Tanzania Institute of Arbitrators

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Unlocking Tanzania's Arbitration Potential

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Introduction

Tanzania has a high un-exploited potential in arbitration. Business transaction within the country and with foreign entities are bound to create disputes. Furthermore, Tanzania has signed a relatively high number of Bilateral Investment Treaties (BITs), some of which could lead to disputes. It has just been served with arbitration notice by Acacia with respect to disputes on goldmines.

Unlocking Tanzania's arbitration potential would involve legal, institutional and operational changes as well as capacity-building. All that will require an appropriate strategy, time and money.

Tanzanian government and companies have been involved arbitrations nationally, regionally and internationally where they have had mixed fortunes. Only recently, on 29th September 2017, the Kenya Court of Appeal referred a dispute involving a Tanzanian company to arbitration under the Kenya Airports Authority Act s. 62 (Kenya Ports Authority v. Modern Holdings Ltd, Civil Appeal 108 of 2016 Court of Appeal, Mombasa,).

Tanzania National Roads Agency and Kundan Singh Construction Company Ltd of Kenya have been doing rounds in courts in Tanzania, Kenya, Sweden and France following an arbitration award related to the construction of a 36-kilometre Section 1 (Mbeya-Lwanjilo) trunk-road in South-Western Tanzania. A member of the 3-person dispute board, which heard the dispute prior to arbitration, is in this conference.

Many arbitration centres have been started in Africa leading to concerns about their long term sustainability, even survival. Some of them have not taken off. Kigali International Arbitration Centre (KIAC), which was started some 7 years ago while Nairobi Centre for International Arbitration (NCIA) is still at its infancy. The jury is still out on how many arbitration centres African needs. However, considering the backlog of cases in courts and the possibility of specialisation, there might be need for even more especially for domestic

arbitrations.

Tanzania's Arbitration Legal Framework

A modern arbitration law is a basic fact considered in the choice of the seat of arbitration. It cannot be overemphasised that Tanzania's arbitration law is outdated by international standards. I will not attempt to list the shortcomings of the Tanzanian Arbitration Act as that has been done elsewhere. The English Act, on which the Tanzanian Act is largely based, was subsequently revised several times,most lately in 1996, while the UNCITRAL Model Arbitration Law (MAL) of 1985 has also been revised.

Fortunately, MAL provides a modern world-class arbitration law. All a country needs to do is simply "copy and paste". However, few countries do that. Most countries make a few amendments in order to accommodate local circumstances and to reflect national aspirations. Within the East African Community, Kenya, Uganda and Rwanda have adopted MAL with amendments. Tanzania does not have to adopted MAL but it has to modernise its arbitration law to bring it in line with international best practice in arbitration law and practice.

Internationally Tanzania is "compliant" with the main international treaties on arbitration. New York Convention 1958 came into force in Tanzania on 12th January 1965 while the country has been a contracting state to the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (ICSID) of 1965 since 17 June 1992.

Embracing Institutional Arbitration

Ad hoc arbitration is where the tribunal,once appointed, is independent of any institution. It s popular in certain types of disputes particularly those involving states because none of them wishes to appear to be ceding its sovereignty to an institution, especially a foreign one. It is potentially inexpensive and allows maximum party autonomy. However, concerns have been raised about delays and the quality of awards. The lack of institutional support and oversight shows in the service which is provided in *ad hoc* arbitration. The introduction of institutional arbitration has been slow in countries where *ad hoc* arbitrations are practised due to resistance from some parties and practitoners.

In administered arbitration, an arbitral institution provides oversight, administrative support, financial services and customer-care to the Tribunal. The level of institutional control ranges widely from "medium" at the London Court of International Arbitration to "high" at the International Chamber of Commerce.

Tanzania Institute of Arbitrators (TIArb) and the National Construction Council, the two arbitral institutions in Tanzania, have embraced institutional arbitration, which is also practised at KIAC, NCIA and at CADER of Uganda. The Tanzanian institutions are on the right path.

Independent Arbitral Institutions

TIArb is an independent professional body while NCC is government owned. Government ownership makes funds available. However, parties who have claims against the government in domestic arbitration and all players in international arbitration avoid government-controlled arbitral bodies as they do with national courts: they believe that *whoever pay the piper calls the tune*. Again, TIArb is on course.

