THE APPLICATION OF THE PUBLIC POLICY EXCEPTION TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN TANZANIA IN COMPARISON WITH SELECTED COMMON LAW JURISDICTIONS

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Abstract

The purpose of an arbitration agreement is that the parties should resolve their dispute amicably and through arbitration, in which case, they should readily comply with the arbitral award rendered in that arbitration process. When parties to a dispute resort to arbitration they uphold the doctrines of finality in its bindingness and enforceability of the arbitral award – i.e., they demonstrate a clear intention that the arbitral tribunal will fairly and expeditiously determine the dispute and such determination is conclusive, final, binding and enforceable. However, where the award-debtor fails to comply with the arbitral award in good faith, the award-creditor should embark on court proceedings for enforcing the arbitral award. In some instances, the court may refuse to recognise and enforce a domestic or foreign arbitral award. Such instances include where the court finds that the concerned award was made contrary to "public policy" of a given country.

This article examines refusal of recognition and enforcement of foreign arbitral awards in Tanzania on the ground of public policy as entrenched in Section 83(5)(b) of the Arbitration Act, Cap. 15 R.E. 2020. It considers the public policy exception to the enforcement of foreign arbitral awards in Tanzania by specifically looking at the scope and applicability of this exception in domestic and international arbitration law. It draws comparative cases on public policy exception to recognition and enforcement of foreign arbitral awards as applied in other selected common law countries. The article concludes that, courts should only interfere with arbitral awards when faced with extreme violations of the public policy exception; and should not use the public policy exception as an excuse to dig into the merits of the arbitral award.

Keywords: *Public policy exception, recognition and enforcement, foreign arbitral awards, arbitration law in Tanzania, international arbitration law, domestication of international arbitration treaties.*

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1.0 Introduction

This article endeavours to examine court's refusal to recognize and enforce foreign arbitral awards in Tanzania specifically on the ground of "public policy" as entrenched in Section 83(5)(b) of the Arbitration Act. Notably, public policy is also a ground for challenging an arbitral award in court.[1] Before dwelling on this subject, the article enumerates the scope of, and rationale for, recognition and enforcement of arbitral awards. It also examines the international and municipal law regime on recognition and enforcement of arbitral awards. In particular it considers the "public policy" exception to the enforcement of foreign arbitral awards in Tanzania by specifically looking at the scope and applicability of this exception in domestic and international arbitration law and practice. In order to locate it in a comparative frame, the article also examines the "public policy" exception to recognition and enforcement of foreign arbitral awards as applied in some other selected common law countries.

The article notes that the "public policy" exception to the recognition and enforcement of foreign arbitral awards in Tanzania should not be used to unreasonably prevent award-creditors from realising the fruits of their awards. This means that the exemption should be invoked sparingly as an exception to the general norm applicable in arbitration law and practice – *i.e.*, arbitral awards are categorically final, binding and enforceable as decrees of the court;[2] and, as such, their recognition and enforcement can only be refused upon exhibition of exceptional grounds such as the public policy exception.

1.1 Contextual Dissection of Arbitration

Arbitration is one of the major forms of alternative or "appropriate" dispute resolution (ADR) practised in many jurisdictions around the world. Today, arbitration is generally accepted as a mechanism for resolving disputes between foreign investors and host States;[3] and between parties to transnational commercial contracts including, other contractual relations.[4] Simply, arbitration is a process 'by which parties submit a dispute to the decision of a neutral person or persons appointed by mutual consent or in accordance with the provisions'

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1 Under Section 75(2)(g) of the Arbitration Act, "public policy considerations" are recognized as one of the criteria for challenging an arbitral award for serious irregularity. For a recent judicial consideration of this issue, *see* particularly *Marine Services v. Gas Entec, op. cit*.

2 In *Eco Swiss China Time Ltd v. Benetton International NV*, C-126/97 [1999] E.C.R. I-3092 ('*Eco v. Benetton*'), available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-126/97 (accessed 5 September 2021), the European Court of Justice propounded that: 'It is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible in exceptional circumstances.'

3 *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24 (Decision on Jurisdiction, dated 8 February 2005) ('*Plama v. Bulgaria*'), paras. 198-99.

4 Blackaby, N., *et al.*, "An Overview of International Arbitration," in Blackaby, N., *et al., Redfern and Hunter on International Arbitration* (Oxford: Oxford University Press 2009), pp. 1 – 83 (noting at p. 1 that: 'arbitration has become the principal method of resolving disputes between States, individuals, and corporations in almost every aspect of international trade, commerce, and investment.').

of the Arbitration Act.[5] In this context, parties in an investment or commercial relationship *consensually* agree to submit their dispute to 'a person whose expertise or judgment they trust.'[6] Such third party, who is called an arbitrator[7] (or arbitrators constituting an arbitral tribunal[8]), is *specifically* and *consensually* constituted by the parties to resolve their dispute in the manner they consensually agree.[9]

Arbitration is, therefore, a *consensual* ADR mechanism[10] through which parties agree[11] to settle their disputes without recourse to conventional courts.[12] This means that where there is an arbitration agreement, the court will have no jurisdiction to deal with disputes arising 'from' or 'under' or 'out of' a contract in which such arbitration agreement is contained, until the proposed arbitration remedy is fully exhausted.[13] For arbitration to take place, parties must consensually agree in an arbitration agreement to submit dispute(s) arising 'from' or 'under' or 'out of' a contract to arbitration.[14] As such, where parties have agreed to resolve their dispute through an arbitrator, the duty of the court is to refer them to such arbitrator.[15]

In the arbitration process, each party puts its respective case to the arbitrator, who listens them, considers the facts and the arguments, and then makes a

5 Section 3 of the Tanzania Arbitration Act, Cap. 15 R.E. 2020.

6 Blackaby (note 2, *op. cit*), p. 1. In *Luganuza Investment Company Ltd. v. The Trustee of Orthodox Church of Tanzania Holy Archdiocese of Mwanza,* High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 49/2020 (Unreported) ('*Luganuza v. Orthodox Church*'), it was held that the key factors that attract many parties to choose arbitration when choosing a dispute resolution mechanism are: (*i*) it saves time, (*ii*) it saves costs, and (*iii*) it saves the litigants long protracted litigation in courts of law.

7 Section 3 of the Arbitration Act (defining an arbitrator as 'a person who handles arbitration disputes in the manner provided under this Act.').

8 Ibid (defining an "arbitral tribunal" as a 'sole arbitrator or a panel of arbitrators' constituted by the parties to resolve their dispute).

9 Mashamba, C.J., *International Arbitration in East Africa* (Dar es Salaam: LexLaw Publishers and Dispute Resolution and Management Ltd., 2021).

10 *Louis Dreyfuls Commodities Tanzania Ltd. v. Roko Investment Tanzania Ltd.* [2017] TLS LR 588 (CAT) ('*Dreyfuls v. Roko*').

11 *Luganuza Investment Company Ltd.* (note 4, *op. cit*) (holding that arbitration is founded on the parties' autonomy/freedom to choose the mode, the law and a forum for dispute resolution). *See* also *Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd. & Nyota Tanzania Ltd.,* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 98 of 2016 (Unreported) ('*Sunshine Furniture v. Maersk*').

12 In *Construction Engineers and Builders Ltd. v. Sugar Development Corporation* [1983] TLR 13 ('*C.E.& B. v. S.D.C.*'), the Court of Appeal of Tanzania held that where the parties to a contact have agreed to submit all disputes or differences arising under the contract to an arbitrator, the dispute must go to arbitration, unless there is good reason to justify the court to override the agreement of the parties. Similarly, in *Shamji v. Treasury Registrar Ministry of Finance* [2002] 1 EA 273 ('*Shamji v. Treasury Registrar*'), the court held that the doctrine of the sanctity of the arbitration agreement requires that where parties have agreed to resolve their dispute through an arbitrator, the duty of the court is to refer them to such an arbitrator. *See* also Greenwood, L., "The Rise, Fall and Rise of International Arbitration: A View from 2030" (2011) 77 *Arbitration* 435-441 (London: Sweet & Maxwell, 2011), p. 435.

13 *Icea Lion General Insurance Co. Ltd. & Another v. Fortunatus Lwanyatika Masha,* High Court of Tanzania at Mwanza, Civil Appeal No. 17/2019 (Unreported) ('*Icea v. Masha*').

14 *Dreyfuls v. Roko*, *op. cit*.

15 *Shamji v. Treasury Registrar*, *op. cit*. *See* also *Cable and Wireless v. IBN United Kingdom Ltd* [2002] EWHC 2059 ('*Cable v. IBN*') (holding that*: 'for the courts to decline to enforce contractual references to ADR on the grounds of intrinsic uncertainty would be to fly in the face of public policy, as expressed in the CPR and as reflected in the judgement of the Court of Appeal in Dunnett and Railtrack [2002] EWCA Civ 303.*').

decision.[16] In principle, such decision is final and binding on the parties[17] in that 'they have agreed that it should be, rather than because of the coercive power of any State.'[18] For that matter, arbitration is 'an effective way' of obtaining a quick, final, binding, and enforceable decision on a dispute or series of disputes, 'without reference to a court of law.'[19]

The fact that arbitration is resorted to by the parties freely and consensually means that a party against whom an arbitral award has been made should honour it in good faith as soon as it is made.[20] This notion is founded on the doctrines of finality,[21] bindingness,[22] and enforceability[23] of the arbitral awards. As the court held in *TANESCO v. Dowans*,[24] by submitting themselves to arbitration, parties demonstrate a clear intention that the arbitral tribunal will determine the matter and such determination is conclusive, final, binding and enforceable. This is so because the purpose of an arbitration agreement is that the parties should resolve their dispute amicably through arbitration,[25] in which case they should readily comply with, and honour, the arbitral award rendered in that arbitration process.

