ENFORCEMENT OF ARBITRAL AWARDS IN TANZANIA: APPLICABLE LAWS AND THEIR PRACTICAL CHALLENGES

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Abstract

Enforcement of arbitral awards forms one of the most crucial aspects of the arbitration framework. It is appreciated that arbitration works perfectly fine with the business circles due to its flexibility and the parties' freedom to choose arbitrators of their own choice; the applicable law; and other aspects. It is expected that once an award has been made, its enforcement is the natural consequence. Much of the gains made in the arbitral proceedings may be frustrated if the enforcement regime is not well attuned. This article, therefore, reviews the applicable laws and practical challenges surrounding the enforcement of arbitral awards in Tanzania. The article concludes that the Tanzanian arbitral enforcement regime requires reforms to address current developments so that enforcement of an arbitral award is not made unnecessarily cumbersome.

Key words: *Arbitration, Arbitral Awards, Enforcement, Applicable laws, Tanzania*

1.0 Introduction

This article reviews the applicable laws on enforcement of arbitral awards in Tanzania. It examines the Arbitration Act and the rules made thereunder as well as the Civil Procedure Code, 1966, specifically, the second schedule which contains rules relating to enforcement of arbitral awards. The aspects examined include: the filing and enforcement of awards under both pieces of legislations and their critique; the question of challenging an award; the powers to set aside an award; the effects of filing an award with the competent court under both applicable laws; appeals against refusal, or setting aside an arbitral award, and whether, leave is, or is not required. A brief discussion on promoting integrity of arbitral process is finally made.

2.0 Applicable Laws on Enforcement of Arbitral Awards

This section seeks to introduce the laws applicable to enforcement of arbitral awards in Tanzania. In this regard, it is noted that, there are two pieces of legislations that are relevant on enforcement of arbitral awards in Tanzania, viz, the Arbitration Act and the Civil Procedure Code, 1966, and the rules made thereunder. In this section, a brief introduction of the laws is brought forward, whereas the questions of filing and enforcement of arbitral wards are discussed in the next immediate section.

2.1 The Arbitration Act, Cap 15 and the Arbitration Rules, 1957

The Arbitration Act[210] is the principal law governing arbitration in Tanzania. The Act contains provisions relating to; *inter alia*, the appointment of arbitrators and recognition and enforcement of arbitral awards. The Arbitration Act[211]

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210 The Arbitration Act, [Cap 15 R. E. 2002].

211 *Ibid.*

is complemented by the Arbitration Rules, 1957.[212] The Rules stipulate the manner of filing awards under the Act, together with the contents of the application, the finer details of which, will be discussed when addressing the next but one part on filing of arbitral awards. It is worthy to note on the onset, that the Act is archaic and there is no doubt that reforms are desirable to bring the Act into current relevance.[213] The substantive provisions on enforcement of arbitral awards will be pinpointed later while discussing enforcement of awards. It suffices, at this point, to note that the Arbitration Act is the principal legislation governing arbitration in Tanzania.

2.2 The Civil Procedure Code, 1966

The Civil Procedure Code[214] also contains a default set of arbitration rules and procedures that apply if the parties agree to refer a dispute that is being heard before a court to arbitration. In addition, the second schedule to the Civil Procedure Code regulates procedures for filing of arbitral awards without court intervention. It appears that the Civil Procedure Code applies both to arbitration in suits or otherwise where the Arbitration Act or any other written law does not provide to the contrary.[215]

3.0 Filing and Enforcement of Arbitral Awards

The section looks at the enforcement regime under the Arbitration Act as well as the Civil Procedure Code, 1966. The aspects reviewed, include filing and enforcement of arbitral awards under both pieces of legislations. The importance of understanding the differences existing in filing and enforcing arbitral awards under the two pieces of legislations cannot be overstated. This relates as to which arbitral awards are to be filed under the Arbitration Act, and the rules made thereunder, as well as those to be filed under the provisions of the Civil Procedure Code, 1966. In addition, the effect of filing an arbitral award under the Arbitration Act is not necessarily the same as those filed under the Civil Procedure Code, 1966. On this understanding, this section seeks to discuss the filing and enforcement of arbitral awards under both pieces of legislations.

