ADOPTION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN TANZANIA- A PRE-REQUISITE OR AN INEVITABLE REQUISITE?

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ABSTRACT

International commercial relations have increased in Tanzania due to the Government`s efforts to promote its investment policy, and the expansion of the private sector. Whenever there is any commercial legal relationship, disputes become almost unavoidable and with rapid globalization, differences in interpretation of contracts and other legal agreements are bound to multiply. Even assuming that all parties to all international agreements are acting in good faith, disputes will inevitably arise owing to misunderstandings based on differences in culture, language and local norms[2]. So much so, in a complex commercial relationship, the business community must be assured of a reliable system for resolving disputes as soon as they enter the relationship, because the occurrence of disputes puts at risk all the vital interests, goals and stakes involved in a commercial dealing[3]. This being the case, commercial dispute resolution is essential to a thriving and vibrant business environment[4].

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[2] Schwartz C.A., 'Commercial law harmonization and bilateral assistance' paper delivered at the conference *Modern Law for Global Commerce* held in Vienna to celebrate the fortieth annual session of UNCITRAL on 9-12 July 2007; **http://www.uncitral.org/uncitral**, accessed on 20 August 2008.

[3] Asouzu A., *International commercial arbitration and African states: Practice, participation and institutional development* (Cambridge UP, 2001), 32.

[4] Ibid, Schwartz.

The UNCITRAL Model Law on International Commercial Arbitration of 1985 has set the internationally accepted standards for national legislation to regulate international commercial arbitrations. This article will analyse whether the adoption of the Model Law on international commercial arbitration in Tanzania, is an important requisite or an inevitable necessity.

1.0 Arbitration in Tanzania

Arbitration in Tanzania is mainly governed by The Arbitration Act Cap 15 of 1931[5]. There are also various other statutes which provide for arbitration. One of these statutes is the Criminal Procedure Code[6], 1985 revised Edition 2002 (R.E). Under this Act, parties may be advised by the Court to settle their differences amicably where the offence in question is a minor offence or an offence of a personal nature, such as a common assault. Under the Civil Procedure Code[7], there is provision for arbitration, under rule 3 Order XXIII of the 2nd Schedule to the Civil Procedure Code; it allows extra-judicial settlement in any case. This implies that arbitration is allowed under this Code. In November 1994, the Chief Justice introduced a compulsory procedure, which seeks for a pre-trial settlement immediately upon a suit being instituted in Court[8]. This is incorporated in Orders XIIIA and XIIIB of the Second Schedule to the Code.

In 1969, the new post-independence government passed a law establishing tribunals for resolving community disputes. These tribunals were formed in each village. They were principally concerned with reconciliation and were run in each village by laymen faithful to

[5] R.E 2002.
[6] S 163.
[7] The Civil Procedure Code, 1966 [R.E 2002].
[8] Tanzania Government, the Judiciary, 'Chief Justice' Circular No. 5' of 1994, Ref. No. JYC/C40/8/71.

the local party[9]. In 1985, these tribunals were placed under the control of local administrative officials and renamed Ward Tribunals[10]. The management of these tribunals were placed under government administrators at district level; however they are not part of the judiciary, though decisions from these tribunals can be appealed to the primary courts.

From the few available resources on the history of arbitration in Tanzania, it appears that arbitration under the colonial statute and its successor was little used, particularly for commercial arbitration disputes and even less for international commercial arbitration. The literature referred to indicates that customary arbitration was mainly for civil disputes and land disputes rather than commercial disputes.

2.0 The UNCITRAL Model Law on International Commercial Arbitration

The United Nations Commission on International Trade Law (UNCITRAL) was set up in 1968 and from the outset, dispute settlement was a priority topic[11]. Professor Christie[12] has summarised the steps which led to the adoption and publication of the Model Law on International Commercial Arbitration in 1985. The first was the commissioning of Professor Nestor to prepare a special report on problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters. Professor Nestor came up with a report which suggested a model set of arbitration rules. This

[9] Tanzania was by then a one-party state.

[10] Ward Tribunals Act 7 of 1985 [R.E 2002].

[11] Christie R.H., 'Arbitration; party autonomy or curial intervention II, international commercial Arbitrations,' (1994) 111 *SALJ* 360 at 361.