However, in many cases, award-debtors do not willingly honour arbitral awards; hence, the need arises for the award-creditor to embark on proceedings

16 Blackaby (note 2, *op. cit*), p. 1.

17 Section 65 of the Arbitration Act. In *Luganuza Investment Company Ltd.* (note 4, *op. cit*), it was held that where parties to a contract choose to subject themselves to the arbitration process, they are subjecting themselves to the process which may be legally binding to them and may impact on their rights.

18 Blackaby, *op. cit*, p. 1.

19 *Ibid*.

20 *Ketankumar Vinubhai Patel (Sole Arbitrator) v. Ramanlal Motibhai Patel,* High Court of Tanzania at Dar es Salaam, Misc. Civil Cause No. 444 of 2020 (Unreported) ('*Patel v. Patel*').

21 Under Section 65(1) of the Arbitration Act, an award made by the arbitral tribunal pursuant to an arbitration agreement 'shall, unless otherwise agreed by the parties, be final and binding to both parties and to any person claiming through or under them.' *See* also *Ubungo Plaza Ltd. v. Blue Pearl Hotels &. Apartments Ltd*., High Court of Tanzania (Commercial Division) (Misc. Commercial Cause No. 145 of 2014) (Unreported) ('*Ubungo Plaza v. Blue Pearl Hotels*'), where the court held that the rule of finality and conclusiveness of arbitral proceedings militates against the court interfering with arbitral awards. *See* also *Travelport International Ltd. v. Precise Systems Ltd.,* High Court of Tanzania (Commercial Division), Misc. Commercial Application No. 359/2011 (Unreported) ('*Travelport v. Precise Systems*').

22 *Ibid*, Section 65(1).

23 *Ibid*, Section 73(1) (providing that an arbitral award made by the arbitral tribunal pursuant to an arbitration agreement 'may, by leave of the court, be enforced in the same manner as a judgment or order of the court.'). According to Section 83(1) of the Arbitration Act, a domestic arbitral award or foreign arbitral award 'shall be recognised as binding and enforceable' upon application in writing to the court. In *United Republic of Tanzania v. Sunlodges BVI & Sunlodges Tanzania Ltd.,* High Court of Tanzania at Dar es Salaam, Misc. Civil Cause No. 373B/2020 (Unreported) ('*Tanzania v. Sunlodges*'), it was held that an award is executable from the date on which it is received in court; and, if it is not opposed or challenged, it is capable of being enforced as a decree of the court. *See* also *Tanzania Cotton Marketing Board v. Cogecot Cotton Company SA* [2004] T.L.R. 133 ('*TCMB v. Cogecot*').

24 *TANESCO v. Dowans Holdings SA (Costa Rica) & Another,* High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 8/2011 (Unreported) ('*TANESCO v. Dowans*').

25 *See*, for example, *M/S Marine Services Co. Ltd. v. M/S Gas Entec Company Ltd*. Consolidated Misc. Commercial Cause Nos.25 & 11/2021: High Court of Tanzania (Commercial Division) (Unreported) ('*Marine Services v. Gas Entec*').

for enforcing the arbitral award.[26] Notably, it is a common practice that, in certain circumstances,[27] the court may refuse to recognise and enforce a domestic or foreign arbitral award. Such circumstances include where the court finds that an award, be it domestic or foreign, was made contrary to "public policy".[28]

2.0 The Scope of Recognition and Enforcement of Arbitral Awards

It is common ground that a party against whom an arbitral award has been made should honour it as soon as it is made.[29] It is a fundamental principle of arbitration law and practice that parties to arbitral proceedings are obliged to live to, and abide by, the agreed terms and conditions as they appear in the final award.[30] This is so because the purpose of an arbitration agreement is that the parties should resolve their dispute amicably through arbitration in which case, they should freely comply with, and honour, the arbitral award rendered in that arbitration process. But, in many cases, award-debtors do not do so; hence, award-creditors are compelled to embark on proceedings for the recognition and enforcement of arbitral awards in courts of law.[31] In many jurisdictions, including Tanzania, recognition and enforcement of an arbitral award take place after all post-award proceedings are concluded.[32]

2.1 The Rationale for Recognition and Enforcement of Arbitral Awards

Like in ordinary civil proceedings, the enforcement of an arbitral award in arbitral proceedings is very crucial. In principle, the enforcement of an arbitral award seeks to ensure that award-creditors realize their entitlements as awarded by the arbitral tribunal. The general rule is that, after the arbitral award is rendered, it is supposed to be recognised and voluntarily complied with by the concerned party or parties (*i.e.*, "the award-debtor") without delay.[33]

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26 *Dreyfuls v. Roko*, *op. cit*, p. 148.

27 Whereas Section 83(2) of the Arbitration Act sets out the circumstances in which the recognition and enforcement of a domestic arbitral award may be refused by the court, Section 83(4) and (5) sets out the circumstances in which the recognition and enforcement of a foreign arbitral award may be refused by the court. *See* also *A-One Products & Bottlers Ltd. v. Guanzou Techlong Packaging Machinery Co. Ltd. & Another*, High Court of Tanzania (Commercial Division). Misc. Commercial Cause No. 410/2017 (Unreported) ('*A-One Products v. Guanzou Techlong*'); and *Luganuza v. Orthodox Church*, *op. cit*.

28 Domestically, the public policy exception to the recognition and enforcement of arbitral award is contained in Section 83(5)(b) of the Arbitration Act. Internationally, this exception is enshrined in, *inter alia,* Article V(2)(b) of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly known as "the New York Convention"), which was adopted by the United Nations Diplomatic Conference on 10 June 1958; Article 52(1)(c) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted in 1965) ('the ICSID Convention'); and Article 5(2)(b) of the Inter-American Convention on International Commercial Arbitration, which was concluded at Panama City on 30 January 1975 ('the 1975 Panama Convention').

29 *Patel v. Patel, op. cit*.

30 *Ibid*.

31 *Dreyfuls v. Roko*, op. cit, p. 148.

32 *See*, for example, Section 36 of the Uganda Arbitration and Conciliation Act, Cap. 4 of the Laws of Uganda.

33 *See*, for example, Article 53(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted in 1965) ('ICSID Convention') (providing in part that: 'Each party shall abide by and comply with the terms of the award.'); and Rule 36(2) of the East African

However, where it is not voluntarily honoured, the award-creditor will have to commence enforcement proceedings in court to execute the award. As noted below, such recognition and enforcement proceedings are commenced by filing the award in court for execution.[34] In Tanzania, the act of filing an award in court for registration transforms the privately conducted arbitral proceedings into a fully enforceable decree of the court.[35]

Usually, in international arbitration, the award-creditor may seek to enforce an arbitral award outside the arbitral seat; and, in most cases, against foreign assets.[36] This then needs an international law protection of the award-creditor while seeking to enforce the award in such situation.[37] In case of a domestic arbitral award, enforcement is sought in the country where it was rendered (*i.e.*, the nationality of an award), although such award may also be enforced in another country as a foreign arbitral award in terms of the New York Convention, other international arbitration treaties,[38] and domestic legislation of that country.[39]

2.2 The International Legal Regime for Recognition and Enforcement of Foreign Arbitral Awards

Generally, the international legal regime for the enforcement of arbitral awards is contained in the New York Convention as well as other international

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Court of Justice (EACJ) Arbitration Rules, 2012 (stipulating that: 'By submitting the dispute to arbitration under Article 32 of the Treaty, the parties shall be deemed to have undertaken to implement the resulting award without delay.'). *See* also *Patel v. Patel, op. cit*).

34 Regulation 51(4) of the Arbitration (Rules of Procedure) Regulations, GN. No. 146 of 2021 ('GN. No. 146/2021'). *See* also *Voltalia Portugal S.A. v. Nextgen Solawazi Ltd.*, High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 7/2020 (Unreported) ('*Voltalia v. Nextgen*').

35 *Luganuza v. Orthodox Church*, op. cit.

36 Born, G.B., *International Arbitration: Law and Practice* (2nd edn.) (The Hague: Kluwer Law International, 2016), p. 375.

37 The international law regime on the recognition and enforcement of arbitral awards is set in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in 1958) ('the New York Convention'), other international arbitration treaties (including the ICSID Convention, and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, adopted by the United Nations Commissionon International Trade Law (United Nations documents A/40/17, annex I and A/61/17)), with amendments as adopted in 2006 ('the UNCITRAL Model Law on International Commercial Arbitration').

38 For example, the ICSID Convention; and the UNCITRAL Model Law on International Commercial Arbitration.

39 *See* particularly Article III of the New York Convention (providing in part that: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.'). This provision is domesticated in Sections 73 and 83 of the Tanzania Arbitration Act (as elaborated further in Regulation 66 of GN No. 146/2021); Sections 36 and 37 of the Kenya Arbitration Act, Cap. 89 of Laws of Kenya; Section 9 (Articles 5-51) of Law N° 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters (Rwanda); Sections 39-43, and 45-47 of the Uganda Arbitration and Conciliation Act (respectively providing for the recognition and enforcement of arbitral awards made pursuant to the New York Convention and the ICSID Convention in Uganda); and the Canada International Commercial Arbitration Act, 2017, SO 2017, *c* 2, *Sch* 5.

arbitration treaties.[40] Specifically, Tanzanian domestic legislation on arbitration contains a robust "pro-enforcement" legal regime for recognizing and enforcing arbitral awards in its jurisdiction, as considered below. For that matter, Tanzania is striving to establish a "pro-enforcement" legal regime for recognizing and enforcing both domestic and international arbitral awards.[41] This "pro-enforcement" legal regime is also reflected in the Treaty Establishing the East African Community ('the EAC Treaty'),[42] the EAC Arbitration Rules (2012) and institutional arbitration rules that have incorporated the key principles of recognition and enforcement of arbitral awards (whether foreign or domestic) in their respective areas of practice.[43]

In Tanzania, the applicable international law regime on the recognition and enforcement of foreign or non-domestic arbitral awards is basically framed in the New York Convention, and other international arbitration treaties (including the ICSID Convention, and the UNCITRAL Model Law). The application of these instruments in the recognition and enforcement of foreign arbitral awards in Tanzania is considered below.

