for Development (SIDA). Over a period of 10 years, a Zambia Centre for Dispute Resolution Limited (ZCDR) and Zambia Association of Arbitrators (ZAA), have been established as institutions responsible for the promotion and development of ADR in the country. Alongside the institutional development, an archaic Arbitration Act of 1933 was repealed and replaced by an Arbitration Act fashioned along the lines of the United Nations Commission on International Trade Law (UNCITRAL) model law.²⁹

A court annexed mediation program was also introduced on 28th May 1997, in the High Courts at Lusaka, Ndola, Kitwe and Livingstone. Mediation however, is only practiced in

²⁸ This was done through the High Court (Amendment) Rules, 1999, S.I No. 29 of 1999

²⁹ Matibini, P. Access to Justice and the Rule of Law: An Issue Paper Presented for the Commission on

the High Court. Under court annexed mediation, cases already in court and deemed suitable for mediation are allocated to judiciary-trained mediators for mediation. If the mediation fails, the cases are referred back to the court in a further endeavor to reduce the backlog and ensure that justice is delivered as speedily as possible and thus restore the confidence of the public in the formal justice delivery.³⁰

2.4 An overview of ADR Methods Currently In Use In Zambia

Arbitration

Arbitration in Zambia was first governed by the 1933 Arbitration Act which was repealed and replaced with the Arbitration Act No 19 of 2000. Arbitration is one of the most widely known forms of ADR. Arbitration, like court adjudication, involves the presentation of proof and arguments by the parties to a neutral third party or panel of neutrals who issue a binding decision.³¹

However, although the outcome is binding on the parties, arbitration awards are not self-enforcing. Failure of the parties to abide by the outcome cannot be sanctioned unless the award has been judicially confirmed. Arbitration can be either voluntary or mandatory and can be either binding or non-binding. Although mandatory, arbitration can only come from a statute or from a contract that is *voluntarily* entered into, where the parties agree to hold all disputes to arbitration, without knowing, specifically, what disputes will ever occur. Non-binding arbitration is, on the surface, similar to mediation. However, the principal distinction is that whereas a mediator will try to help the parties find a middle ground on which to compromise, the (non-binding) arbitrator remains totally removed from the settlement process and will only give a determination of liability and, if appropriate, an indication of the quantum of damages payable.³²

Unless the parties agree, arbitration does not involve pre-trial discovery. The arbitration hearing is usually more informal than a court proceeding and the rules of evidence are not strictly applied. The parties may agree, either by contract or by mutual agreement, to

³⁰ K Markie, A Handbook of Dispute Resolution: ADR in Action, Butterworths, Toronto, 1991. Page 78

³¹ A Marriot, Mandatory ADK and Access to Justice, Foundation Press, Westbury, 2002. Page 10

³² David, R. Arbitration in international trade. Sweet and Maxwell Limited, London, 1985. Page 20

have their case heard before a single arbitrator or a panel of arbitrators. Generally, the parties agree to jointly select the arbitrator or panel and to split the costs of arbitration.³³

Mediation

Mediation is governed by the mediation Rules: The Industrial Court Relations (Mediation and Arbitration Procedure) Rules apply to cases involving mediation which commences in the Industrial relations Court; The High Court amendment rules 1997 which apply to the mediation cases referred from the High Court. Mediation is an appropriate form of ADR for nearly every civil case. It gives the parties an opportunity to be heard without constraining either side with a binding adjudication of the case. In mediation, the parties negotiate their case towards resolution with the assistance of a neutral third party. The mediator is a powerful tool in helping parties realize and accept inherent weaknesses in their cases, which is a necessary precursor to a reasonable and realistic resolution.³⁴

The mediation process generally involves a short introduction by the mediator followed by an opening statement from each party, during which the parties outline their case for the benefit of the mediator and opposing counsel. Each party usually has prepared a position paper stating the legal and factual bases of the case. The position paper is submitted to the mediator prior to mediation. Following opening statements, the mediator meets separately with each party in the case and that party's attorney. In doing so, the mediator is able to determine the desires of each party and is able to help the parties realistically evaluate weaknesses.³⁵

While the settlement reached by the parties is not itself binding, it can be a binding and enforceable resolution if reduced to writing and signed by the parties. The mediator cannot force a settlement; however, the courts can enforce a settlement reached by the parties through mediation in the same manner as any legal settlement reached outside of mediation.³⁶

³³ Verady T. etal international Commercial Arbitration 3rd Ed Central Press, Jerusalem, 1992. Page 60

³⁴ A Marriot, Mandatory ADR and Access to Justice, Foundation Press, Westbury, 2002 . Page78

³⁵ B Christian, Arbitration and Mediation in International Business: 2nd Edition , Sweet and Maxwell Limited, London,2006.Page 49

³⁶ A Marriot, Mandatory ADR and Access to Justice, Foundation Press, Westbury, 2002 . Page83

One great advantage of mediation over court adjudication or arbitration is that the parties themselves arrive at a resolution of their case. For that reason, there is a greater feeling of satisfaction in the result. A number of jurisdictions order mediation of those cases set for trial. Even with court-annexed mediation, however, any settlement reached by the parties is strictly voluntary. The parties may still proceed to trial should they fail to resolve the case during mediation.³⁷

Negotiation

Settling disputes by direct negotiation of the parties is the commonest way that disputes are settled. It is only when direct negotiation breaks down that some other means of reaching a settlement is required.³⁸ Negotiation is not on its own an ADR process. It is the most fundamental way of trying to resolve differences, and when it fails, ADR processes may become employed. While negotiation is invariably one of the main components of ADR processes, it is only when it is accompanied by neutral intercession and a more structured process framework that it becomes ADR. Negotiation is therefore the starting point for any form of dispute resolution. In negotiation, participation is voluntary and there is no third party who facilitates the resolution process or imposes a resolution. The parties decide what the important facts are and they decide the best solution together.³⁹

2.5 Conclusion

Chapter two has looked at four significant aspects of this study: importance of ADR; its advantages over litigation; the introduction of ADR into the Zambian legal system and the major ADR mechanisms currently at use in Zambia which are negotiation, arbitration and mediation.