[12] Ibid, Christie at 361, citing an unpublished paper by Herrmann G. (then the senior legal officer, International Trade Law Branch, Office of Legal Affairs, United Nations.), entitled 'The UNCITRAL Model Law on International Commercial Arbitration- the universal basis for harmonisation and improvement of laws'.

led to the UNCITRAL Arbitration Rules of 1976 (currently in the process of being revised), followed in 1980 by the formulation of conciliation rules. A year earlier, in 1979, the Asian-African Legal Consultative Committee recommended to the Commission certain additions to the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958. However the Commission did not amend the New York Convention, but worked on a new Model Law to fit in with the New York Convention and the UNCITRAL Arbitration Rules. According to Professor Christie,[13] this decision was given effect to by a working group through a process of consultation and adaptation of contributions from various stakeholders; finally on 11 December 1985, the final text of the UNCITRAL Model Law on International Commercial Arbitration was adopted by the General Assembly of the United Nations.

In passing the resolution to adopt the Model Law, the United Nations General Assembly requested the Secretary General to transmit the text of the Model Law and *travaux prèparatoires* to governments and to arbitral institutions and other interested parties. It further recommended that member states of the United Nations implement the Model Law on International Commercial Arbitration[14].

Since most national laws on arbitration are designed and drafted to cater for the needs of domestic arbitration, the Model Law would therefore be particularly useful for international commercial arbitration, by taking into account its special features and needs[15]. The Model Law on International Commercial Arbitration was specifically designed for incorporation into domestic systems of different states whose domestic statutes on international commercial arbitration are not comprehensive and modernised. It aimed at ensuring that there is certainty

[13] Ibid, Christie at 362.

[14] General Assembly Resolution A/40/72 of December 11, 1985.

[15] Binder P., *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, (2005) 8-9.

and uniformity in arbitration laws among states, attempting to minimise and avoid to the largest extent possible, conflicts between national laws and different arbitration rules[16]. In other words, the Model Law is intended to act as a universal standard law on international commercial arbitration, it is a benchmark of any modern law of arbitration[17], though the state adopting it can also incorporate it for domestic arbitration as well or alter its contents. According to Dr. Binder,[18] the Model Law is only a prototype of law on international commercial arbitration, which means that, any state can choose either to adopt it verbatim or only partially. This makes it distinct from most conventions which can only be ratified verbatim.

3.0 International commercial arbitration in African states

Most African states have modernised or are in the processes of modernising their arbitration legislation so that they may keep up with the pace of modern developments in arbitration, especially international commercial arbitration. For instance, a number of African countries have adopted the UNCITRAL Model Law on International Commercial Arbitration. These include Kenya, Zimbabwe, Uganda, Nigeria, Tunisia, Egypt, Zambia, Madagascar and Mauritius[19]. Sixteen[20] mainly Franco-phone African countries are members of the Organisation for the Harmonisation of Business Law in Africa (OHADA), known in French as *l'organisation pour l'harmonisation en Afrique du droit affaire.* These states have adopted

[16] 'Obstacles to International Commercial Arbitration in African Countries', http://www.jstor.org/stable/76092.

[17] Redfern A. & Hunter M., *Law and Practice of International Commercial Arbitration* (4th ed, 2004), vii.

[18] Ibid, Binder 11.

[19] The version adopted by Mauritius in November 2008 includes provisions based on the 2006 amendments. See UNCITRAL's website at www.uncitral .org.

[20] Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. According to OHADA this number is likely to expand to include new members. See www.ohada.org.

OHADA's Uniform Arbitration Act. It unifies the arbitration laws of all the Member States. It applies when the seat of arbitration is in any of the Member States[21].

The position is different in Tanzania, the Tanzanian Arbitration Act Chapter 15 (Cap 15) of 1931 (hereinafter referred to as 'the Act') still lags behind. It has its origin in the English Act of 1889 and the Indian Arbitration Act of 1899[22], which have both been superseded. As regards the basic provisions on arbitration the Act has not been changed in its content but it has been amended in its form only, for example in 1932 by ordinance no 32 of 1932 and in 1971 by the second schedule to Act 10 of 1971. In 1974 the Arbitration Act was revised, but the revision was, in fact, a mere consolidation of the existing content, and lastly in 2002 when it was renamed from ordinance to Act retaining the same old provisions which were imported from the English Arbitration legislation.[23] This Act regulates both domestic arbitration and the enforcement of foreign arbitration awards[24].