2.2.1 The Application of the New York Convention in Recognising and Enforcing Arbitral Awards in Tanzania

The New York Convention,[44] which has been ratified and domesticated by Tanzania,[45] seeks to provide common legislative standards for the recognition of arbitration agreements as well as the recognition and enforcement of foreign and non-domestic arbitral awards by national courts. Its principal aim is that foreign and non-domestic arbitral awards should not be discriminated against in the process of enforcement. The New York Convention also obliges States parties to ensure foreign arbitral awards are recognized and are generally capable of enforcement in their jurisdictions in the same way as domestic arbitral awards.[46]

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40 *See* particularly Articles 53 and 54 of the ICSID Convention; and the UNCITRAL Model Law on International Commercial Arbitration.

41 *See* particularly Sections 73, and 83-84 Arbitration Act; Section 33 of the Tanzania Investment Act (2022); and Regulation 66 of GN.No.146/2021.

42 Article 32 of the EAC Treaty.

43 Some arbitration institutions in Tanzania have adopted their own arbitration rules. *See*, for example, the National Construction Council (NCC) Arbitration Rules of 2001 (revised in 2007); the Tanzania Institute of Arbitrators (TIArb) Arbitration Rules of 2018; and the Tanzania International Arbitration Centre (TIAC) Arbitration Rules of 2021. *See* also GN. No. 146/2021

44 *A-One Products v. Guanzou Techlong*, op. cit (holding that the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards is part of Tanzanian law on recognition and enforcement of foreign arbitral awards).

45 Tanzania ratified the New York Convention on 12 January 1965. Available at https://www.newyorkconvention.org/ implementing+act+-+united+republic+of+tanzania (accessed 1 September 2021).

46 Article III of the New York Convention.

As a secondary aim, the Convention requires domestic courts in Contracting States to give full effect to arbitration agreements by requiring domestic courts to deny the parties' access to court in contravention of their agreement to refer the matter to an arbitral tribunal.[47] The Convention obliges each Contracting State to recognize foreign arbitral awards 'as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon', under the conditions laid down in the Convention.[48] In domesticating the New York Convention, the doctrines of finality, bindingness and enforceability of arbitral awards are respectively set out in Sections 65, 73 and 84 of the Tanzania Arbitration Act.[49]

The New York Convention's obligation imposed on courts of Contracting States to recognize and enforce foreign arbitral awards has been entrenched in Section 83 of the Tanzania Arbitration Act and procedurally elaborated in Regulation 66 of GN. No. 146/2021. In an application for recognition and enforcement of a foreign arbitral award, the applicant is obliged to demonstrate: (*i*) that the recognition and/or enforcement is sought of an arbitral award;[50] (*ii*) arising from a "commercial" relationship;[51] and (*iii*) a "defined legal" relationship;[52] (*iv*) the award is a "foreign" or "non-domestic" award;[53] and (*v*) any reciprocity requirements are satisfied.[54]

However, courts may refuse to recognize and enforce foreign arbitral awards on both substantive and procedural grounds enumerated in Article V of the

47 Ibid. *See* particularly Article II(3) of the New York Convention. In several occasions, Tanzania courts have upheld this principle. *See* particularly *A-One Products v. Guanzou Techlong*, *op. cit*); *Dreyfuls v. Roko*, *op. cit*; *Travelport v. Precise Systems*, *op. cit*; *Shamji v. Treasury Registrar*, *op. cit*; and *TCMB v. Cogecot*, *op. cit*.

48 Article III of the New York Convention.

49 *See* particularly *Luganuza v. Orthodox Church*, *op. cit*; *Ubungo Plaza v. Blue Pearl Hotels*, *op. cit; Travelport v. Precise Systems*, *op. cit*; *Tanzania v. Sunlodges*, *op. cit*; and *TCMB v. Cogecot*, *op. cit*.

50 Whereas Article I(1) provides that the New York Convention applies to the 'recognition and enforcement of arbitral awards", Article III deals only with "arbitral awards".

51 Notably, Article I(3) of the New York Convention applies 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.' This is equally applicable to an arbitral award. *See* also Article 1(1) of the UNCITRAL Model Law.

52 Article II(3) of the New York Convention requires that an arbitration Agreement should be 'in respect of a defined legal relationship, whether contractual or not". This is equally applicable to an arbitral award. *See* also Article 7 of the UNCITRAL Model Law.

53 Article I(1) of the New York Convention states categorically that:
'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

54 Article I(3) of the New York Convention allows Contracting States to make "reciprocity reservations" – *i.e.* undertaking the Convention's obligations only towards other Contracting States. It provides, in part, that:
'any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.' A more general reciprocity provision is set out in Article XIV, which states that:
'A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.'

New York Convention. This provision has been domesticated in Section 83(2), (4) and (5) of the Tanzania Arbitration Act. In particular, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that:

(i) The parties to the agreement referred to in Article II were, under the law applicable to them, 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;[55]

(ii) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present his case;[56]

(iii) The award deals with a difference 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. However, 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 recognized and enforced;[57]

(iv) The composition of the arbitral authority 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;[58] or

(v) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[59]

In addition, recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(i) The subject matter of the difference is not capable of settlement by arbitration under the law of that country;[60] or

(ii) The recognition or enforcement of the award would be contrary to the public policy of that country.[61]

55 *Ibid*, Article V(1)(a).
56 *Ibid*, Article V(1)(b).
57 *Ibid*, Article V(1)(c).
58 *Ibid*, Article V(1)(d).
59 *Ibid*, Article V(1)(e).
60 *Ibid*, Article V(2)(a).
61 *Ibid*, Article V(2)(b).

Although the New York Convention is the bedrock of recognition and enforcement of foreign arbitral awards around the world, it does not provide a detailed procedure on how recognition and enforcement can be dealt with in domestic courts. It leaves that to the mercy of the municipal arbitration laws of a particular enforcing State, in which case (as some commentators argue[62]) a successful party may 'suffer injustice and even fail to enforce a foreign award where the domestic law is not pro-enforcement.'[63]

In principle, some of the matters not dealt with by the New York Convention and that a party seeking enforcement must be informed of include: firstly, whether the arbitral award will be enforced by a court or which procedure to be followed; and, secondly, the conditions or fees that may be charged and how they relate to those imposed on the recognition or enforcement of domestic awards in the country of enforcement.[64] Indeed, such matters involve additional expenses in hiring local lawyers which 'might occasion unnecessary delay defeating the whole purpose of arbitration in the first place.'[65]

2.2.2 The ICSID Convention and Enforcement of Foreign Arbitral Awards in Tanzania

The ICSID Convention, to which Tanzania is a State party,[66] applies to investment disputes between States and nationals of other States. It strives to encourage cross-border investments in developing States by providing an effective means of enforcing contractual rights in situations of disputes between Host States (including their agencies or firms), on the one hand, and "covered" investors and investments, on the other hand.[67] In terms of recognition and

62 Kariuki, F., "Challenges Facing the Recognition and Enforcement of International Arbitral Awards within the East African Community," a paper that was originally presented at a Conference on Commercial Private International Law in East and Southern Africa on 15 September 2015 at the Research Centre for Private International Law in Emerging Countries, Faculty of Law, University of Johannesburg, South Africa.

63 Ibid. *See* also Opiya, R., "Recognition and Enforcement of International Arbitral Awards: A Comparative Study of Ugandan and UK Law and Practice", LL.M Thesis, Oxford Brookes University, 2012, p. 36.

64 Rana, R., "The Tanzania Arbitration Act: Meeting the Challenges of Today with Yesterday's Tools?" *Alternative Dispute Resolution Journal*, Vol. 2, 2014, pp. 234.

65 Kariuki, *op. cit*.

66 Tanzania deposited its instrument of ratification of the ICSID Convention on 18 May 1992 having signed it on 10 January 1992 and the Convention entered into force for Tanzania on 17 June 1992. For the list of contracting States to the ICSID Convention, see particularly ICSID, "Database of ICSID Member States"; available at ttps://icsid.worldbank.org/about/member-states/database-of-member-states (accessed 8 December 2023).

67 A "covered" investment means, with respect to a State Party to an international investment agreement (IIA), an investment in its territory of an investor of the other Party in existence as of the date of entry into force of the said IIA or established, acquired or expanded thereafter and which, where applicable, has been admitted according to its laws and regulations. *See* Yeğinsu, C. and C. Mulderrig, "Covered Investment," in Legum, B. (ed), *The Investment Treaty Arbitration Review* (4th edn.) (London: Law Research Ltd., 2019), pp. 3-16. For a discussion on the ICSID Convention, *see* particularly Schreuer, C., "Commentary on the ICSID Convention," *ICSID Review - Foreign Investment Law Journal*, Vol. 11, Issue 2, Fall 1996, pp. 318–492. Available at https://doi.org/10.1093/icsidreview/11.2.318 (accessed 21 August 2023). According to Partick W. Pearsall and David Manners-Weber, "covered investors" are (1) persons (either natural or juridical) (2) with the requisite nationality who (3) have control over an investment that is entitled to

enforcement of arbitral awards emanating from the ICSID Convention-related arbitral proceedings, the relevant provisions are Articles 53 and 54 of the ICSID Convention.