Capacity Building

Many universities now have courses on arbitration and alternative dispute resolution. Some arbitral institutions also have their own courses in arbitration, mediation, adjudication, etc. Attending one-off units in a law degree or participating in arbitration courses, workshops and conferences can supplement but cannot replace structured training.

The leading trainer in arbitration worldwide is the Chartered Institute of Arbitrators. It has unrivalled courses on domestic and international arbitration. The syllabus is very detailed, the tutors closely supervised and all tests thoroughly moderated. In addition to the assignments, lectures and tutorials, there are real-life scenarios. However, the courses are quite expensive even when offered locally. There must be a way to deliver CIArb courses or equivalent without paying enormous cost.

Arbitration Conferences

This is TIArb's inaugural arbitration conference. Congratulations to leaders and the members on this historic event.

TIA needs to get into the network which organises regional and international arbitration conferences and to explore sponsorships from corporate sector and from law firms. Individual members also need to pay the necessary costs for training themselves, if need be.

The Government Role

As pointed out above, government management and control of an arbitration centre are perceive negatively, and for good reason. However, there are numerous ways in which the

government could promote arbitration in the country.

Firstly, by ensuing that its domestic contracts provide for arbitration, and that the arbitration clauses are capable of being implemented. Consider this clause, which I found in the contract of a neighbouring country's state-owned company:

"Any dispute, difference of opinion or question which may arise at any time between the parties touching upon the construction of this Contract or the rights and liabilities of the parties with respect thereto shall be referred to the decision of a single arbitrator to be agreed upon by the parties."

The clause did not name a default appointing authority should the parties not agree on an arbitrator. That means the parties have to go to court thereby incurring costs, spending their own and crowding the court corridors, merely for the appointment of an arbitrator.

Secondly, by invoking arbitration. In the Kenya Ports Authority case above, the parties would have saved themselves about 20 years and two pots of money if it had invoked statutory arbitration in the first instance instead of defending the case in the High Court in 2008, appeal the decision in 2014 only to be referred to arbitration in 2017.

Thirdly, by taking part in arbitration. Nothing looks worse than an *ex parte* award issued against a government for lack of appearance. I understand that the Tanzanian government defended itself robustly in an arbitration in Uganda recently.

Fourthly, by paying the tribunal's fees in time. Governments frustrate arbitration by delaying or defaulting in paying tribunal fees. They cite bureaucracy and budgetary constraints. Such defaults are usually covered up by the other party paying the government's share. Governments should set good examples, not bad ones, for citizens to follow.

Fifthly, the government could promote arbitration by engaging local lawyers to represent it in international arbitration. Some of the young lawyer from London, New York and Paris posing as experts in international arbitration and in Tanzanian law had no idea where Tanzania was before they got the brief! Tanzania and African governments must engage local advocates as a way of acknowledging their expertise, retaining money locally and exposing them to the international arena.

I was proud of the Kenyan lawyers who appeared in the International Criminal Court in the Hague a few years ago. They stood up against the smartest legal minds and gave as much as

they got. Of course many of Kenya's now senior lawyers studied their law in the University of Dar Es Salaam in the 1970s. Why would the government engage foreign lawyers to represent it in arbitrations abroad? At the very least it should instruct local counsel, who would then engage foreign law firms for specific assignments – like holding brief at mentions, research work or advice in specific areas. I have no stake in the practice of law, so I can afford to talk boldly without appearing to be touting for instructions.

Sixthly, governments can also contribute to arbitration by honouring their contractual obligations. They they can be going to arbitration as the claimants, instead of always going there on the defensive. At the very least, that gives them the advantage of making the first move and having the last word, or the right of reply.

Strategic Planning

The above and other related issues need to be addressed in a systematic manner in a strategic plan. The others are: whether or not TIArb should forge a closer relationship with CIArb, possible areas of specialisation like maritime arbitration, promoting visibility and networking in regional and international for a, investing in good websites which give sufficient information on the services on offer, exploring donor funding, etc.

Conclusion

Tanzania has unexploited potential for arbitration but needs to amend its arbitration act, make institutional changes and invest in invest in capacity-building.

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