The Act still incorporates outmoded international conventions such as the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on Execution of Foreign Awards. The 1927 Geneva Convention on Execution of Foreign Awards is incorporated under the fourth schedule of the Act. Under this schedule, foreign arbitral proceedings are recognised

[21] Ibid, Asouzu 126-129.

[22] This can be evidenced by the provisions of section 17(2) of the Tanganyika Order in Council of 1920 which provided for the application in Tanganyika of all laws which were applicable in India by 10 January 1920, save where the Customary Law applied. This order provided further that where there was a *lacuna,* the substance of Common Law, the doctrines of equity and statutes of general application in force in England at the date of the order would apply in Tanganyika (now Tanzania). The Indian Arbitration Act of 1899 was not expressly mentioned in the order in council, but it could be implied by the wording of section 17(2) which provided inter alia for the application of:

> 'other Indian Acts and other laws which are in force in the territory at the date of the commencement of this order',

This could imply that the said Indian Arbitration Act of 1899 was made applicable to Tanganyika.

[23] The English Act 1889.

[24] Pursuant to schedule 4 of the Act.

as binding in Tanzania when they are or have been conducted in the territories of any contracting party of the 1927 Geneva Convention. Like the Geneva Protocol of 1923, the Geneva Convention of 1927 is now mostly of only historical interest:[25] the New York Convention of 1958 replaces both as between the member states of the last-mentioned Convention[26].

4.0 Adoption of the Model Law- a pre-requisite or an inevitable necessity

There are two issues to be addressed before any Jurisdiction embarks upon the reform of its arbitration legislation[27] to be in line with the Model Law. The first is the role of the Court in arbitration. Under this issue the modern trend is towards limiting rather than increasing the Courts' role in arbitration proceedings. The second is the response which should be made to the UNCITRAL Model Law on International Commercial Arbitration[28].

International arbitration has become the most widely used and best established method of determining international commercial disputes. All over the world states have modernised their laws of arbitration by either adopting the Model Law on International Commercial Arbitration or adapting their law in the light of the Model Law[29], to take account of this fact[30]. Hong Kong was the first of the common-law countries to reform its arbitration legislation on domestic arbitration after 1979 and it subsequently adopted the UNCITRAL Model Law with effect from 6 April 1990; Nigeria implemented legislation based the UNCITRAL Model Law in 1988; in

[25] Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (4th ed, 2004), 439-440.
[26] See Art VII(2) of the New York Convention.
[27] Butler D, 'South African arbitration legislation - the need for reform', (1994) 27 *CILSA* 118 at 120.
[28] An important object of the Model Law is harmonisation of arbitration laws of different states for international arbitration taking place in their jurisdictions (Ibid Butler at 120).
[29] See further the SA Law Commission's Report 14 n 4 and UNTITRAL's website at www.uncitral.org regarding the jurisdictions that have adopted the Model Law.
[30] Ibid, Redfern A. & Hunter M., 1.

Canada, the UNCITRAL Model Law has been adopted at both federal and provincial level for international arbitration. There is no reason why Tanzania, as a country striving to develop its economy especially in the international trade sector, should not join the majority of modern states in adopting legislation to promote efficient means of settling disputes, that is the Model Law. In this case adoption of the Model Law becomes more of an inevitable requisite rather than just a pre-requisite. Therefore initiatives should be taken to update the Tanzanian arbitration law so that it may follow the trends of international practice.

Adoption of the Model Law becomes an inevitable requisite due to the reason that, the member states of the East African Cooperation[31] agreed in a meeting held in Arusha Tanzania in 1998 to form a structure for a business dispute arbitration body. The arbitral body would be part of the East African Business Dispute Settlement Centre[32]. This centre is meant to have international jurisdiction[33]. This centre is intended as a response to the growth in regional trade and investment, and was meant to obviate the need for commercial parties who conduct business in the region to have recourse to Western international commercial arbitration institutions based in developed countries. This meeting also decided that Tanzania and Uganda should harmonize national laws on arbitration within the region by adopting the UNCITRAL Model Law on Arbitration or enact modern arbitration statutes by July 1998[34]. Only Tanzania has not fulfilled this agreement to date, because Uganda has already adopted the UNCITRAL Model Law on commercial arbitration for both domestic and international arbitration in 2000.