In particular, an arbitral award[68] rendered under the auspices of the ICSID is binding on the parties.[69] In addition, every State Party to the ICSID Convention is obliged to abide by, and comply with, the terms of (and the pecuniary obligations imposed by) the award, except to the extent that enforcement shall have been stayed by way of revision[70] or annulment.[71] Each Contracting State is obliged to recognize an award rendered pursuant to the ICSID Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were '*a final judgment of a court in that State*.'[72] Where a Contracting State has a federal constitution, it may enforce such an award in or through its federal courts and 'may provide that such courts shall treat the award as if it were a *final judgement of the courts* of a constituent state.'[73]

In order to smoothly discharge its international law obligation under the ICSID Convention, each Contracting State is obliged to designate[74] (and notify the ICSID's Secretary-General of the designation of) a competent court[75] or other authority for the purpose of recognition and enforcement of arbitral awards made pursuant to the ICSID Convention.[76] Tanzania has designated, by law, the High Court as the competent court in relation to international arbitration.[77] If there is any subsequent change in such designation, notification has also to be made in the same manner.[78]

Like the New York Convention, the ICSID Convention leaves the procedure for execution of ICSID-seated arbitral awards to be governed by the laws concerning the execution of judgments in force in the State in whose territories

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protection under a given IIA. *See* Pearsall, P.W. and D. Manners-Weber, "Covered Investor," in Legum, B. (ed), *The Investment Treaty Arbitration Review* (4th edn.) (London: Law Research Ltd., 2019), pp. 17-25, at p. 17.

68 In terms of Articles 53(2) of the ICSID Convention, "award" as used in Article 53 includes 'any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.'

69 *Ibid*, Article 53(1).

70 *Ibid*, Article 51.

71 *Ibid*, Article 52.

72 *Ibid*, Article 54(1).

73 *Ibid*.

74 *Ibid*, Article 54(2) (stating that: 'A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General.').

75 Under Section 6(1)(b) of the Tanzania Arbitration Act, the court with competent jurisdiction to deal with any matter, including recognition and enforcement of awards in relation to international arbitration, is the High Court in the exercise of its ordinary original civil jurisdiction.

76 Article 54(2) of the ICSID Convention.

77 Under Section 6(1)(b) of the 2020 Arbitration Act, the term "court", in relation to international arbitration, means 'the High Court in the exercise of its ordinary original civil jurisdiction.'

78 Article 54(2) of the ICSID Convention.

such enforcement is sought.[79] This poses certain risks of non-enforcement of arbitral awards made pursuant to the ICSID,[80] including national court's reluctance to enforce such awards as decrees of the court on various grounds as it happened in relation to *SCB-HK v. TANESCO*[81] and *Sunlodges v. Tanzania.*[82] Accordingly, such an approach by domestic courts 'poses serious concerns for potential foreign investors about [the State's] willingness to comply with its obligations under the ICSID Convention.'[83] As such, a proposal has been made for reviewing the ICSID Convention with a view to developing therein a framework for the recognition and enforcement of awards instead of leaving it to the domestic courts, which might lead to unnecessary delays and abuses.[84]

2.2.3 The Role of the UNCITRAL Model Law in the Enforcement of Arbitral Awards in Tanzania

Like other countries in East Africa (with the exception of Burundi), Tanzania has aligned its current Arbitration Act with the UNCITRAL Model Law,[85] which strives to reduce the discrepancy in domestic procedural laws affecting international commercial arbitration. The Model Law mainly aims at ensuring that resort to arbitration brings about greater predictability, objectivity and certainty, thereby outlining essential elements of a favourable legal framework

79 *Ibid*, Article 54(3).

80 Kariuki, *op. cit*.

81 In *Standard Chartered Bank (Hong Kong) Ltd. v. Tanzania Electric Supply Company*, ICSID Case No. ARB/10/20 (*'SCB-HK v. TANESCO'*), while the matter was still pending at the ICSID, the Tanzanian High Court issued an injunction ordering the parties to an ICSID arbitration against Tanzania to refrain from 'enforcing, complying with or operationalizing' the ICSID tribunal's "Decision on Jurisdiction and Liability" of 12 February 2014. According to Kariuki, ibid, the court's order 'appears to have violated Tanzania's obligation under the ICSID Convention to enforce any ICSID award as a final judgment of its own courts.'

82 In *Sunlodges BVI & Sunlodges Tanzania Ltd. v. United Republic of Tanzania,* PCA Case No. 2018-9 (award dated 20 December 2019) *('Sunlodges v. Tanzania')*, the arbitral proceedings were filed before a tribunal constituted under the Agreement between the United Republic of Tanzania and the Italian Republic on the Promotion and Protection of Investments dated 21 August 2001 ('the Tanzania-Italy BIT') and under the UNCITRAL Arbitration Rules, 1976. Subsequently, the tribunal rendered its award in favour of the Italian investor, prompting its challenge in the High Court of Tanzania in *Tanzania v. Sunlodges,* op. cit. Although on 9 November 2021 the High Court of Tanzania set aside the award in what seems to be an academic exercise, the two investors successfully initiated recognition and enforcement proceedings in Ontario, Canada, where the Arbitral Award was recognized and given full force and effect in Ontario pursuant to the Canadian International Commercial Arbitration Act, 2017, SO 2017, *c* 2, *Sch* 5. *See*: *Sunlodges Ltd. & Sunlodges (T) Ltd. v. The United Republic of Tanzania,* Court File No.: CV-20-00648370-00CL: Ontario Superior Court of Justice Commercial List (order dated 29 January 2021) available at ttps://jusmundi.com/en/document/decision/ en-sunlodges-ltd-and-sunlodges-t-limited-v-the-united-republic-of-tanzania-order-of-the-ontario-superior-court-of-justice-friday-29th-january-2021#decision_15861 (accessed 7 August 2023). Subsequent to this order, the Ontario court made a freezing order by attaching movable property belonging to Tanzania located in Canada. Consequently, on 22 April 2021, the Ontario Superior Court of Justice lifted the freezing order obtained by Sunlodges and its subsidiary against Tanzanian property in Canada after Tanzania had satisfied the award quantum. *See* "*GAR* Covers Steptoe's Success in $22M Judgment Enforcement Against Tanzania", 3 May 2021. Available at https://www.steptoe.com/en/news-publications/ gar-covers-steptoes-success-in-dollar22m-judgment-enforcement-against-tanzania.html (accessed 7 October 2023).

83 Kariuki, *op. cit*.

84 Opiya, *op. cit*.

85 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (accessed on 3 September 2021).

for the conduct of arbitral proceedings. Aimed at avoiding uncertainty in domestic arbitration laws and practices, such essential elements include: arbitration agreement;[86] composition of the arbitral tribunal;[87] jurisdiction of the arbitral tribunal;[88] issuance of interim measures;[89] conduct of arbitral proceedings;[90] making of arbitral awards and termination of proceedings;[91] setting aside of arbitral awards;[92] as well as conditions for recognition and enforcement of awards and grounds for refusing recognition or enforcement.[93]

In terms of recognition and enforcement of arbitral awards, Article 35(1) of the UNCITRAL Model Law provides that an arbitral award, irrespective of the country in which it was made, 'shall be recognized as binding.' And, upon application in writing to the competent court, such award should be enforced subject to the conditions laid down in Article 36 of this treaty.[94] This provision is reflected in Section 83(1) of the Tanzania Arbitration Act as procedurally elaborated in Regulation 66 of GN. No. 146/2021.

3.0 Enforcement of Arbitral Awards in Tanzania

As noted above, the Tanzanian arbitration legislation contains specific provisions on the enforcement of arbitral awards.[95] As it was stated by the court

86 Articles 7-9 of the UNCITRAL Model Law on International Commercial Arbitration.
87 *Ibid*, Articles 10-15.
88 *Ibid*, Article 16.
89 *Ibid*, Articles 17 and 17A-17J.
90 *Ibid*, Articles 18-27.
91 *Ibid*, Articles 28-33.
92 *Ibid*, Article 34.
93 *Ibid*, Articles 35-36.
94 According to Article 36(1) of the UNCITRAL Model Law, recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: '(*a*) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
(i) a party to the arbitration agreement referred to in article 7 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; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
(*b*) if the court finds that:
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.'
95 *See* Sections 73, and 83-84 Arbitration Act, and Regulation 66(3) of the Arbitration (Rules of Procedure) Regulations, GN.No.146/2021.

in *TANROADS v. Kundan Singh,*[96] by ratifying and domesticating the New York Convention and other relevant international arbitration treaties, a State is required to recognise and enforce a foreign arbitral award irrespective of the State in which it was made. Again, in *Claus Bremer v. Chief Court Administrator,*[97] the court held that; it is trite law in Tanzania that once an award is issued (unless the other party pays the amount awarded to the award creditor immediately thereafter without further hustles) 'it is the duty of the party in whose favour it was decided to cause the Arbitrator to have the award filed in court of competent jurisdiction, if that party wants to have it enforced as a Decree of the Court.'

As clearly stipulated in Section 65 of the Arbitration Act, the effect of an arbitral award is that it is 'final and binding to both parties and to any person claiming through or under them,' unless otherwise agreed by the parties. Such an award is only enforceable or executable upon the court is satisfied that it is enforceable, in which case it will be deemed to be a decree of the court.[98] Courts in Tanzania have held time and again that an arbitral award alone cannot be enforced if it is not converted into a decree by a court order, and an order alone without the award would not amount to a decree.[99] That is, an arbitral award, having been filed in court, must be tabled before a judge or magistrate, as the case may be, who will make the necessary order to render it a decree of the court. Notably, where the award is filed for registration in the court, the Registrar is not empowered to order it to be an enforceable decree; rather, it is a Judge or Magistrate who is empowered to render the award a decree of the court.[100]

Although Tanzania has recently enacted a robust arbitration law, the manner of filing an arbitral award in court for registration, and hence enforcement, under the current Arbitration Act is similar to the one that was set out in the repealed law.[101] Under both the repealed and current arbitration laws, there are two *alternative* ways of filing the award in court for registration:[102] firstly, the arbitral tribunal, at the request of any party to the award or any *person claiming under him or her*, is *obliged* to *cause* to be filed in court an arbitral award for registration as a court decree;[103] or, secondly, the arbitral tribunal *may,* in a letter

96 *Tanzania National Roads Agency v. Kundan Singh Construction Ltd.,* Misc. Civil Application No. 176 of 2012 (reported as *Tanzania National Roads Agency v. Kundan Singh Construction Ltd.* [2013] eKLR) ('*TANROADS v. Kundan Singh*').