The historical development of ADR into the legal system is considered to have been critical to improving the accessibility of justice due to the inadequacies of litigation which pointed to the reality that there was need to introduce into the legal system devices

³⁷B Christian, *Arbitration and Mediation in International Business*: 2nd Edition, Sweet and Maxwell Limited, London, 2006. Page 65

³⁸A Redfern, *Law and Practice of International Commercial Arbitration*: 4th Edition Estates Gazette Limited, London, 2004. Page 67

³⁹B Christian, *Arbitration and Mediation in International Business*: 2nd Edition, Sweet and Maxwell Limited, London, 2006. Page 55

that would provide other and more efficient ways of accessing justice. Effective impartial third party intercession, one of the basic features of ADR, can help to overcome blocks to settlement by expediting and facilitating resolution, thereby saving costs and avoiding the delays and risks of litigation. Negotiated agreements rather than the contentious proceedings are perceived to be more beneficial for parties with due regard to providing an effective system of dispute resolution that increases the reconciliation of interests.

Regarding the discussion on the advantages of ADR, it is worth stressing that to every advantage there may be corresponding arguments to the contrary and there are perhaps many arguments to show that the judicial process is the more superior mechanism of dispute settlement. However, it must be emphasized that ADR should be seen not as a replacement of the judicial system nor as a reformation of the law, but rather as a complementary process to locate alternative views of resolving a dispute. We should hasten to add that because each case is different and not all disputes are the same, the question is one of degree in terms of the appropriateness of the system rather than a blanket application of one system over the other. The term appropriate dispute resolution is used to express the idea that different kinds of disputes may require different kinds of processes: there is no one legal or dispute resolution process that serves for all kinds of human disputing.

Admittedly, ADR is a relatively new concept in Zambia. The concept behind the introduction of ADR methods in Zambia, *inter alia*, was to reduce the delays and costs associated with litigation, to introduce relatively formal methods of dispute resolution, to introduce consensual problem solving and empower individuals by enabling them to control the outcome of their dispute and develop dispute resolution mechanisms that would preserve personal and business relationships. The most commonly used ADR mechanisms in Zambia are Mediation, Arbitration and Negotiation.

It is the author's view that the significance of this study to delve into the foregoing aspects of ADR cannot be undermined because these aspects create a basis for understanding the ideal purpose of ADR and thus lay a foundation for the various

CHAPTER THREE: THE LEGAL FRAMEWORK OF ARBITRATION IN ZAMBIA

3.0 Introduction

Arbitration is increasingly becoming popular in Zambia particularly in industrial, construction and labour practices, commercial and consumer goods. The Arbitration Act No 19 of 2000 has brought radical changes to arbitration mechanism in Zambia because it has implemented the United Nations Commission on International Trade Law Model Law on International Commercial arbitration (herein referred to as the Model Law) into Zambia. In so doing, it has introduced the bifurcated system of national and international arbitration laws which substantially apply in Zambia.

The philosophy of the model law is based on the New York Convention on the recognition and enforcement of foreign arbitral awards 1958. It provides a framework within which international commercial arbitrations can be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy. Its aim is to promote the harmonisation and uniformity of national laws pertaining to international arbitration procedures.

The objectives of the Act include to repeal and replace the Arbitration act with provision for domestic and international arbitration through the adoption, with modifications, of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985; to provide for an arbitral procedure which is fair, efficient and capable of meeting the specific needs of each arbitration; to redefine the supervisory role of courts in the arbitral process; to preserve the legal recognition and enforcement of foreign arbitral awards under the Geneva Protocol on Arbitration Clauses (1923) and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927); to provide for the recognition and enforcement of foreign arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958); and to provide for matters connected with or incidental to the foregoing.

The focus of this chapter is to look at the 2000 in light of some of its salient provisions. It is worth noting that the Act has harmonized in part the domestic and international regimes by modifying certain provisions of the model law so that they comply with domestic provisions.

3.2 The Legal Framework Of Arbitration in Zambia

Scope of application

The Act applies to every arbitration agreement; and every arbitral award, both international and national. Where a written law provides for a matter to be determined by arbitration whether or not in accordance with any law relating to arbitration, the provision in the written law shall be deemed to an arbitration agreement and a person by or against whom a claim subject to arbitration in pursuance of that provision may be made or has been made shall be deemed to be a party to that arbitration agreement. The Act shall not apply to an arbitration subject to a written law if, or to the extent that, those provisions are inconsistent with the provisions of the written law concerned or with any rules of procedure application under that law; or are excluded by the written law concerned or by any other written law.⁴⁰

An arbitration agreement shall not be discharged by the death of a party and may be enforced by or against the personal representative of that party. This shall not affect the operation of any written law or rule of law by virtue of which a substantive right or obligation is extetinguised by death.⁴¹

Waiver of Right to Object

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet

⁴⁰ Section 3

⁴¹ Section 5

proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.⁴²

Extent of Court Intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.⁴³ The purpose of this provision is to achieve a certainty as to the maximum extent of court intervention, including assistance, by listing in the Model Law all instances of court intervention. Thus, it isolates the operation of arbitration from court intervention, except when such court intervention is expressly permitted.