[31] The Commission for East African Cooperation (EAC), which comprises Kenya, Uganda and Tanzania, was first formed in 1967 as the East African Community. It collapsed in 1977 due to ideological and political differences. The EAC Secretariat was relaunched in March 1996 to promote closer economic cooperation among its members. *See* www.africa-union.org/root/AU/recs/eac.

[32] 'World Arbitration & Mediation Report February', 1998 Juris Publications, Inc.

[33] The arbitral body would consist of seven arbitrators, one of whom would be the presiding arbitrator. Each member state would nominate two persons for appointment as arbitrators in the Centre.

[34] www.africa-union.org/root/AU/recs/eac.

According to the then Tanzanian Deputy Minister for Justice and Constitutional Affairs[35];

> 'An effective system of Commercial Law is central to the development of any market economy…[a]nd as international trade grows within Tanzania, so must our justice systems develop to meet the challenges of increased internal and cross-border commercial litigation. That means minimizing those forces that discourage and impede trade, such as unnecessary delay and excessive cost.'

Though the Deputy Minister did not expressly state where exactly these unnecessary delays and excessive costs arise, it is obvious that they are in the traditional judicial system, that is to say the Court systems. According to the Deputy Minister, one of the solutions to the problem of resolving commercial disputes is the formation of the Commercial Division of the High Court. One of the reasons that led to the establishment of the Commercial Court was to have a place where business disputes could be resolved justly, effectively, efficiently and speedily. The traditional judicial system proved to be slow and inefficient in resolving commercial disputes. Stakeholders demanded the establishment of a specialized court which was expected to act as a catalyst for enabling the private sector to play an increasingly active role in the economic development of the country. The Commercial Court was formed as the response to this demand[36].

Though the Commercial Court was formed to resolve commercial disputes expeditiously, this object does not seem to have been attained and it is further against the philosophy of international commercial arbitration, which is based on the principle of party autonomy and minimum court intervention. Especially in the case of international commercial disputes the

[35] M.M. Chikawe, Keynote address on the occasion of the World Bank Workshop on Commercial Dispute Resolution held on 29 May 2006 at Dar es Salaam.

[36] Dr. S.J. Bwana**, (**Judge-in-charge, High Court of Tanzania, Commercial Division): 'The role of Courts in supporting financial sector reforms in Tanzania' (paper presented at a public lecture of the Tanzania Bankers Association 20 April, 2006).

only solution would be the adoption by Tanzania of the UNCITRAL Model Law on International Commercial Arbitration.

There is no rule of thumb as to what constitutes substantial adoption of the Model Law. However, commentators on international commercial arbitration suggest that, what amounts to adoption can be apparent from the arbitration laws of states that have long adopted the Model Law[37]. Principally, what can be deduced from the laws of these states is what are called 'pillars' of the Model Law, which include articles 5, 8, 16, 18, 34, 35 and 36. In addition to that, when a state desires to modify the Model Law, it should draft its statute in conformity with the general philosophies of the Model Law. First, the legislator of the state that modifies the Model Law must convey the impression that the Model Law was the basis and that amendments and additions were made and that the legislature did not merely follow its principles; secondly, at least 70% to 80% that is to say of the bulk of the Model Law provisions must be included; thirdly, the enacted Law must not contain any provisions that are incompatible with modern international commercial arbitration, for example, a provision that prohibits foreigners to be arbitrators or a mandatory provision for an appeal on errors of law.[38]

[37] Ibid, Binder 11.
[38] Ibid, Redfern & Hunter, 633.

5.0 What choices does Tanzania have in deciding to modernise its arbitration legislation

A country may give wider application to the Model Law, by applying it for both domestic and international arbitration or it may otherwise choose to adopt it for international arbitration alone and retain the existing statute for domestic arbitration. Commentators in this area of law have suggested various choices that may be taken by the adopting country. Professor Butler suggested three alternatives for Botswana in adopting the Model Law. These may as well apply for Tanzania. These alternatives are[39];

The first alternative is for the State to decide to adopt the Model Law without significant changes, for both international and domestic arbitration. This route was the one recently chosen by Zimbabwe, Kenya, Germany and India[40]. Adopting the Model Law for both domestic and international arbitrations would avoid the complexities of a dualistic system as well as the need to define when arbitration must be treated as international as opposed to domestic.