97 *Claus Bremer Associates Ltd. v. The Office of Chief Court Administrator, Judiciary of Tanzania* High Court of Tanzania (Commercial Division), Misc. Commercial Application No. 50/2020 (Unreported) ('*Claus Bremer v. Chief Court Administrator*').

98 Section 84 of the Arbitration Act.

99 *Ardhi University v. Kiundo Enterprises (T) Ltd.,* High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Cause No. 272/2015 (Unreported) ('*Ardhi University v. Kiundo*').

100 Ibid.

101 *Voltalia v. Nextgen*, *op. cit*. For a discussion on this matter, *see* particularly *TCMB v. Cogecot*, *op. cit*.

102 *Ibid*.

103 Section 12(2) of the repealed Arbitration Act; and Regulation 51(4) of GN. No. 146/2021.

transmitting the arbitral award to the parties, *allow any party* to the proceedings to file a certified copy of the award together with the proceedings thereof with the court for the purposes of registration of the same.[104]

The current Arbitration Act has introduced a two-tier judicial avenue through which a party may commence proceedings for enforcement of an arbitral award: in case of foreign arbitral awards, enforcement proceedings are filed in the High Court,[105] and, in case of domestic awards such proceedings may be commenced in the District Court, the Court of the Resident Magistrate, or the High Court[106] depending on the pecuniary jurisdiction of the respective court. Such filing for registration of an arbitral award is done by *writing a letter* to the Registrar of the relevant High Court Registry or Resident Magistrate in-charge of either the respective District Court or Court of Resident Magistrate.[107] The letter should be accompanied with certified copies of the award together with the evidence on reference and the minutes of the proceedings. As such, the receipt of the award by the court registry constitutes the filing of the award.[108] In addition, the filing is done upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award.[109] Notably, a notice of the filing must be given to the parties by the arbitrators.[110]

It should be noted that the period of limitation for filing and registration of an arbitral award for enforcement is six months.[111] This means that an award filed out of time should be dismissed in terms of Section 3 of the Law of Limitation Act.[112] However, a party may, in terms of Section 14(1) of the Law of Limitation Act, make an application in court for extension of time to file for registration of an arbitral award out of time upon sufficient cause being exhibited.[113] Notably,

104 Regulation 51(5) of GN. No. 146/2021.

105 Under Section 6(1)(b) of the Arbitration Act, the term "court", in relation to international arbitration, means 'the High Court in exercise of its ordinary original civil jurisdiction.'

106 In terms of Section 6(1)(a) of the Arbitration Act, the term "court", in relation to domestic arbitration, means 'the district court, resident magistrate's court, the High Court in exercise of its ordinary original civil jurisdiction.'

107 *Voltalia v. Nextgen*, *op. cit*.

108 *Ardhi University* (note 93, *op. cit*).

109 Regulation 51(4) of GN. No. 146/2021; and *Voltalia v. Nextgen*, *op. cit*.

110 Regulation 51(4) of GN. No. 146/2021.

111 *See* particularly item 18 of the first column of the First Schedule, Part III of the Law of Limitation Act, Cap. 89 R.E. 2019. *See* also *Kigoma/Ujiji Municipal Council v. Nyakirang'ani & Construction Ltd.,* High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Cause No 239/2015 (Unreported) ('*Kigoma/Ujiji v. Nyakirang'ani*'); *Siemens Ltd. & Another v. Mtibwa Sugar Estates,* High Court of Tanzania (Commercial Division) at Dar es Salaam Misc. Commercial Cause No. 247/2015 (Unreported) ('*Siemens v. Mtibwa Sugar*'); and *Bogeta Engineering Ltd. v. Nanyumbu District Council*., High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 9/2019 (Unreported) ('*Bogeta v. Nanyumbu DC*').

112 Cap. 89 R.E. 2019. *See* also *Siemens v. Mtibwa Sugar, ibid*.

113 *Claus Bremer v. Chief Court Administrator, Judiciary*, *op. cit*; *Lyamuya Construction Company Ltd. v. Board of Registered Trustees of Young Women's Christian Association of Tanzani*a, Court of Appeal of Tanzania, Civil Appl. No. 2/2010 (Unreported) ('*Lyamuya v. YWCA*'); *Wambele Mtimwa Shahame v. Mohamed Hamis*, Court of Appeal of Tanzania, Civil Ref. No. 8/2016 (Unreported) ('*Wambele v. Hamis*'); and *Yusufu Same & Another v.*

what constitutes sufficient cause is subjective, in that it depends on the circumstances of each case.[114] In such situation, the decision as to whether or not to grant time within which an applicant will be able to file an arbitral award in court, having failed to do so within the prescribed time, is a decision arrived at as a result of an exercise of the court's judicial discretion; and not as of right.[115]

This means that such discretionary power must be exercised judiciously.[116] Indeed, such power is dependent upon various circumstances, including the need to do substantive justice to the parties to the suit, the nature and reasons for such a delay,[117] and in accordance with sound and reasonable judicial principles.[118] It should be noted, however that financial constraint is not a sufficient ground for extension of time to file an arbitral award out of time.[119] As such, an applicant, who seeks for extension of time to do a legal act which ought to have been done within a particular prescribed time, must account for each day of delay.[120]

4.0 The Public Policy Exception to Recognition and Enforcement of Arbitral Awards

As a general rule, States that have ratified and domesticated the New York Convention and other relevant international arbitration treaties, such as Tanzania, are required to recognise and enforce foreign arbitral awards irrespective of the State in which it was made;[121] unless the exceptions set out in Article V of the New York Convention (as domesticated in Section 83(5)(b) of the Tanzania Arbitration Act) are invoked. Relevant to this analysis is the provision of Section 83(5)(b) of the Arbitration Act that engrains the "public policy" exception to the recognition and enforcement of foreign arbitral awards in Tanzania. According to this provision, one of the exceptions upon which a court may refuse to recognize and enforce a foreign arbitral award is where it finds that 'the enforcement of the award would be contrary to the public policy of Mainland Tanzania.' However, like the repealed Arbitration Act[122] as well as international arbitration treaties, the current Arbitration Act does not explicitly describe what constitutes "public policy".[123] Nonetheless, the scope and

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Hadija Yusufu, Court of Appeal of Tanzania, Civil Appeal No. 1/2002 (Unreported) ('*Same v. Yusufu*'). *See* also and *Zabitis Kawuka v. Abdul Karim* (EACA) Civil Appeal No. A8/1937 ('*Kawuka v. Karim*').

114 *Wambele v. Hamis,* ibid; *Yusufu Same, ibid;* and *Kawuka v. Karim, ibid*.

115 *Claus Bremer v. Chief Court Administrator, op. cit*.

116 *Lyamuya v. YWCA*, *op. cit*.

117 *Ibid*.

118 *Rookey's Case* 77ER 209; (1597) 5 Co.Rep.99j s; and *Osborn v. Bank of the United States*, 22 U. S. 738 £1824j.

119 *Lyamuya v. YWCA*, *op. cit*.

120 *Ibid*.

121 *TANROADS v. Kundan Singh*, op. cit; and *Claus Bremer v. Chief Court Administrator,* op. cit.

122 This is also the case with the New York Convention and arbitration laws in other common law countries including the UK, Kenya, Nigeria, and Uganda.

123 This deficiency in the definition of what constitutes the "public policy" exception to the recognition and enforcement of foreign arbitral awards is not only unique to the Tanzanian arbitration law. It is common in both international and domestic arbitration laws. *See* particularly Uluc, I., "Corruption in International

application of the "public policy" exception have been exemplified by caselaw in Tanzania and other common law countries, as considered below.

4.1 The Scope and Application of the Public Policy Exception in International Arbitration Law and Practice

It should be noted from the outset that international arbitration law[124] generally governs recognition and enforcement of foreign arbitral awards. Viewed in this context, international arbitration treaties are enacted 'to guarantee the international respect necessary for domestic courts to enforce private foreign arbitral awards.'[125] Whereas these international arbitration treaties encompass general preconditions for recognition and enforcement of foreign arbitral awards,[126] they also contain certain exceptions under which domestic courts may legally refuse to recognise and enforce a foreign arbitral award.[127] One of such exceptions is the "public policy" consideration. In particular, recognition and enforcement of a foreign arbitral award may be refused if a competent court in the country where recognition and enforcement is sought finds that such recognition and enforcement of the award would be contrary to the public policy of that country.[128]

On the other hand, the UNCITRAL Model Law also contains elements of public policy exceptions. Accordingly, the enforcement of international arbitral awards may be challenged on the ground of public policy in a similar way as the defense of public policy exception contained in the New York Convention applies.[129] In particular, Article 34 of the UNCITRAL Model Law identifies "public policy" as both a ground for setting aside an award by the courts at the seat of the

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Arbitration," *SJD Dissertations* (Paper 1) (Penn State Law, Penn State Law eLibrary, 2016) p. 284, available at https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Claimants%27%20Reply%20%28Redacted%20per%20PO8%29/Legal%20Authorities/CL-0052.PDF (accessed 5 September 2021) (noting that the majority of the national and international legislations 'neither define public policy, nor fashion a universal standard regarding its application.').

124 International arbitration law on the recognition and enforcement of arbitral awards is governed by the New York Convention and other related conventions, such the UNCITRAL Model Law and the ICSID Convention.