3.1 Awards Filed under the Arbitration Act, Cap 15 R.E. 2002

As stated earlier, the principal legislation governing arbitration in Tanzania is the Arbitration Act[216] and the rules made under it.[217] The Arbitration Rules, 1957[218] govern arbitral awards filed under the Act.[219] In terms of section 17 of the Act, the award when filed shall be enforceable as if it were a decree of the court. The arbitrator or umpire are required to cause an award be filed in the court and all the document stipulated under rule 4 of the Arbitration Rules.

212 The Arbitration Rules, 1957, GN. No. 427 of 1957.
213 Werema, F.M., "Enforcement of Foreign Judgment & Arbitral Awards in Tanzania." Paper presented in Commercial Court Round-Table Consultations on Contract Enforcement through Judicial System in Tanzania.
214 The Civil Procedure Code, 1966, [Cap. 33 R. E. 2002].
215 *Ibid*, section 64.
216 The Arbitration Act, [Cap. 15 R. E. 2002].
217 The Arbitration Rules, 1957, GN. No. 427 of 1957.
218 *Ibid*.
219 *Ibid*. Rule 3.

3.1.1 Mode of Application

The mode of application is provided for under Rule 5 which is by way of a petition. It is a mandatory requirement that every petition should contain a brief statement, in summary form, of the material facts. The consequences of not complying with the rule, renders the application incompetent. This position was emphasized in *East African Development Bank v. Blueline Enterprises Ltd,*[220] where it was stated:

> 'The real question to be determined here is whether or not the petitioner's application was properly brought in court. In my opinion, it was not properly brought. First of all, it is not correct for Counsel for the petitioner to say that the application is not made under the substantive provisions of the Arbitration Ordinance. I say so because apart from being shown in the petitioner's chamber summons that the application is brought under the provisions of the Civil Procedure Code which are mentioned therein, it is also shown that the application is brought under section 16 of the Arbitration Ordinance Cap. 15. …. At any rate, it is next to impossible to argue against the Rule. Thus, Rule 5 of the Arbitration Rules, 1957 ought to have been followed by bringing the application by way of petition. This rule is mandatory.'

3.1.2 Entitlement of the Petition

It is the requirement under Rule 6 that all petitions, affidavits and other proceedings under the Act to be entitled "*In the matter of the Arbitration and in the matter of the Act*" and reference to be made in the application to the relevant section of the Act.[221] The effect of this rule is to clearly show that applications made under Rule 5 follow the procedure stipulated under the Act or Rules if any. In other words, awards filed under the Act make the provisions of the Civil Procedure Code Arbitration Rules inapplicable. This was made clear in *Tanzania Electric Supply Company Ltd v. Dowans Holdings SA (Costa Rica) and Dowans Tanzania Ltd,*[222] where at page 9, it was stated:

> '… [A]re no authorities for the proposition that the provisions of section 64 and the second schedule to the Civil Procedure Code do not apply to a judgment and decree entered and issued pursuant to section 17 of the Arbitration Act. However, with due respect to Mr. Fungamtama, it is incorrect to suggest that the applicable provision will then be rule 21(2) of the Second Schedule to the Civil Procedure Code.'

It is therefore submitted in respect of the awards filed under the Arbitration Act, that, one should not invoke the provisions of the Civil Procedure Code, 1966. This is the case, because, the Arbitration Act as

220 Misc. Civ. Case No. 142 of 2008; High Court of Tanzania at Dar es Salaam (Unreported).
221 The Arbitration Rules, 1957, GN. No. 427 of 1957, Rule 6.
222 Misc. Civ. Case No. 8 of 2011, High Court of Tanzania at Dar es Salaam (Unreported).

well as the rules made thereunder, make it clear that, awards filed by way of a petition under the Act are meant to be governed by the provisions of the Arbitration Act and the rules made thereunder. As it shall be argued in due course, the provisions of the Civil Procedure Code Arbitration Rules are only applicable in arbitration in suits or where no any written law makes provisions in a particular situation.