Arbitration Agreement

An arbitration agreement means an agreement, whether in writing or not, by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.⁴⁴ Arbitration agreements contained or evidenced in writing but not necessarily signed by the parties, and agreements made orally but by reference to terms set out in writing, are encompassed by the definition of an 'agreement in writing'.⁴⁵

An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. In summary, the criteria for determining whether an agreement is in writing for the purpose of the Act requires: the agreement made in writing whether or not it is signed; the agreement made by an exchange of written communications; the agreement though not of itself in writing, is evidenced in writing; where there is an exchange of written submissions, in which the existence of an arbitration agreement otherwise than in writing is alleged by one party and not denied by the other in response to the allegation; where parties agree otherwise than in writing by

⁴² Section 6

⁴³ Section 8

⁴⁴ Section 7

⁴⁵ Section 2

reference to terms which are in writing, their agreement shall be treated as an agreement in writing.⁴⁶

An arbitration agreement shall not be discharged by the death of a party and may be enforced by or against the personal representative of that party. This shall not affect the operation of any written law or rule of law by virtue of which a substantive right or obligation is extinguished by death.⁴⁷

Stay of Legal Proceedings

A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. Where such legal proceedings have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.⁴⁸

Appointment of Arbitrators

Parties are free to determine the number and the method of appointment of arbitrators. Failing such determination, three arbitrators are to be appointed, each party appointing one and the two chosen arbitrators selecting the third.⁴⁹ If the agreement on the appointment procedure does not provide for other means for securing the appointment of arbitrators, any party may request the court to take up the role of appointing arbitrators in the following instances: where, under an appointment procedure agreed upon by the parties—a party fails to act as required under such procedure; or the parties, or two

⁴⁶ Section 9

⁴⁷ Section 7

⁴⁸ Section 12

⁴⁹ Section 13

arbitrators, are unable to reach an agreement, expected of them under such procedure; or a third party, including an arbitral institution.⁵⁰

The court or arbitral institution, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than any of the nationalities of the parties. A decision on a matter entrusted to the court or to an arbitral institution shall not be subject to appeal.⁵¹

Where the mandate of an arbitrator terminates because his appointment has been challenged or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. If the sole or other presiding arbitrator is replaced, any hearing previously held shall be held afresh; and if an arbitrator, other than a sole or a presiding arbitrator is replaced, any hearing previously held may be held afresh at the request of any party. An order or ruling made prior to the replacement of an arbitrator under this article is not invalid solely because of a change in the composition of the arbitral tribunal. The procedure for appointment of substitute arbitrator is subject to an agreement made by the parties.⁵²

Challenge to Appointment of Arbitrators

When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him. An arbitrator may be challenged only if circumstance exist that give rise to justifiable doubts as to his

⁵⁰ Section 14

⁵¹ Section 15

⁵² Article 16

impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.⁵³

The parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.⁵⁴

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

Jurisdiction of Arbitral Tribunal

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea

⁵³ Article 17

⁵⁴ Article 18

by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified. On the basis of this plea, the arbitral tribunal may rule either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of the ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.⁵⁵

Power of Arbitral Tribunal to Order Interim and Other Measures

The tribunal is empowered to:

Order interim measures of protection in respect of securing sums in dispute, orders for the detention, preservation or inspection of any property or thing in the custody, possession or control of a party which is in issue in the arbitral proceedings and to authorise for any of those purposes any person to enter upon any land or any building in the possession of a party, or to authorise any sample to be taken or any observation to be made or experiment to be carried out which may be necessary or expedient for the purpose of obtaining full information or evidence; to grant an interim injunction or other interim order; to order the parties to make a deposit in respect of the fees, costs and expenses of the arbitration; to make any order it considers appropriate to compel the attendance of a witness before it to give evidence or produce documents; to order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the tribunal or any other person in order to produce information or evidence for use by the arbitral tribunal; to order the discovery of documents and interrogatories; to issue a commission or request for the taking of evidence out of jurisdiction.⁵⁶

Conduct of Arbitral Proceedings

⁵⁵ Article 21

⁵⁶ Section 11

The parties to arbitral are to be treated with equality and each party shall be given a full opportunity of presenting his case. They are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of the model law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

For the place of arbitration, the Act provides that where the parties have failed to agree on the place of arbitration, the place shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties. It further provides that the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts of the parties, or for an inspection of goods, other property or documents.⁵⁷

Arbitral proceedings in respect of a particular dispute comence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal is authorized to determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. The arbitral tribunal may order that any documentary evidence shall accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.⁵⁸

Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statement.

⁵⁷ Article 21

⁵⁸ Article 22

The parties may submit with their statements all documents they consider to be relevant or may add reference to the documents or other evidence they will submit. Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other material. However, unless the parties have agreed that no hearing shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents. All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or evidentially document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.⁵⁹

The parties have not agreed on the appointment of an expert, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

⁵⁹ Article 23

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Making of Award and Termination of Proceedings

The arbitral tribunal has the duty of deciding the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usage of the trade applicable to the transaction.⁶⁰

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award, such an award has the same status and effect as any other award on the merits of the case.