125 Emelonye, U.P. and U. Emelonye, "Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria," *Beijing Law Review*, Vol. 12 No.1, March 2021, 266-286. doi: 10.4236/blr.2021.121016. Available at https://www.scirp.org/journal/ paperinformation.aspx?paperid=108187 (accessed 30 August 2021.

126 The New York Convention, for instance, requires that, in an application for recognition and enforcement of an arbitral award, the applicant must demonstrate that: (*i*) the recognition and/or enforcement is sought of an arbitral award (Article I(1)), (*ii*) arising from a "commercial" relationship (Article I(3)), and (*iii*) a "defined legal" relationship (Article II(3)), (*iv*) the award is a "foreign" or "non-domestic" award (Article I(1)), and (*v*) any reciprocity requirements are satisfied (Article I(3)).

127 Domestic courts may refuse to recognize and enforce foreign arbitral awards on both substantive and procedural grounds enumerated in Article V of the New York Convention.

128 *Ibid*, Article V(2)(b).

129 Born, G., *International Arbitration: Cases and Materials* (Hague: Kluwer Law International, 2011), p. 27.

arbitration and a ground for refusing recognition and enforcement of a foreign arbitral awards.

Although the ICSID Convention does not expressly contain the "public policy" exception, one of the grounds for annulling an ICSID-seated arbitral award constitutes some of the elements of this exception. In particular, under Article 52(1)(c) of the ICSID Convention, an award may be subjected to annulment on the ground that 'there was corruption on the part of a member of the Tribunal.' As shall be considered below, corruption[130] has been interpreted as one of the constituent elements of the public policy exception to the recognition and enforcement of foreign arbitral awards.[131]

Apart from the UNCITRAL Model Law and the New York Convention, other conventions have attempted to provide public policy as an exception to the recognition and enforcement of foreign arbitral awards. For instance, the repealed 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[132] stated, in Article 1(e), that an award would not be enforceable if it was contrary to the public policy or to the principles of the law of the country in which it was sought to be relied upon. Correspondingly, the 1975 Inter-American Convention on International Commercial Arbitration ('the 1975 Panama Convention')[133] makes reference to the public policy exception in a similar manner as Article V(2)(b) of the New York Convention.[134] In addition, the 1979 Montevideo Convention, the 1983 Riyadh Convention, and the Amman Convention all provide that enforcement of a foreign arbitral award may be

130 Corruption has featured in international arbitration as contrary to *bonos mores* or international public policy, beginning with the famous 1963 ICC Award (Case No. 1110 of 1963, 10 Arb. Int'l 282 (ICC Int'l Ct. Arb.) where Judge Lagergren observed that: 'corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.' In *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (October 4, 2006) ('*World Duty Free v. Kenya*'), the Tribunal noted that bribery is contrary to the international public policy of most, if not all, States.

131 Malik, D. and G. Kamat, "Corruption in International Commercial Arbitration: Arbitrability, Admissibility and Adjudication," *The Arbitration Brief,* available at https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1052&context=ab (accessed 5 September 2021) (noting that: 'The modern trend with respect to international commercial arbitration has moved towards "zero tolerance" of corruption, which arbitrators have become compelled to address.'). *See* also Wolfensohn, J.D., "The Right Wheel: An Agenda for Comprehensive Development," in Wolfensohn, J.D. (ed.), *Voice for the World's Poor: Selected Speeches and Writings of World Bank President James D. Wolfensohn 1995-2005* (Washington, DC: World Bank - Presidential Speeches, 2005), pp. 138, 140.

132 This Convention, which was signed at Geneva on 26 September 1927 (https://www.trans-lex.org/511400/_/convention-on-the-execution-of-foreign-arbitral-awards-signed-at-geneva-on-the-twenty-sixth-day-of-september-nineteen-hundred-and-twenty-seven/), was repealed by the New York Convention in 1958.

133 The 1975 Panama Convention was concluded at Panama City on 30 January 1975.

134 *Ibid*, Article 5(2)(b).

refused if such award is 'contrary to public policy or good morals of the signatory State where enforcement is sought.'

However, as noted above, like it is the case with domestic arbitration law,[135] the meaning and scope of the "public policy" exception to the recognition and enforcement of foreign arbitral awards is not expressly described in the foregoing international arbitration treaties.[136] This omission leaves the issue of defining the scope of what constitutes public policy heavily to the domestic courts' own understanding of what constitutes "public policy",[137] a situation that has generated much attention and debate. This situation is also aggravated by the fact that there is no clear codification of any specific group of issues that should be regarded as constituent ingredients of the public policy exception.[138] It has been rightly contented that the public policy ground 'is highly susceptible to abuse because of its imprecise definition and the fact that what constitutes public policy differs from one country to another', compared to all other grounds provided under the New York Convention on which enforcement of foreign arbitral awards can be refused.[139]

Clearly, the application of public policy varies in accordance with a reviewing court's understanding of what constitutes public policy. This may pose a great risk to the finality of an award 'when placed in the hands of a national court hostile to arbitration.'[140] All in all, "the international public policy" is principally defined in the context of fundamental values concerning the entire international community.[141] This statement is supported by frequent quotations by domestic courts in many jurisdictions and scholars alike: "the forum state's most basic notions of morality and justice";[142] "some moral, social, or economic principle so sacrosanct […] as to require its maintenance at all costs and without exception";[143] and "the fundamental economic, legal, moral, political, religious,

135 *See*, for instance, *Catic International Engineering (T) Ltd. v. University of Dar es Salaam,* High Court of Tanzania (Commercial Division), Misc. Commercial Case No. 1 of 2020 (Unreported) ('*Catic v. UDSM*'); *Tanzania v. Sunlodges*, *op. cit*; *TANROADS v. Kundan Singh, op. cit*; *Christ for All Nations Apollo Insurance Co. Ltd.* [2002] 2 EA 366 (CCK); *Kenya Shell Ltd. v. Kobil Petroleum Ltd.* [2006] eKLR ('*Kenya Shell v. Kobil*'); *Anne Mumbi Hinga v. Victoria Njoki Gathara* [2009] eKLR ('*Hinga v. Gathara*'); and *Attorney General of Kenya v. Anyang' Nyong'o & 10 Others* [2010] eKLR ('*A.G. v. Nyong'o*').

136 Uluc, *op. cit*, pp. 284-5.

137 Emelonye and Emelonye, *op. cit*.

138 *Ibid*.

139 *Ibid*.

140 Uluc, op. cit, p. 284.

141 Ibid, p. 286.

142 *Parsons Whittemore Overseas Co., Inc. v. Société Générale De L'industrie Du Papier (Rakta)*. 508 F.2d 969. US Court of Appeals, 2d Cir., Dec. 23, 1974, at 974 ('Parsons v. SGLP').

143 Sheppard, A., "Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards," *Arbitration International,* Vol. 19 No. 2, 2003, pp. 217-229, at p. 218.

social standards of every state or extra-national community […] those principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."[144] These phrases, when taken collectively, highlight 'the judicial preference to protect the international community as a whole, not just a single State.'[145]

A broader context of what constitutes "international public policy" is made by the International Law Association pursuant to Recommendation 1(c) of the International Law Association Final Report on "Public Policy as a Bar to Enforcement and Recognition of International Arbitral Awards (2002)" thus:

> [International public policy is] the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).

As such, it is trite that "public policy" has been known as a "multi-faceted", "open-textured and flexible" concept with "various guises" and hence a "vast variety in the vocabulary and ambiguities".[146] In that vein, many national legislatures and courts have been levelheadedly hesitant to describe "public policy" thoroughly.[147] Therefore, the "public policy" exception to the recognition and enforcement of foreign arbitral awards has been left to be raised by: (*i*) the party contesting the enforcement, or (*ii*) the courts of the host country on their own volition.[148]

4.2 The Scope and Application of the Public Policy Exception in Tanzania

As noted above, the current arbitration law regime in Tanzania is modelled on international arbitration law. As the court held in *A-One Products v. Guanzou Techlong*,[149] Article V(2)(b) of the New York Convention is part of Tanzania arbitration law.[150] As such, the "public policy" exception to the recognition and

144 Lew, J.D.M., *et al., Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), at p. 422.
145 Uluc, *op. cit*, p. 286.
146 Cole, R., "The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Award," (1985-1986, p. 366). Available at https://core.ac.uk/download/pdf/159598227.pdf (accessed 30 August 2021).
147 Emelonye and Emelonye, *op. cit*.
148 Ibid.
149 *Op. cit*.
150 Article V(2)(b) of the New Yock Convention provides that recognition and enforcement of an arbitral

enforcement of foreign arbitral awards in Tanzania is domesticated in Section 83(5)(b) of the current Arbitration Act. Under this provision, the court may refuse to recognise and enforce a foreign arbitral award where it finds that such recognition and enforcement 'would be contrary to the public policy of Mainland Tanzania.'

In addition, Section 75(2)(g) provides additional standing to a party to challenge an award basing on public policy as one of the elements constituting the ground of "serious irregularity" affecting the arbitral tribunal, the proceedings or the award where such an award was 'obtained by fraud or procured in a manner that is contrary to public policy.'[151] As noted above, the current Arbitration Act – like the repealed Arbitration Act of 1931 – does not explicitly describe what constitutes "public policy".[152] This is also the case in a number of common law jurisdictions as considered below. However, the scope of what constitutes the "public policy" exception in Tanzania has been expounded in caselaw.

Recently, the scope of "public policy" as an exception to refusing recognition and enforcement of foreign arbitral awards has been clarified by the High Court of Tanzania in *Tanzania v. Sunlodges*[153] in light of Section 30(1)(e) of the repealed Arbitration Act (now, Section 83(5)(b) of the 2020 Arbitration Act). Borrowing heavily from Kenyan authorities,[154] the High Court, in *Tanzania v. Sunlodges,* held that; although the repealed Arbitration Act[155] did not define what constitutes "public policy", this term has to be widely explicated to include such acts that are injurious to public good, reprehensive, unconscionable, by being contrary to the Tanzanian Constitution and laws, or being contrary to the interests of Tanzania or being contrary to justice and morality.