3.1.3 Contents of and Annexure to Petitions

These are provided for under rules 7 and 8 respectively. The contents of the petition as per rule 7, is that, the petition should contain a brief statement, in summary form, of the material facts, divided into paragraphs numbered consecutively, state the nature of the reliefs sought or the question of law for the opinion of the court. Under rule 8, every petition must be annexed to it the submission, the award or the special case, to which the petition relates, or as a copy of it certified by the petitioner or his/her advocate to be a true copy. Failure to comply with the rules renders the petition incompetent and bad in law. This was confirmed in *East African Development Bank v. Blueline Enterprises Ltd.*,[223] at page 6, in the following words:

> 'In my opinion, the award filed in court by the petitioner is part and parcel of the petition. I say so because this document is supposed to be annexed to the petition. Certainly, a petition filed without it would be incomplete. Rule 8 of the Arbitration Rules, 1957, GN No. 427 clearly states that the award has to be annexed to the petition and in cases where its copy is annexed to the petition; it has to be certified by the petitioner or his advocate to be a true copy. In this case, that was not done. I agree with Prof. Fimbo that the petitioner's failure to do so renders the petition incompetent and bad in law. For this reason, I uphold the respondent's point of preliminary objection against the petition.'

The ruling in the above case informs that, under rule 8 of the Arbitration Rules, 1957, it is mandatory that the petition has to be accompanied by the submission, the award or the special case, to which the petition relates. Importantly, is where, copies of the submission, the award or the special case, to which the petition relates are annexed; the same must be certified by the petitioner or his advocate to be a true copy. The consequences of non-compliance cannot be overstated, in that, the petition is rendered incompetent and is bound to be struck out with or with no costs as the court deems fit.

3.2 Awards Filed under the Civil Procedure Code, 1966

The Civil Procedure Code, 1966[224] contains provisions on arbitration. Section 64 provides;

> 'Save in so far as is otherwise provided by the Arbitration Act or any other written law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the Second Schedule.'

223 Misc. Civ. Case No. 142 of 2008, High Court of Tanzania at Dar es Salaam (Unreported).
224 The Civil Procedure Code, 1966 [Cap. 33 R. E. 2002].

The Second Schedule contains provisions relating to, *inter alia*, order of reference to arbitration by courts,[225] appointment of arbitrators[226] and the requirement that the award be signed and filed.[227] In this article, rules 10, 14, 15, 16, 20 and 21 are briefly examined. A close reading of the second schedule to the Civil Procedure Code, 1966, shows that there are two mechanisms of filing an arbitral award. One relates to filing of an award pursuant to reference to arbitration in suits; and the other, filing of an award without the intervention of the court.

3.2.1 Filing of an Award Pursuant to Reference to Arbitration in Suits

Rule 10 to the second schedule of the Civil Procedure Code, 1966 provides;

> 'Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any dispositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.'

The rule is to the effect that it is the duty of the persons who made the award to sign it and cause it to be filed in court. It appears that for arbitration in suits, the filing of the award does not make it automatically enforceable. The court is required to pronounce a judgment according to the award if it sees no cause to remit the award or any of the matters referred to arbitration, for re-consideration and that no application has been made to set aside the award, or the court has refused such application.[228] Once a judgment is pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

In a Kenyan case, *Ruhara v. Kabunga & Another*,[229] where Order XLV Rule 17(2) of the Kenyan Civil Procedure Rules (Cap. 21) which is in *pari materia* with Rule 16 of the Civil Procedure Code Arbitration Rules, the Court of Appeal of Kenya held:

> 'A decree that is in excess or not in accordance with an award on which it is based cannot be allowed to go forth and will have to be subject of a right of appeal; Once, however, an award survives an application to set aside, there would seem to be no compelling need to provide for an appeal on any ground other than that the decree reflecting the judgment was in access of or not in accordance with the award.'

3.2.2 Filing of an Award in Matters Referred to Arbitration without Intervention of the Court

Unlike arbitration in suits, where a matter has been referred to arbitration without intervention of a court, and an award has been made thereon; any

225 Rule 1 of the Second Schedule to the Civil Procedure Code, 1966.
226 *Ibid*, Rule 2.
227 *Ibid*, Rule 10.
228 *Ibid*, Rule 16 (1).
229 (1989) KLR 551.

person interested in the award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in court.[230] The application under the Civil Procedure Code, 1966 is to be made in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.[231] Upon an application being made, the court directs that notice be given to all parties to arbitration, other than the applicant, requiring them to show cause within a time specified, why the award should not be filed.[232]
Again, rule 20(1) of the Civil Procedure Code Arbitration Rules, provides;

> 'Where the court is satisfied that the matter has been referred to arbitration and that an award has been made thereon and where no ground such as is mentioned or referred to in rule 14 or 15 is proved, the court shall order the award to be filed and shall proceed to pronounce judgment according to the award.'