Form and Content of Award

The award shall be made in writing and shall be signed by the arbitrator or arbitrators; and in arbitral proceedings with more than one arbitrator, the signature of the majority of

⁶⁰ Article 24

all members of arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award made after the parties have on agreed terms during arbitral proceedings, settled the dispute, thereby terminating the proceedings. The award shall state its date and the place of arbitration as determined in accordance with the Act. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

Unless otherwise agreed by the parties, the costs and expenses of an arbitration including the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and other expenses related to the arbitration, shall be as fixed and allocated by the arbitral tribunal in its award. Where the award does not specify otherwise, each party shall be responsible for their own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.⁶¹

Unless otherwise agreed by the parties an arbitral tribunal may award- in the case of an arbitration which, under article 1(3) of the First Schedule, is international, simple or compound interest, in accordance with the law applicable to the arbitration; or in any other case, simple or compound interest in accordance with the law applicable in Zambia to judgement debts on the whole or any part of any sum and in relation to such period and at such rate as is specified in the arbitral award. Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a legal practitioner or other person of that party's choice.

A person who has acted as arbitrator in arbitral proceedings shall not act as counsel for, or representative of, any of the parties in legal proceedings which were the subject of the arbitral proceedings. A party to legal proceedings shall not be allowed to present a person who has acted as arbitrator as a witness in legal proceedings which were the subject of the arbitral proceedings.⁶²

⁶¹ Section 16

⁶² Section 21

A professional body or organisation in Zambia or elsewhere may apply to the Minister for an order (in this Act referred to as a "recognition order") declaring the body or organisation to be an arbitral institution for the purposes of this Act. An application for this recognition order under subsection shall be made in such manner as the Minister may, by statutory instrument, prescribe; and shall be accompanied by such information as the Minister may reasonably require for the purpose of determining the application. Every application shall be accompanied by a copy of the constitution establishing the body or organisation or evidence of any other authority under which it is constituted. a professional body or organisation" means a body or organisation which regulates the practice of a profession⁶³

The Minister may, on an application duly made in accordance with section twenty-three and after being furnished with all such information as the Minister may require under section twenty-three, make or refuse to make a recognition order. The Minister may refuse to make a recognition order in respect of a body or organisation if the Minister considers that its recognition is unnecessary having regard to the existence of one or more other bodies or organisations which are concerned with the resolution of disputes; and where the Minister refuses to make a recognition order the Minister shall give the applicant written notice to that effect stating the reasons for the refusal.⁶⁴

Subject to the conditions on making a recognition order, the Minister may, on an application duly made for the recognition of arbitral institution and after being furnished with all such information as the Minister may require, make or refuse to make a recognition order. The Minister may refuse to make a recognition order in respect of a body or organisation if the Minister considers that its recognition is unnecessary having regard to the existence of one or more other bodies or organisations which are concerned with the resolution of disputes; and where the Minister refuses to make a recognition order the Minister shall give the applicant written notice to that effect stating the reasons for the refusal. The Minister shall not make a recognition order unless the Minister is satisfied that, from the information furnished by the applicant and having regard to any information in the Minister's possession, the body or organisation in respect of which the

⁶³ Section 25

⁶⁴ Section 26

application is made has satisfactory rules relating to the qualifications of a persons for membership of the arbitral institution; the certification of arbitrators; the effective monitoring and enforcement of compliance with prescribed standards of arbitration; the integrity, conduct, discipline and control of arbitrators; the investifation of complaints by parties against arbitrators; and any other requirements for the maintenance of proper standards of arbitration. ⁶⁵

The Minister may revoke a recognition order if at any time it appears to the Minister that the arbitral institution concerned has failed to comply with any obligation to which it is subject under this act. An order to revoke a recognition order shall state the reasons for the revocation and may contain such transitional provisions as the Minister considers appropriate. Before revoking a recognition order, the Minister shall give written notice of the Minister's intention to do so to the arbitral institution and publish the notice in such manner as the Minister considers appropriate for bringing it to the attention of persons who are likely to be affected by the revocation. The notice shall give the reasons for which the Minister proposes to revoke the recognition order and the arbitral institution upon which a notic is served may, within two months or such longer period as the Minister may allow after the date of service, make representations to the Minister. ⁶⁶

Regarding confidentiality, an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award make in those proceedings. On the other hand, the publication, disclosure, or commnication of information shall not be prevented if the publication, disclosure or commnication is required under any law: to a professional or other adviser of any of the parties; or by an arbitral institution or a person authorised in writing by an arbitral institution, but in such a manner as to maintain the anonymity of the parties and to reveal only those facts which may be necessary for the understanding of the subject of the arbitration and the decision of the arbitral tribunal.

⁶⁵ Section 27

⁶⁶ Section 28

An arbitrator, an arbitral or other institution or a person authorised by or under this Act to perform any function in connection with arbitral proceedings is not liable for anything done or omitted in good faith in the discharge or purported discharge of that function. A witness in arbitral proceedings shall have the like protection from liability as a witness before the court.

Correction or Interpretation of Award

Parties are authorized to apply to the arbitral tribunal for correction or modification of the award, within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties. A party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature. In addition, parties are allowed to request the arbitral tribunal to give an interpretation of a specific point or part of the award. The same article gives the parties the opportunity to request from the arbitral tribunal additional awards as to claims presented in the proceedings but omitted from the award.⁶⁷

Setting Aside an Award

Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with the provisions of this Act. An arbitral award may be set aside by the court only if the party making the application furnishes proof that a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the laws of Zambia; the party making the application was not given proper notice of the appointment of an arbitral or of the arbitral proceedings or was otherwise unable to present his case; the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be

⁶⁷ Article 33

set aside; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act or the law of the country where the arbitration took place; or the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

An award may also be set aside if the court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or the award is in conflict with public policy; or the making of the award was induced or effected by fraud, corruption or misrepresentation.