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award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: '(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.'

151 *TANESCO v. Dowans*, *op. cit*.

152 *Ibid*.

153 *Op. cit*. However, the Italian investors did not participate in these proceedings. Instead, they successfully initiated recognition and enforcement proceedings in Ontario, Canada, where the Arbitral Award was recognized and given full force and effect in Ontario pursuant to the Canadian International Commercial Arbitration Act, 2017, SO 2017, *c* 2, *Sch* 5. *See*: *Sunlodges Ltd. & Sunlodges (T) Ltd. v. The United Republic of Tanzania,* Court File No.: CV-20-00648370-00CL: Ontario Superior Court of Justice Commercial List (order dated 29 January 2021) available at ttps://jusmundi.com/en/document/decision/en-sunlodges-ltd-and-sunlodges-t-limited-v-the-united-republic-of-tanzania-order-of-the-ontario-superior-court-of-justice-friday-29th-january-2021#decision_15861 (accessed 1 September 2021).

154 *See* particularly *TANROADS v. Kundan Singh*, op. cit; *Christ for All Nations Apollo Insurance Co. Ltd., op. cit*; *Kenya Shell v. Kobil, op. cit*; *Hinga v. Gathara*, op. cit; and *A.G. v. Nyong'o,* op. cit.

155 Section 30(1)(e) of repealed Arbitration Act. This provision is similar to Section 83(5)(b) of the current Tanzanian Arbitration Act.

In this case, the High Court refused to recognise and enforce an arbitral award that was rendered by an ICSID-constituted tribunal and thus proceeded to set it aside on the ground that it was contrary to the Tanzanian "public policy". In doing so, the High Court listed the following as the elements that constitute breach of Tanzanian "public policy": firstly, on the basis of Tanzanian "land public policy" and laws, the international arbitral tribunal was not supposed to award the respondents the market value land as compensation contrary to Section 49(3) of the Land Act,[156] which allows compensation in respect of revoked title to land only for unexhausted improvements. Secondly, the international arbitral tribunal could not award an amount of compensation that was not pleaded before it, which was contrary to Sections 30(2)(c) and (3) of the repealed Arbitration Act as well as the authority in *Makori J.B. Wasaa v. Joshua Mwaikambo & Another*.[157]

Thirdly, the High Court held that, since the claim of US$ 1,908,356.45 awarded to the respondents by the international arbitral tribunal was based on special damage (*i.e.,* loan advanced by the first respondent to the second respondent); the respondents were required to specifically prove what was pleaded before the tribunal could enter an award.[158] Fourthly, the international arbitral tribunal was wrong in relying on extraneous consideration in assessing the amount of compensation to the respondents, contrary to Tanzanian law and "public policy". Fifthly, as there was no agreement by the parties for awarding compound interest,[159] the tribunal acted contrary to Tanzanian law and "public policy" in awarding such interest to the respondents.

Similarly, in *Catic v. UDSM*,[160] it was held that an illegality infringing "public policy" is one of the fundamental grounds for setting aside an arbitral award as it goes to the root of the dispensation of justice. The court was of the view that, while it is trite that an error in law will lead to the setting aside of an award, such illegality or error in law must be apparent on the face of the award; that is, unless an illegality clearly appears on the face of the record of the award, the Court will not interfere with it. According to the court, where an award infringes "public policy", that illegality may be sufficiently relied upon to set

156 Cap. 13 R.E. 2002.
157 [1987] TLR 88] (*'Wasaa v. Mwaikambo'*).
158 *See* particularly *Nico Insurance (T) Ltd. v. Philip P. Owoya,* High Court of Tanzania at Dar es Salaam, Civil Appeal No. 15/2017 (Unreported) (*'Nico Insurance v. Owoya'*); and *Zuberi Augustino v. Anicet Mugabe* [1992] TLR 137 (*'Augustino v. Mugabe'*).
159 *Afriscan v. Ministry of Agriculture Food Security and Cooperatives*, Misc. Civil Case No. 42/2006: High Court of Tanzania (Commercial Division) (Unreported) (*'Afriscan v. MoAFSC'*).
160 *Op. cit.*

aside an arbitral award. In particular, the court held that where an award infringes Tanzanian public procurement laws or "public policy", that illegality may be sufficiently relied upon to set it aside. In this regard, the court held that an award can be set aside if it is in breach or would result into an express violation of a law or be contrary to "public policy".

Although in the foregoing cases Tanzania courts interpreted and applied the "public policy" exception so broadly as to refuse recognition and enforcement of foreign arbitral awards, in *TANESCO v. Dowans*,[161] the High Court interpreted the "public policy" exception narrowly and restrictively so as to enforce an arbitral award. As a general norm of international arbitration, the narrow and restrictive interpretation and application of the "public policy" exception is intended to prevent public policy from impairing the doctrines of finality, bindingness, and enforceability of an arbitral award.[162] For that matter, courts in leading "pro-arbitration" jurisdictions exercise 'antagonism towards the public policy exception and construe it as narrowly as possible.'[163] Such an approach may seem to create a conflict of application between "international public policy" and "domestic public policy". In leading pro-arbitration jurisdictions, courts prioritize universal values embraced by civilized nations and interpret "international public policy" in the context of these values; and, therefore, they condition 'award non-enforcement upon violations of international public policy, rather than violations of national interests (domestic public policy concerns).'[164]

However, this precedence of international public policy over domestic (national) public policy separates cases where a reviewing court should enforce the award from cases where judicial intervention is required.[165] In *Parsons & Whittemore Overseas Co.*,[166] it was held that:

> The public policy defence as a parochial device protective of national political interests would seriously undermine the [New York] Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that [States parties], in

161 *Op. cit.*
162 Uluc, op. cit, pp. 284-5.
163 *Ibid*, p. 285.
164 *Ibid*.
165 *See* generally Hwang, M. and K. Lim, "Corruption in Arbitration – Law and Reality," *Asian International Arbitration Journa*l, Vo. 8 No. 1, 201).
166 Note 141, *op. cit*.

acceding to the Convention, meant to subscribe to this supranational emphasis.

Similarly, in *Valorisation v. Hilmarton*,[167] the English High Court enforced the second arbitral award that gave effect to an intermediary agreement, which was deemed illegal under the laws of the performance country (*i.e.,* Algerian Law No.78-02). The court rationalized that; because the contract did not conflict with international public policy, it was enforceable.[168] Correspondingly, in *UAE v. Westland*,[169] the Swiss Federal Tribunal paralleled the English High Court and constrained review of an arbitral award to 'a limited number of transnational principles accepted not only by the forum, but by the international community at large.'[170] According to the Italian Court of Cassation,[171] "international public policy" is based 'first and foremost on the need to safeguard a legal and moral minimum which is common to the feeling of several nations.'[172]

Nonetheless, the general principle which can be derived from the above cited Tanzanian cases is that, a foreign award may either be refused to be recognised and enforced or be set aside if it is in breach or would result into an express violation of a Tanzanian law, or would be contrary to "public policy" as applied by Tanzanian courts.[173]

4.3 Comparative Perspectives of the Public Policy Exemption of Arbitral Awards

Comparatively, few countries that share similar legal traditions with Tanzania have also codified the public policy exception to recognition and enforcement of foreign arbitral awards. To begin with, Kenya has domesticated international arbitration norms concerning the recognition and enforcement of arbitral awards through the enactment of the Arbitration Act in 1995.[174] So, the recognition and enforcement of foreign arbitral awards in Kenya is largely regulated by the Kenya Arbitration Act and the Civil Procedure Act.[175]

167 *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.* [1999] 2 Lloyd's Law Review 222 ('*Valorization v. Hilmar ton*'); available at http://www.simic.net.cn/upload/2010-06/20100621140518009.pdf. (accessed 5 September 2023).

168 F or a discussion of this case, *see* Uluc, *op. cit*, pp. 284-6.

169 *United Arab Emirates v. Westland Helicopters*, Swiss Federal Tribunal, April 19th, 1994 ('*UAE v. Westland*').

170 Ibid. *See* also Mourre, A. and L.G.R. Di Brozolo, "Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back," *Journal of International Arbitration*, Vol. 23 No. 2, 2006, pp. 171, 175.

171 *Alarcia Castells v. Hengstenberge* e Procuratore generale presso la Corte di appello di Milano, RDIPP XIX (1983).

172 Lalive, P., "Transnational (or Truly International) Public Policy and International Arbitration in Comparative Arbitration Practice and Public Policy in Arbitration," 3 ICCA Congress Series 258, 277 (1987).

173 *See* particularly *Tanzania v. Sunlodges*, *op. cit*.

174 Cap. 89 of the Laws of Kenya.

175 Cap. 21 of the Laws of Kenya.

Modelled on the UNCITRAL Model law and the New York Convention, the Kenya Arbitration Act allows for the recognition of foreign arbitral awards, with Sections 36 and 37 requiring equal treatment to foreign and domestic arbitral awards in terms of their recognition and enforcement.[176] In fact, this equal treatment is in harmony with Article III of the New York Convention.[177]

Correspondingly, the grounds for refusal of recognition and enforcement of foreign awards under the Kenya Arbitration Act are similar to those enshrined in the New York Convention.[178] Nevertheless, the Kenya Arbitration Act sets out additional grounds for the refusal of recognition and enforcement of arbitral awards if the granting of the award was induced or affected by fraud, bribery, corruption or undue influence.[179]

It is interesting to note that; like in Tanzania,[180] Kenyan courts have treated with ambiguity the ground set out in Section 37(1)(b)(ii) of the Kenya Arbitration Act concerning the refusal of recognition and enforcement of a foreign arbitral award on ground of being contrary '*to the public policy of Kenya*.' As Francis Kariuki posits, the ambiguity surrounding the definition and scope of the public policy exception 'gives municipal courts a blank cheque to refuse the recognition and enforcement of foreign awards.'[181] For instance, in *Christ for All Nations v. Apollo Insurance Company Ltd.*,[182] Ringera, J. (as he then was) held the view that an arbitral award would be inconsistent with the public policy of Kenya if it was shown that it was either:

> […] (a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the

176 According to Section 36(1) and (2) of the Kenya Arbitration Act:
'(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.
(2) An international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.'