The effect of the rule is that filing alone does not render an award enforceable as a judgment. It requires the court to pronounce a judgment on the award and a decree follows thereon.[233] Like in arbitration in suits, a decree so pronounced is not appealable unless it is in excess of or not in accordance with the award.

3.3 Critical Observations on the Filing and Enforcement of Awards

A quick glance at the Arbitration Act[234] and the Civil Procedure Code, 1966[235] reveals some inconsistent provisions. While it is admitted that the Second Schedule to the Civil Procedure Code, 1966 is primarily meant to apply in arbitration pursuant to a suit, it is also submitted that rules 20 and 21 were meant to be applicable in other arbitral awards rendered without court intervention. It is compelling to argue that awards made under the Arbitration Act may be filed under rules 20 and 21 of the Civil Procedure Code, 1966. Nevertheless, however compelling the argument is, the clear provisions of the Arbitration Rules, 1957[236] dilutes such an argument. The High Court had had an opportunity to express its opinion in *Consolidated Holding Corporation v. S.P. International Limited*[237] in these words:

> 'Apparently the problem lays with the respondent when he mixed up the Rules made under Cap 15 and those in the Schedule of the Civil Procedure Code, 1966 which are for arbitration in suits brought under the Civil Procedure Code; and clearly titled: ARBITRATION IN SUITS.'

A further discussion on this issue will be undertaken when addressing the question of appeals against arbitral awards in due course. Another area is on the effect of filing of the award. While under section 17 of the Arbitration

230 *Ibid*, Rule 20(1).
231 *Ibid*, Rule 20(2).
232 *Ibid*, Rule 20(3).
233 *Ibid*, Rule 21(2).
234 The Arbitration Act, [Cap. 15 R. E. 2002].
235 The Civil Procedure Code, [Cap. 33 R. E. 2002].
236 The Arbitration Rules, 1957, GN. No. 427 of 1957.
237 Misc. Civil Case No. 8 of 2004; High Court of Tanzania at Dar es Salaam (Unreported).

Act,[238] an award once filed becomes automatically enforceable as if it were a decree of the court, rules 16, 20 and 21 of the Civil Procedure Arbitration Rules are to the effect that once the award is filed, the court should proceed to pronounce a judgment in accordance of the award and subsequently a decree. It is clear that where the Arbitration Act or any other written law does not provide otherwise, references to arbitration are to be governed by the Second Schedule to the Civil Procedure Code, 1966.[239] This probably aimed at covering situations that may not have been provided for. However, it is becoming too tricky in terms of arbitration under the Arbitration Act. The issue highly laboured the mind of a Judge in *Tanzania Electrical Supply Co. Ltd. v. Dowans Holdings SA (Costa Rica) Ltd. and Dowans Tanzania Ltd*,[240] where his Lordship was forced to bring in the aid of the provisions of the Appellate Jurisdiction Act, 1979. Whether the decision was desirable or not, is the subject of discussion in the coming part where it is intended to discuss on the appeals against filing and enforcement of arbitral awards. It is worthy to note that this area requires keen consideration as it is vital that enforcement of arbitral awards is not a complicated process.

4.0 Challenging an Arbitral Award

It is proposed to start this section by referring to the observation of the learned author Sempasa, who once said, 'the arbitrator exercises a private mission conferred contractually, and it is by a rather artificial interpretation that one can say that his powers arise from and even then very indirectly a tolerance of the state of the place of arbitration.'[241] An arbitral award may be challenged by an aggrieved party. There are various grounds that may be invoked either to oppose enforcement of the award, remitting of the award or setting aside of the award. This part briefly examines various mechanisms and grounds that may be invoked to challenge an arbitral award, both under the New York Convention, 1958 and national laws. The idea is making a comparative study while pinpointing areas that would seem not up to date.