An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award. The court, when asked to set aside an award may, where appropriate and if so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Recognition and Enforcement of Award

An arbitral award, irrespective of the country in which it was made, is recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section nineteen. The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. If the award or agreement is not made in the official language, the party shall supply a duly certified translation thereof into the official language.

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; the party

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

Furthermore, recognition or enforcement may be refused if the court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zambia; or the recognition or enforcement of the award would be contrary to public policy; or the making of the award was induced or effected by fraud, corruption or misrepresentation.

If an application for setting aside or suspension of an award has been made to a court, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award order the other party to provide appropriate security.⁶⁸

Finally, the Act also recognizes and enforces New York Convention award. A "New York Convention award" means an award made in pursuance of an arbitration agreement, in the territory of a state (other than the Republic of Zambia) which is a party to the New York Convention. In this regard, an arbitration agreement means an arbitration agreement in writing. the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958, set out in the Second Schedule of the Act. A new York Convention award shall be recognised as binding, in the manner

⁶⁸ Article 36

provided for in this Act, on the persons in relation to whom it was made and shall be enforceable in accordance with the Act's provision on recognition and enforcement of foreign awards.⁶⁹

Other Acts of Parliament and Rules of Court that Apply to Arbitration

Apart from the Arbitration Act, there are other Acts of Parliament and rules of court that form part of the legal framework for arbitration in Zambia. One such Act is the Investment Dispute Convention Act, which was enacted to give effect to the Convention on the settlement of Investment Disputes between states and Nationals of other states to which Zambia is signatory. The Act regulates the registration in the High Court of awards rendered through the arbitration process under the convention. Section 4 and 5 prescribe the procedure for registration of awards in the high court and the effect of such registration. Section 6 has provision for rules of court to be made to facilitate such registration. Any person who seeks recognition or enforcement of an award is entitled to have the award registered in the High court upon satisfying the requirements of the Act. If a document required to be produced in the High Court is in foreign language, the applicant is under obligation to furnish certified translation of that document.

The convention on the settlement of investment disputes between states and national of other states further provides for the settlement of disputes by arbitration through an arbitral tribunal based on the international centre for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the convention. It maintains panels of conciliators and arbitrators.

The Privatization Act provides in section 47 for any dispute that arises from the privatization process to be settled by arbitration in accordance with the arbitration Act. In addition to these provisions, the rules of the High Court also have provision for reference of some matters to arbitration. Order XLV of the High Court Rules, provides for the reference of matters to arbitration upon application by the parties to a suit before the final judgment. The reader should take note of the fact that with the enactment of the

⁶⁹ Section 33

arbitration proceedings rules 2001, the High Court Rules only apply when the 2001 Arbitration Rules do not provide for any particular matter or do not make sufficient provision enabling a court to dispose of a matter before it or to enable a party to prosecute its case. However such rules of court should not be inconsistent with any of the provisions of 2001 rules. By necessary implication, where such there are such inconsistencies, the provisions of 2001 rules prevail.

Order XLIII of the Subordinate Court rules has provision concerning reference of cases to arbitration similar to those found in order XLV (45) of the High Court Rules. Thus, at any stage of the proceedings before final judgment, matters in difference in a suit in the subordinate court may be referred to arbitration if the parties so wish.

3.3 Conclusion

This chapter has outlined the provisions of the Arbitration Act of 2000. By so doing, it has shown the sort of legal framework for arbitration in Zambia. What therefore remains to be proved in this study is whether arbitration has been of immense value as an efficient, fast and efficacious form of Alternative Dispute Resolution. Chapter four will therefore look at the impact of the 2000 Act on the Arbitration in Zambia.

CHAPTER FOUR: EFFECTIVENESS OF ARBITRATION IN ZAMBIA

4.0 Introduction

This chapter forms the core of the author's research because it unveils some of the shortcomings of arbitration which prompted the author to research on how effective arbitration is, as an alternative form of ADR in Zambia. The inadequacy of the arbitration is revealed in light of the provisions of the Act discussed in chapter three.

4.1 Avoidance of unnecessary delay or expense of litigation

As we have seen in chapter one, the ideal purpose of arbitration includes avoiding the expense and time of litigation. The author's findings have reflected that it is not necessarily the case that arbitration is a quicker or cheaper alternative to the present day litigation in commercial disputes. Arbitrations have become increasingly lengthy, for a variety of reasons:

Intervening Interlocutory Applications

The length of the arbitration process, both domestic and international is affected by intervening interlocutory applications. The arbitrator sets a timetable within which the arbitration will be conducted to be concluded with a written reasoned Arbitration Award by the Arbitrator. However, it is often challenging for the arbitration process to adhere with any fidelity to the predetermined timetable because of the intervening interlocutory applications and developments that may arise as the arbitration unfolds. As seen in section 11 of the Act, a party has the liberty, before or during arbitral proceedings to request from a court an interim measure of protection and the court may grant such measure.

Appointment of Arbitrator(s)

Court intervention may also be needed, under section 12, where the parties are unable to appoint an arbitral tribunal. A party may in fact have no choice but to have recourse to courts. Such court interventions can thus complicate the procedure and constitute a potential disadvantage of arbitration because the court system experiences a significant backlog of cases and thus substantial delays. This is augmented by procedural rules in regard of the time taken to get an appointment from court with all the money that could entail.⁷⁰

Setting Aside Arbitral Awards

Arbitral awards are not subject to appeal.⁷¹ Arbitration leaves no room for an appeals process in the overwhelming majority of instances unless in cases of corruption, fraud, or other circumstances that would affect an arbitrator's ability to remain impartial. Where an application is made to the High Court on the grounds mentioned above, litigation is obviously used for dispute resolution. In essence, an attempt made to avoid the inadequacies of litigation which include the time and expense of litigation is defeated.