177 Article III of the New York Convention provides expressly that:
'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'

178 Section 37(1) of the Kenya Arbitration Act.

179 Ibid, Section 37(1)(a)(vii).

180 For example, in *TANESCO v. Dowans, op. cit*, the court interpreted the public policy exception narrowly and restrictively so as to enforce an arbitral award.

181 Kariuki, *op. cit*.

182 *Op. cit*.

> second category, I would without claiming to be exhaustive, include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.

However, in some cases, Kenyan courts have endeavoured to avoid interfering with arbitral processes as a matter of public policy in order to honour the doctrines of finality, bindingness and enforceability of arbitral awards. This is in compliance with Article 5 of the UNICITRAL Model Law[183] and Section 10 of the Kenya Arbitration Act. For instance, in *Kenya Shell v. Kobil*,[184] the court held that the spirit of Sections 6, 10, 12, 15, 17, 18, 28, 35 and 39 of the Kenya Arbitration Act strives to achieve the finality of arbitration of disputes and a severe limitation of access to the courts during arbitration. As such, the court went on to opine that: 'as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy.' Yet again, in *Hinga v. Gathara*,[185] the Court held categorically that:

> We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act.

A similar position was taken by the Kenyan High Court in *Gumbe v. Mwai Kibaki*.[186] In this case, the Court was of the view that:

> Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally.

183 In particular, Article 5 of the UNICITRAL Model Law provides that 'no court shall intervene except where so provided in law.' This provision is similarly reflected in Section 10 of the Kenyan Arbitration Act.

184 *Op. cit.*

185 *Op. cit.*

186 *Prof. Lawrence Gumbe &Another v. Hon. Mwai Kibaki & Others*, High Court of Kenya, Miscellaneous No. 1025 of 2004 (Unreported) ('*Gumbe v. Mwai Kibaki*').

On its part, Zimbabwe has modified the text of the UNCITRAL Model Law with regard to the public policy exception to the recognition and enforcement of foreign arbitral awards in Article 34(5) of the Arbitration Act (2002), which provides that:

> […] for the avoidance of doubt [...] it is declared that an award is in conflict with the public policy of Zimbabwe if (*a*) the making of the award was induced or effected by fraud or corruption; or (*b*) a breach of the rules of natural justice occurred in connection with the making of the award.

For that matter, the scope of the public policy exception was construed by the Zimbabwean Supreme Court in *Zesa v. Maposa*,[187] where it reasoned that:

> An award may be refused on the basis of public policy only where it was based on so fundamental an error, and constituted an inequity so far-reaching and outrageous in its defiance of logic or acceptable moral standards, that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.

The public policy exception is also entrenched in the English Arbitration Act (1996). Like Kenya, Tanzania and Zimbabwe, the UK is a Contracting Party to the New York Convention[188] subject to the "reciprocity" reservation and is governed at the domestic level by the 1996 Arbitration Act, which deals with both domestic and international arbitration. Enacted by one of the leading pro-arbitration jurisdictions, Section 103(3) of the 1996 English Arbitration Act enshrines public policy as one of the grounds for refusal of recognition or enforcement of a foreign arbitral award. Nonetheless, courts in the UK have shown reluctance to refuse enforcement of an award on the basis that it is contrary to public policy.[189] For example, in the case of *Soinco v. N.A. Plant*[190] the court declined an application to refuse enforcement of an arbitral award on the ground that compliance with the award would offend the law of the place of incorporation of the respondent company.

However, there are also instances where UK courts have refused to recognise and enforce arbitral awards based on public policy as it was the case in *Westacre*

187 (2) ZLR 452 (s) (1999) (Zimbabwe).
188 As a signatory to the New York Convention, courts in the UK are obliged to enforce awards made in a State that is also party to the Convention.
189 Emelonye and Emelonye, *op. cit*.
190 *Soinco SACI & Another v. Novokuznetsk Aluminium Plant & Others,* Court of Appeal, England and Wales (Dec. 16, 1997) [1998] CLC 730 ('*Soinco v. N.A. Plant*').

v. Jugoimport.[191] In this case, the court held that a contract involving bribes would only be contrary to English domestic public policy if it contravenes the domestic public policy of the country where it is to be performed. Similarly, in the case of *Soleimany v. Soleimany*,[192] the English Court of Appeal refused to recognise and enforce an arbitral award on the ground of public policy, holding that:

> The parties cannot override that concern by private agreement. They cannot use arbitration [...] to enforce an illegal contract. Public policy will not allow it. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that the plaintiff can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the *lex fori*.

Therefore, this analysis points out to the fact that most jurisdictions have widely accepted the application of a narrow interpretation[193] of the public policy exception in refusing to recognize and enforce foreign arbitral awards. For that matter, many courts across different common law jurisdictions have endorsed the fact that only when faced with extreme violations of public policy should the national courts interfere with foreign arbitral awards.[194] Courts in many

191 *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd.* [1999] 3 ALL ER ('*Westacre v. Jugoimport*').

192 *Soleimany v. Soleimany* [1998] APP.L.R. 02/19.

193 Unfortunately, the Indian Supreme Court decision in *Renusagar Power Plant Co. Ltd. v. General Electric Co.* (1994). SC 860 (India) ('*Renusagar v. G.E.C.*') has not been followed by subsequent decisions of the Indian courts. For instance, in *Oil & Natural Gas Corp. v. Saw Pipes* (2003) 5 SCC 705 ('*O&N Gas v. Saw Pipes*'), the Indian Supreme Court rejected the narrow interpretation of public policy ground was given in the *Renusagar* case since the concept of public policy included matters that concerned "public good and public interest." The Supreme Court set aside the award on grounds of public policy on the basis that the arbitral tribunal had erred when it concluded that ONGC had to prove its loss in order to seek liquidated damages. Realizing the impact of this jurisprudence on the economic growth of the country, the Indian Government decided to bring about certain legislative changes in order to address the problems created by these decisions. In 2010, it launched changes to the Indian Arbitration Act to deal with the excessive interference of the Indian courts in foreign arbitral awards and proposed that "fundamental policy of India, the interests of India or justice and morality" be the three heads under which an award could be set aside under the public policy ground. Post 2010, recent decisions by Indian courts have shown a change in attitude towards the defence of public policy. In *Penn Racquet Sports v. Mayor International Ltd.* (2011) 122 DRJ 117 (India) ('*Penn v. Mayor*'), the court upheld an arbitral award and rejected the claim that the award violated public policy. The Court stated that a mere violation of Indian public policy will not suffice in setting aside a foreign arbitral award. For a petition to set aside an arbitral award to be successful, the Court held, it must have violated the fundamental policy of Indian law, the interests of India, justice and morality. *See* particularly Emelonye and Emelonye, op. cit.

194 For example, in *Renusagar*, *ibid*, the Indian Supreme Court held that an award may be contrary to public policy if enforcement is contrary to (*i*) the fundamental policy of Indian law; or (*ii*) the interests of India; or (*iii*) justice or morality. The Court further stated that:
'It is obvious that since the [1996 India Arbitration and Conciliation] Act is calculated and designed to sub serve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction.'

jurisdictions have also held that domestic courts should not use the public policy exception 'as an excuse to delve into the merits of the foreign award.'[195]

5.0 Conclusion

The fact that arbitration is resorted to by the parties freely and consensually means that a party against whom an arbitral award has been made should honour it in good faith as soon as it is made.[196] This notion is founded on the doctrines of finality,[197] bindingness[198] and enforceability[199] of the arbitral awards; entailing that, by submitting themselves to arbitration, parties demonstrate a clear intention that the arbitral tribunal will determine the matter and such determination is conclusive, final, binding and enforceable.[200] Indeed, this is so because the purpose of an arbitration agreement is that the parties should resolve their dispute amicably and through arbitration in which case, they should readily comply with the arbitral award rendered in that arbitration process.

Therefore, this article points out to the fact that most jurisdictions have widely accepted the application of a narrow interpretation[201] of the public policy exception in refusing to recognize and enforce foreign arbitral awards. For that matter, many courts across different common law jurisdictions have endorsed the fact that only when faced with extreme violations of public policy will domestic courts interfere with foreign arbitral awards.[202] As such, courts in many jurisdictions have held that domestic courts should not use the public policy exception 'as an excuse to delve into the merits of the foreign award.'[203]

195 Emelonye and Emelonye, *op. cit.*
196 *Patel v. Patel, op. cit*.
197 *See* Section 65(1) of the Tanzania Arbitration Act; and *Ubungo Plaza v. Blue Pearl Hotels,* op. cit.
198 *Ibid*, Section 65(1).
199 *Ibid*, Section 73(1). In *Tanzania v. Sunlodges, op. cit*, it was held that an award is executable from the date on which it is received in court; and, if it is not opposed or challenged, it is capable of being enforced as a decree of the court. *See* also *TCMB v. Cogecot, op. cit*.
200 *TANESCO v. Dowans, op. cit*.
201 *Renusagar v. G.E.C., op. cit*. *Cf: O&N Gas v. Saw Pipes*, *op. cit*; and *Penn v. Mayor*, op. cit.
202 *Renusagar v. G.E.C., ibid*.
203 Emelonye and Emelonye, *op. cit*