4.1 Remission of the Award

Section 15 of the Arbitration Act[242] contains provisions on the powers of the court to remit awards to the reconsideration of the arbitrators or umpire. The Act does not state the grounds that may make the court remit the award. It appears that it is at the discretion of the court. Speaking of section 22 of the English Arbitration Act, 1950 which is in *pari materia* with our section 15, the Court of Appeal of England in *Moran v. Lloyd's*[243] had these to say:

238 The Arbitration Act, [Cap. 15 R. E. 2002].
239 The Civil Procedure Code, 1966, [Cap. 33 R. E. 2002], see section 64 and the Second Schedule to the Act.
240 Misc. Civil. Case No. 8 of 2011, High Court of Tanzania at Dar es Salaam (Unreported).
241 S. L. Sempasa; 'Obstacles to International Commercial Arbitration in African Countries'; *The International and Comparative Law Quarterly*, Vol. 41, No. 2 (Apr, 1002), pp. 383-43; University of Cambridge; Footnote No. 55; Accessed at http://www.jstor.org/stable/760926 on 11/04/2012 06:42
242 The Arbitration Act, [Cap. 15 R. E. 2002].
243 [1983] 2 ALL ER 200.

> 'Section 22 of the 1950 Act differs from section 23 in that it gives a power of remission, as contrasted with a power to set aside, and that its exercise does not depend on a finding of misconduct on the part of the arbitrator or umpire. It is in terms wholly discretionary, but that discretion has to be exercised in accordance with established principles.'

Notwithstanding the fact that the Arbitration Act does not provide for grounds for which the court may remit an award for reconsideration by the Arbitrator or umpire, it may however, be argued that, a situation where an award does not deal with all the questions referred to, may be one of the grounds to prompt the court to remit the award to reconsideration.[244] It is worthy to note that the provision leaves it to the court to decide whether a particular situation warrants remission. Unlike section 15 of the Arbitration Act, the Hong Kong Arbitration Ordinance,[245] under its section 24 specifically states the situations where the court may remit the award. Those situations include; where the award lacks the essentials for validity; where a mistake is admitted by the arbitrators and cannot be corrected under its section 19; or misconduct by the arbitrator (without any misconduct or mishandling of the arbitration); or where the arbitrator has not dealt with costs of arbitration.

Among the above situations, courts give clear guidance as to the so called 'misconduct', where there is a 'technical misconduct' rather than a 'legal misconduct',[246] which would not be serious enough to justify setting aside of the award under section 25(2) of the Hong Kong Arbitration Ordinance. Case law shows, such misconduct has been held to include, for instance; failure to award interest; or deciding an issue that has not been referred or pleaded; or inconsistent finding of the award; or failure by the tribunal to hear a party in relation to documentary evidence requested from him; or purported alterations to the award after the arbitrator becomes *functus officio*.[247]

Notwithstanding the fact that the Arbitration Act does not state the grounds for remitting an award, the Civil Procedure Code Arbitration Rules on its part, succinctly provides for the grounds for remitting an award. Rule 14 is to the effect that an award may be remitted where the award has left undetermined any of the matters referred to arbitration; where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred; where the award is so indefinite as to be incapable of execution; or where an objection to legality of the award is apparent upon the face of it. It may safely be submitted that the grounds stated under rule 14 may be invoked to remit awards filed under the provisions of the Arbitration Act, as it is at the discretion of the court under section 15.

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244 See section 30 (c) of the Act which provides, *inter alia*, that if the award does not deal with all the questions referred the court may, if it thinks fit, either postpone the enforcement of the award or….

245 The Arbitration Ordinance, Cap 341 (Hong Kong).

246 See *Fox v. PG Wellfair Ltd.* 2Lloyd's Rep. (1981), 514, 531, per Dunn, LJ. (Court of Appeal, England).

247 See G. Weixia, 'Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration'; source: http://www.chinisejil.oxfordjournals.org Accessed on June 8, 2012.