An illustration of such a happening is in the case of *Zambia Telecommunications Co. Ltd v Celtel Zambia Ltd*, where, a matter was referred to arbitration. The matter was one of interpreting a clause in the agreement document between the parties. Before the award was made on 28th May 2004, the Chairman of the Arbitral Tribunal was appointed to another Arbitral Tribunal as an Arbitrator on 26th May 2004. Among the people who signed the letter in which he was so appointed was an advocate of the defendant (Celtel) in this case. The chairman was perceived to have been biased because he had agreed to this appointment two days to the making of the Award.

Consequently, an application to set aside the award was made to the High Court on the basis that the failure by the Chairman to disclose his interest in the other matter rendered the award in this case to be "in conflict with public policy". The issue really was not that

⁷⁰ Interview: Chileshe, C 25/12/2010

⁷¹ As pointed out on page 34 of chapter three

the Chairman in this matter was biased or that his impartiality was compromised. The matter was looked into from an objective position, that is, how reasonable people would have viewed the Chairman's involvement in both cases without him disclosing this fact to all the parties. The perception would have been that there was a possible conflict of interest because: of his failure to disclose his interest in the other matter; one of the advocates appearing before this tribunal was also one of the two advocates who appointed him as arbitrator in the other tribunal; the fact that the same advocate, was also a member of the tribunal to which the chairman was appointed.

Public Policy has not been defined in the Arbitration Act No.19 of 2000. However, the court was of the view that it is public policy that a person ought to be tried by an impartial tribunal. In this case the learned Chairman's involvement in this case without disclosing his interest in the other arbitral tribunal could easily be perceived as being contrary to public policy because the perceptions from the objective test, would have been that a likelihood of bias or possible conflict of interest could not be ruled out.

The reason for setting aside the Award in the High Court was because of the appointment of the chairman as co-arbitrator, with one counsel that represented the defendant in this case. According to the judge, the chairman's failure to disclose his appointment created an impression of possible bias which was sufficient to set aside the award. It was conceded, on behalf of the defendant, that one ground upon which an arbitral award may be set aside is that "it is in conflict with the public policy of the state". The argument of possible bias was carried further that misconduct by an arbitrator raised the issue of public policy based on the natural rules of justice. An example is where an "arbitrator or umpire" acts unfairly and in breach of the rules of natural justice by, for example, hearing only one party but refusing to hear the other or even talking to one of parties in the absence of the other.

On appeal, the Supreme Court totally agreed that the learned Chairman's failure to disclose the fact that he had been appointed to another Arbitral Tribunal by one of advocates in the proceedings under review, raised the question of perceived bias against him. The same advocate was to sit with him in that other arbitral tribunal. Admittedly, the

letter appointing him to that arbitral tribunal was written two days before the award in the matter before was made. The possibility, however, was that before the Chairman was formally written to on 26th May, 2004 to notify him of his appointment, he must have been earlier on approached over the same. The challenge of the Arbitral Tribunal's award made on 28th May, 2004 based on perceived bias on the part of the Chairman was reasonable.⁷²

This case illustrates yet another instance when court intervention in arbitration makes the process of arbitration lengthy and expensive. In a nutshell, an arbitral award delivered on 28th May 2004 was set aside in the High court judgment of 10th March 2005 upon an application by the dissatisfied party. The matter did not end here: on appeal to the Supreme Court, judgment was given on 14th May 2008.

The turnout of events implied that in addition to the cost spent on the arbitral tribunal, the parties had to pay more for taking the matter to court: they went back to litigation which they had avoided in the first place and even though the arbitral award was successfully set aside, it is not known how the parties ended up resolving their dispute. Evidently, in their quest to resolve their dispute, they ended up spending more costs and time without even reaching an amicable solution to their dispute.

No Right of Appeal

Most individuals would like the option for an appeal in the event a ruling is not in their favor. This option for an appeal is more than probable in the course of litigation, however, with arbitration, the options for appeals are virtually nil. On the one hand, one or both parties may be dissatisfied with the result and thus opt for new arbitration proceedings before a different arbitrator, thereby incurring more costs. This, therefore, makes a significant difference in costs. On the other hand, increase in cost can result from a party's recourse to national courts because they are not satisfied with the Arbitral Award.

⁷² Interview: C. Mpande 18/09/2010

The fact that awards cannot be appealed against, can, depending on the circumstances, be viewed as an advantage or as a disadvantage. On side of this ensures that there will be only one procedure and that the losing party will not be able to delay enforcement by initiating time and cost-consuming appellate proceedings. On the other hand, it can be very frustrating to parties not to be able to have another tribunal review a flawed award. The impossibility to appeal arbitral awards is thus an advantage only where the tribunal has rendered a well-founded award.

4.3 Other Inadequacies of the Act

General Duty of Parties to obey Orders and Direction of Arbitral Tribunal

The Act is silent on the general duty of the parties to progress arbitrations and to obey the orders and directions of the arbitral tribunal. Explicitly stating such an obligation in the conduct of proceedings would ensure compliance without delay with any determination of the arbitral tribunal as to procedural or evidential matters, or with any of its other orders or directions.

Time Limitations for Commencement of Arbitral Proceedings

Regarding the commencement of arbitral proceedings, the Act provides that proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. This reveals a shortcoming in that it leaves much uncertainty as to the circumstances in which time limits set in arbitration agreements may be extended. One of the defining characteristics of ADR is flexibility. Therefore, requiring the parties to commence arbitral proceedings even when it might not be convenient for either one of them is in conflict with the trait of flexibility. A dispute over time limits is no different from any other dispute which is likely to arise under the contract.