The second alternative is that recommended by the South African Law Commission for South Africa. It is also the approach in, for example, Australia, Canada, Singapore and Scotland. This is to adopt the Model Law with minimal changes for international commercial arbitration, while adopting or retaining a separate modern statute for domestic arbitration, which is considerably more detailed than the Model Law.

The third alternative is that chosen by New Zealand in 1996. New Zealand basically adopted the Model Law for both international and domestic arbitration, subject to certain minor

[39] Butler D 'Current Botswanan Arbitration Legislation: a Regional Perspective', unpublished paper delivered at a seminar arranged by the Law Society of Botswana in Francistown on 1 April 2000, para 4. Compare Butler (1994) 27 *CILSA* at 132-134.

[40] In an English-language jurisdiction, this also involves retaining the official English text of the Model Law.

additions. The English text of the Model Law is contained in the First Schedule to the Arbitration Act of 1996. The Second Schedule contains a number of additional provisions, which, in terms of section 6 of the Act, apply to all domestic arbitrations in New Zealand, unless the parties otherwise agree.

The first alternative will arguably be the best alternative for Tanzania considering the weaknesses contained in the existing arbitration Act of 1931 (R.E 2002). It has rightly been argued that adopting the Model Law for both domestic and international arbitrations would avoid the complexities of a dualistic system as well as the need to define when arbitration must be treated as international as opposed to domestic[41]. It has further been argued that[42] one of the major goals of the Model Law was to promote harmonisation, so by adopting this approach this goal will be attained. Furthermore, adopting the Model Law for both domestic and international commercial arbitration will promote Tanzania as a suitable venue for an international arbitration, in that it will be considered as having appropriate legislation for the purpose. This will in turn promote foreign investment in that the Model Law ensures court support for arbitration, even if the arbitration is being held elsewhere. Hence adoption of the Model Law with minimum changes sends out a strong signal that arbitration clauses in their agreements will, if necessary, receive the support of the local courts[43].

The second alternative is not an appropriate route for Tanzania. This approach will result into two separate statutes for domestic and international arbitrations which will be fundamentally

[41] Ibid Butler (1994) 27 *CILSA* at 135 and the South African Law Commission's Report 48-50 for a discussion of some of the complexities of the definition of "international". See also Redfern & Hunter 12-17.

[42] Butler D, 'The Need for Harmonised Arbitration and ADR legislation in the SADC Region', unpublished paper delivered at the Law Teachers Conference in Pretoria, January 2008, at 5.

[43] Ibid, Butler, 2008 Pretoria Conference paper, at 6.

different in a number of important respects hence causing uncertainties and confusion in interpretation and unnecessary complexity.

The third alternative could also be a suitable alternative to be adopted by Tanzania. This option offers greater flexibility in providing for the needs of domestic arbitration in the particular jurisdiction, without discouraging the use of the country as a venue for international commercial arbitration[44].

6.0 Conclusion

Due to a weakness of the legislation governing arbitration in Tanzania and the need of the business community to have their disputes settled expeditiously and cost effectively, the Model Law on International Commercial Arbitration is obviously the proper solution for that problem. The set-up for arbitration in Tanzania is obsolete, hence it is not supportive to international commercial arbitration. This is to a large extent the result of the archaic arbitration legislation which is out of line with modern international commercial arbitration trends.

Tanzania must choose between alternatives one and three (as discussed under part 5.0), if it wants to keep pace with modern developments in international commercial arbitration for resolving international commercial disputes. Among the reasons for this suggestion includes the fact that Tanzania has neither an established arbitration tradition nor well established and tested arbitration practices and in view of its obsolete arbitration statute, a complete revamp is required. Further, this approach has been adopted by Kenya and largely by Uganda, hence

[44]See Butler, 2008 Pretoria Conference paper, at 10.

Tanzania must follow this route so as to have a harmonised regional system of international commercial arbitration dispute settlement[45].

It can therefore be rightly argued that, adoption of the Model Law on international commercial arbitration is an inevitable requisite if Tanzania is to keep pace with modern development in commercial dispute settlement by the way of arbitration.

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[45] Tanzania, Kenya and Uganda are among the member states of the East African community, other countries include Rwanda and Burundi. The East African Community (EAC) is the regional intergovernmental organization which aims at establishing a Common Market by 2010, subsequently a Monetary Union by 2012 and ultimately a Political Federation of the East African States. (See also para 3.2 above regarding the East African Cooperation, of which only Kenya, Tanzania and Uganda are members.)

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