4.2 Refusing Enforcement of Arbitral Awards

The legal framework under the Arbitration Act provides for grounds that may be invoked to refuse enforcement of foreign awards. There is no mention of domestic awards. The grounds stated in the Act are similar to those provided for under the New York Convention 1958. The Convention provides the following as grounds that may be advanced to refuse enforcement of a foreign arbitral award in its Article V;

> '1. 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:
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> a. 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; or
> b. 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; or
> c. 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, 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
> d. 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; or
> e. 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.
>
> 2. 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:
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> a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> b. The recognition or enforcement of the award would be contrary to the public policy of that country.'

Section 30 of the Arbitration Act contains conditions for enforcement of foreign arbitral awards. In that it must have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; made by the tribunal provided in the agreement and its constitution made in conformity with the law governing the arbitration procedure; have become final in the country in which it was made; and made in respect of a matter which may be lawfully referred to arbitration in Tanzania; and its

enforcement must not be contrary to public policy, or the law of Tanzania. Subsection 2 to section 30 states that a foreign award shall not be enforceable if the court is satisfied that; the award has been annulled in the country in which it was made or the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was not properly represented or the award does not deal with all questions referred or contain decisions on matters beyond the scope of the agreement for arbitration. The grounds are not exhaustive as section 30 (3) provides for the possibility of other grounds other than the listed ones.

It is noted that while it is the duty of the party seeking to oppose enforcement to prove that the grounds exist; it is also clear that the court may, *suo moto,* refuse enforcement on the public policy and contrary to law defences, and the defence that the dispute was not capable of settlement by arbitration under our laws. This is on understanding that Article V. 2 of the New York Convention, 1958 clearly provides that the competent authority may refuse enforcement if those grounds exist.

It has been observed that the public policy defence rarely causes enforcement to be refused.[248] One reason for this is the distinction drawn between domestic and international public policy, for what is considered public policy in domestic relations does not necessarily constitute public policy in international relations. It is yet to see the courts in Tanzania refusing enforcement of a foreign arbitral award on a public policy ground. The Austrian Supreme Court refused the enforcement of a Dutch Award because it violated Austrian Public Policy prohibiting purchases on a margin basis (Differenzgeschafter).[249] The court held that no distinction between domestic and international public policy was envisaged in Article V (2) (b) of the New York Convention as Article V (2) (b) refers clearly to cases where an award is contrary to the public policy of the country where it shall be enforced. The Civil Procedure Code Arbitration Rules does not contain provisions on the grounds for refusing enforcement of an award.

4.3 Setting Aside an Arbitral Award

Both the Arbitration Act and the Civil Procedure Code Arbitration Rules contain provisions on power of the court to set aside an arbitral award. Under section 16 of the Arbitration Act, the court may set aside the award where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured. The Act, however, does not elaborate as to what constitutes misconduct or the circumstances under which an award can be said to have been wrongly procured. Unlike the Arbitration Act, rule 15 of the Civil Procedure Code Arbitration Rules contains more grounds for setting aside the award; *viz*; corruption or misconduct of the arbitrator or umpire; either

248 Albert Jan Van den Berg; 'New York Convention of 1958: Refusals of Enforcement'; *ICC International Court of Arbitration Bulletin* – Vol. 18/Nov. 2-2007.

249 See Oberster Gerichtsh of [Supreme Court], 11 May 1983, Dutch Appellant v. Austrian Appellee, reported in Year Book Commercial Arbitration (1985), pp. 421-23 (Austria No. 7).

party having been guilty of fraudulent concealment of any matter which he ought to have disclosed or of willfully misleading or deceiving the arbitrator or umpire; and the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit, or after the expiration of the period allowed by the court or being otherwise invalid.

To make it clear, section 16 of the Arbitration Act applies to awards filed under the Act whereas rule 15 of the Civil Procedure Code Arbitration Rules applies to awards pursuant to arbitration in suits. It is therefore sound to state that awards filed under the Arbitration Act can only be set aside where the grounds provided for under section 16 are proved to exist, that is, the arbitrator or umpire has misconducted himself or the award has been improperly procured.