Wrong Interpretation of Arbitral Referral by Parties

Another one of the most common challenges in arbitration includes interpreting the provisions of the arbitral referral correctly. In many cases the arbitration process is

invoked by the parties having agreed, as part of the provisions of a clause in contract documents, to refer the resolution of certain types of disputes to arbitration. In an interview with one of the practicing arbitrators, an illustration of where disputes have cross-border implications, or conflicts of private international law issues, was brought to the author's attention. The arbitration may call for application of foreign arbitration laws and rules that may be more commonly used as custom and practice of the particular legal relationship or trade activity out of which the dispute arises.

To amplify on this sort of conflict, the arbitrator cited a case in which a dispute arose out of a contract performed in Zambia by a Zambian company acting as agent for a Canadian company employed by a British plc listed on the London and Vancouver stock exchanges and operating mining activities in Zambia. This dispute was referred to arbitration under a contractual arbitration clause that provided that it be conducted under the rules of the Court of Arbitration of the International Chamber of Commerce based in Paris France. Eventually, they had the parties agree to amend the contract, to the extent that enabled the arbitration to be conducted under the Zambian Arbitration Act No.19 of 2000 as amended, as read together with Arbitration Rules of the Chartered Institute of Arbitrators of England and Wales.⁷³

This affects the efficiency of the Act because parties are unable to decide the correct terms of reference of the arbitration, and by implication, the Act is not being implemented according to its purpose.

Non Consolidation of Disputes

Because of the consensual nature of arbitration, arbitrators cannot generally consolidate actions absent an agreement by both parties. That can constitute a significant drawback

⁷³ Interview: C. Chanda 14/11/2010

where disputes between the same parties relate to different contracts that have not been subjected to the same arbitration agreement. Such disputes may have to be resolved before either two arbitral tribunals or an arbitral tribunal and a court, thus leading to increased costs and to two distinct decisions that may not constitute a satisfactory overall resolution.

Lack of Mechanism to Monitor how many cases are referred to Arbitration

In assessing the effectiveness of arbitration in Zambia, it becomes necessary to look at the kind of impact it has had on the community, the number of cases handled by arbitration, the kind of parties that benefit from it. However, this cannot be effectively done because there is no mechanism that obliges the parties to have their awards registered either at the courts or ZCDR.⁷⁴

4.4 Conclusion

Arbitration has been part of the *Zambian Alternative Dispute Resolution* for many decades, although it has only become commonly used and enacted into purpose-built recent statutes by Parliament since 1990. With the formation of the Zambia Association of Arbitrators, and a growing body of members of foreign trained and qualified arbitrators under such regulators as the Chartered Institute of Arbitrators of England and Wales and similar institutions in the Republic of South Africa and United States of America, it is a fast developing area of practice. Arbitration in Zambia is perceived to be of immense value as an efficient, fast and efficacious form of Alternative Dispute Resolution. With growth of capacity building in arbitration, it is here to stay.

Even though this perception exists, this chapter has boldly pointed out that it is not necessarily the case that arbitration effectively serves its purpose as a quicker and cheaper alternative to litigation because of interlocutory applications to court; application

⁷⁴ Interview: B. Mulenga 17/03/11

to court for appointment of arbitrator(s); application to court to set aside arbitral award under any of the grounds specified in the Act. These are potential situations in which the supposed quick and cheap process of arbitration is lengthened and made expensive because of court intervention.

Other shortcomings of the Act that have an effect on its efficiency include the following: enlargement of time for commencing arbitral proceedings; inability to provide for non consolidation of arbitral proceedings relating some other dispute of the same parties; wrong Interpretation of Arbitral Referral by Parties; general duty of parties to obey orders and direction of arbitral tribunal

CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS

5.0. General Conclusion

The ultimate objective of this essay has been to determine the effectiveness of arbitration as an alternative form of ADR in Zambia. In doing so, the author made an inquiry on the practical impact of arbitration in light of the provisions of the Arbitration Act No 19,2000.

As an alternative to litigation, arbitration in Zambia does not have an effective mechanism for resolving disputes. This conclusion on arbitration in Zambia is augmented by some of the problems that have a negative effect on the intention of arbitration being as a quicker and cheaper alternative to litigation because of interlocutory applications to court; application to court for appointment of arbitrator(s); application to court to set aside arbitral award under any of the grounds specified in the Act. These are potential situations in which the supposed quick and cheap process of arbitration is lengthened and made expensive because of court intervention.

The locus of the essay turns to the importance of ADR in Chapter 2. Firstly, the extent to which ADR has become an alternative to litigation and the reasons for such is assessed in light of an examination of the inherent attributes of ADR in solving disputes. Following this, the historical development of ADR in Zambia and an overview of the ADR mechanisms currently in use in Zambia is given. The object of the Thesis in this part is to make a foundation for understanding the various arguments reflected in this study, which is based on examining the effectiveness of arbitration as an alternative form of dispute resolution in Zambia.

Apart from court intervention, the Act does not provide for joinder of arbitral proceedings relating some other dispute of the same parties which implies more costs for paying two different arbitral tribunals. Its efficacy is further affected by the fact that people are not aware of how to make references to arbitration especially international arbitration; general duty of parties to obey orders and direction of arbitral tribunal. On the basis of this conclusion, the final substantive element of this essay will look at recommendations for the purpose of achieving an effective mechanism for arbitration.