5.0 Appeals against Orders, Decisions, Decrees and Judgments in Enforcement Actions

An arbitral award may be remitted to the reconsideration of the arbitrators or umpire under section 15.[250] It may also be set aside where an arbitrator or umpire has misconducted himself or arbitration or award has been improperly procured under section 16.[251] Its enforcement may be refused if the court is satisfied that the grounds for refusal do exist.[252] In most cases, a party to arbitration seeking a particular remedy moves the court. Depending on the applicable law, a filed award may be automatically enforceable as a decree of the court,[253] or it may be necessary for the court to pronounce a judgment and a decree.[254]

In terms of section 29,[255] a foreign award shall be enforceable in the High Court either by action or under the provisions of section 16.[256] In all these processes, the High Court may decide the award be filed or refuse its filing; it may upon application set aside the award or refuse to set it aside, or else it may remit the award or refuse to remit it to reconsideration by the arbitrator or umpire. On top of that, it may refuse to enforce the award upon an application being made or on its own motion, if the award is against public policy and law or the subject matter is not arbitral under Tanzanian laws. In either case, the next question will be what are the available remedies to the aggrieved party? Whether leave to appeal is or is not required. These issues are the subject of discussion in the following sub-sections.

5.1 Leave to Appeal

This has been one of the grey areas that have engaged the minds of both, the Bench as well as the Bar. The decisions on this point cannot easily be reconcilable with the provisions of the law that is inherent in the law itself, giving Judges a leeway to decide which route to follow. It is intended in this

250 The Arbitration Act, [Cap. 15 R. E. 2002].
251 *Ibid.*
252 See Section 30 of the Arbitration Act, and Article V of the New York Convention, 1958.
253 The Arbitration Act, [Cap. 15 R. E. 2002], section 17.
254 The Civil Procedure Code Arbitration Rules, [Cap. 33 R. E. 2002], see rules 16 and 21.
255 The Arbitration Act, [Cap. 15 R. E. 2002].
256 Section 16 of the Arbitration Act, is now section 17 following the renumbering of the sections.

part, to examine the provisions of the law and decided cases on the question of leave to appeal. The starting point is section 21 of the Arbitration Act which provides as follows:

> ' The High Court may make rules as to-
>
> a) the filing of awards and all consequential or incidental proceedings;
> b) the filing and hearing of special cases and all consequent or incidental proceedings;
> c) the staying of any suit or proceedings in contravention of a submission to arbitration; and,
> d) the general conduct of all proceedings in court under the Act.'

On the strength of the above provision, the Arbitration Rules, 1957 were made.[257] The rules apply to all awards filed under the Act.[258] Interestingly, these rules do not provide for any procedure for appeals. Twaib, J. observed at page 8 in *Tanzania Electrical Supply Company Limited v. Dowans Holdings Costa Rica (SA) and Dowans Tanzania Limited*,[259] in these words:

> 'Although section 21(d) of the Arbitration Act gives the High Court powers to make rules "for the general conduct of all proceedings under the Act," none of the Rules made under GN 427 of 1957, provide for any procedure for appeals.'

This means that the question whether or not appeal lies and leave to appeal is required for awards filed under the Arbitration Act is not answered either by the Act or the rules made thereunder. One has to seek the answer somewhere else. This takes me to consider the Civil Procedure Code Arbitration Rules.[260]

Section 64 of the Civil Procedure Code provides; 'Save in so far as is otherwise provided by the Arbitration Act or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions contained in the second schedule.'

It would appear under rule 21 that, an appeal shall not lie against a decree unless it is in excess of or not in accordance with the award. The rule does not restrict right to appeal against filing or refusing to file the award or the judgment upon such award. Additionally, the rule does not address the question of leave to appeal. It is observed therefore, the Arbitration Act, the Arbitration Rules and the Civil Procedure Code Arbitration Rules do not address the question of appeals in enforcement proceedings besides rule 21 providing for appeal against a decree. With such a state of affairs, the Appellate Jurisdiction Act, 1979[261] comes into play.