5.1. Recommendations

The outline of the recommendations is as follows: Streamline Court rules; Provide for Consolidation of arbitral proceedings; Educate the general community on the correct terms of reference to arbitration; Specify party obligations in arbitral proceedings; Specify circumstances in which time for commencement of proceedings can be extended;

We now explore the recommendations in detail.

Streamline Court rules

We have seen in chapter two that the traditional arguments made in favour of arbitration are well known. Its attractiveness lies inter alia in the cost and time that can be saved in dispute resolution. In the arena of international commerce, however, the advantages of arbitration are brought into sharper focus where businesses faced with litigation outside of their home jurisdiction may have to engage in foreign court proceedings which can be time-consuming, complicated and expensive.

From here we can build up a picture of the defining characteristics which are important to bear in mind as we move through this recommendation: a mechanism for resolving disputes, avoidance of unnecessary delay or expense. The author, however, stresses that although the latter is commonly perceived to be the most significant distinguishing trait of arbitration as compared to litigation, it is not necessarily the case that arbitration is a quicker or cheaper alternative to litigation in present day commercial disputes. A potential complication of arbitration process, as shown in chapter four, arises from the fact that in certain situations the intervention of courts becomes necessary with due regard to the appointment of arbitrators where no agreement exists, the hearing of challenges to arbitrators, the replacement of arbitrators unwilling to act, the determination of preliminary issues as to the jurisdiction of the arbitrators on appeal from their decision on the point, providing assistance with obtaining evidence and the setting aside of awards on certain grounds.

The role of the courts in arbitration, as enunciated above, is desirable especially where there is a need for effective sanctions to ensure compliance. Even though desirable, such court interventions can complicate the arbitral procedure and constitute a potential downside of arbitration because many court systems experience a significant backlog of cases and thus substantial delays and not forgetting the expenses of litigation. The High Court has a commercial list registry which was introduced in 2000 as a measure to expeditiously handle commercial matters. However, as seen from the case of *Zamtel v Celtel*, this measure is not very effective because it took four years for the award to be set aside by the Supreme Court.

In light of the foregoing, it is therefore recommended that the Act should overhaul and streamline the commercial court rules governing applications in respect of arbitration. This should be done for the purpose of the court rules making adequate provision for applications to court arising from arbitration proceedings, so that such applications should not cause unnecessary delay and expenses. This would be of undoubted benefit to both the foreign practitioner and domestic practitioner to know that there is a simple, straightforward and standard system for applications to court in relation to arbitration.

Provide for Consolidation of arbitral proceedings

Arbitrators cannot generally consolidate actions absent an agreement by both parties. This can constitute a significant drawback where disputes between the same parties relate to different contracts that have not been subjected to the same arbitration agreement. Such disputes may have to be resolved before either two arbitral tribunals or an arbitral tribunal and a court, thus leading to increased costs and to two distinct decisions that may not constitute a satisfactory overall resolution. It is therefore recommended that the Act makes provision for consolidation of arbitral proceedings in this instance to make arbitration process significantly less than commensurate formal legal actions. Dispute resolution procedures must take account of the need to minimize costs in the interest of efficiency

Educate the general community on the correct terms of reference to arbitration

In an interview with Mr Chileshe, it was brought to the author's attention that amongst of the most common challenges arbitrators have faced in arbitration include interpreting the provisions of the arbitral referral correctly. In many cases the arbitration process is invoked by the parties having agreed, as part of the provisions of a clause in contract documents, to refer the resolution of certain types of disputes to arbitration. However, the situation has been that some parties do not understand the rules to apply on how to refer a matter to arbitration. In addition to this, disputes have cross-border implications, or conflicts of private international law issues. The arbitration may call for application of foreign arbitration laws and rules that may be more commonly used as custom and practice of the particular legal relationship or trade activity out of which the dispute arises.

Therefore it becomes necessary to decide, inter alia, the correct terms of reference of the arbitration, the scope of the issues in dispute brought forward for resolution, the composition of the arbitral panel, the governing law and procedural rules to be applied. The Zambian community should be able to implement the provisions of the Act in a manner that achieves its purpose. It is the author's recommendation that awareness of the requirements for referring a matter to arbitration should be raised through the judicial system: for instance through ZCDR.

Specify party obligations in arbitral proceedings

The general duty on the parties to progress arbitrations and to obey the orders and directions of the arbitral tribunal has not been explicitly stated in the Act. Such an obligation would ensure compliance without delay with any determination of the arbitral tribunal as to procedural or evidential matters, or with any of its other orders or directions. Therefore, the author recommends that the Act makes provision for this.

Specify circumstances in which time for commencement of proceedings can be extended *Limitation periods*

Regarding the commencement of arbitral proceedings, article 21 provides that proceedings commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. The Act is unsatisfactory in this regard as it leaves much uncertainty as to the circumstances in which time limits set in arbitration agreements may be extended. A dispute over time limits is no different from any other dispute which is likely to arise under the contract.

It is recommended that the Act should be amended to insert a clause that addresses the circumstances in which time limits set in arbitration agreements may be extended.

5.3 Conclusion

The recommendations have looked at some of the necessary adjustments that could increase the efficiency of arbitration as an alternative form of ADR. Arbitration must be readily accessible by consumers when a dispute arises. Accessibility not only means that the mechanism be called upon when needed but that there are no unreasonable barriers to access such as unreasonable costs. Equally important, arbitration must be able to resolve disputes quickly for it to meet the needs of the parties that resort to it. The efficacy of arbitration, to a large extent lies on the legal rules which, when implemented, will provide an effective mechanism for avoiding the inadequacies of litigation.

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