Section 5(1) of the Appellate Jurisdiction Act[262]is the governing provision on appeals in civil cases and is relevant in appeals relating to arbitral awards. For

257 The Arbitration Rules, 1957, GN. No. 427 of 1957.
258 *Ibid,* rule 3.
259 Misc. Civ. Case 8 of 2011, High Court of Tanzania at Dar es Salaam (Unreported).
260 The Civil Procedure Code, 1966, [Cap. 33 R. E. 2002].
261 The Appellate Jurisdiction Act, 1979, [Cap. 141 R. E. 2002].
262 *Ibid*.

purposes of clarity, section 5 (1) is reproduced wholly below;

'In civil proceedings, except where any other written law for the time being provides otherwise, an appeal shall lie to the Court of Appeal-

a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, in the exercise of its original jurisdiction;
b) against the following orders of the High Court made under its original jurisdiction, that is to say;
    i. an order superseding an arbitration where the award has not been completed within the period allowed by the High Court;
    ii. an order on an award stated in the form of a special case;
    iii. an order modifying or correcting an award;
    iv. an order filing or refusing to file an agreement to refer to arbitration;
    v. an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
    vi. an order filing or refusing to file an award in an arbitration without the intervention of the High Court;
    vii. an order under section 95 of the Civil Procedure Code which relates to the award of compensation where an arrest or a temporary injunction is granted;
    viii. an order under any of the provisions of the Civil Procedure Code, 1966, imposing a fine or directing the arrest or detention in a civil prison, of any person, except where the arrest or detention is in execution of a decree;
    ix. any order specified in rule 1 of Order XLIII in the Civil Procedure Code, 1996, or in any rule of the High Court amending, or in substitution for, the rule;
c) with leave of the High Court or of the Court of Appeal, against every other decree, order judgment, decision or finding of the High Court.'

The Court of Appeal had an opportunity to explain the input of section 5(1) above in the case of *Blueline Enterprises Limited v. East African Development Bank*[263] in these terms:

> 'In some decrees given by the High Court in its original jurisdiction, an appeal may need leave of the High Court. That is the import of section 5 (1) (c). On the other hand some High Court orders given in original jurisdiction can be appealed against without the need for leave. That is what is provided for in paragraph (b) of sub-section 1 of section 5 of the Act. The thrust of section 5 (1) of the Act, therefore, can be said to be this. Unless some other law provides differently, all decrees of the High Court in its original jurisdiction, given under the Civil Procedure Code, 1966 are appellable as of right without the need for leave. Secondly, certain specified orders of the High Court in its original jurisdiction, whether or not under the Civil Procedure Code, 1966, are appellable as of right, without the need for leave. Thirdly, unless some other law provides differently, decisions of the High Court, whether or not in its original jurisdiction, are appellable only with leave of the High Court or the Court of Appeal.'

263 Civil Application No. 103 of 2003, Court of Appeal of Tanzania at Dar es Salaam (Unreported).

5.2 Circumstances Where Leave is not required

It is abundantly clear that section 5 (1) of the Appellate Jurisdiction Act, 1979 enumerates various issues on which the court's orders, decrees, judgments or decisions are appellable without leave of the court. These orders are; an order superseding arbitration where the award has not been completed within the period allowed by the High Court;[264] an order on an award stated in the form of a special case;[265] an order modifying or correcting an award;[266] an order filing or refusing to file an agreement to refer to arbitration;[267] an order staying or refusing to stay a suit where there is an agreement to arbitration;[268] an order filing or refusing to file an award in an arbitration without the intervention of the High Court.[269] The question whether or not leave is required arose in *Tanzania Electrical Supply Company Limited v. Dowans Holdings Costa Rica (SA) and Dowans Tanzania Limited*,[270] where it was observed as follows:

> 'As was held in *Blueline Enterprises v. EADB*, a decision under section 17 of the Arbitration Act, though instituted by way of a petition, is made by this court in exercise of its original jurisdiction. That said, I think the way to go is through the provisions of clause (vi) of paragraph (b) of sub-section (1) of section 5 of the Appellate Jurisdiction Act. It provides for appeals to the Court of Appeal against orders made by the High Court under its original jurisdiction **"filing or refusing to file an award in arbitration without the intervention of the High Court".** What Mushi J, did in his judgment of 28th September 2011 was to make an order filing the ICC Final Award……. It affirmed the arbitrators' award and ordered that the said award be registered. Such decision is appellable as of right and an intended appellant may appeal against any point of law or fact…….. Having found, as I have done, that the applicable law is section 5 (1) (b) (vi) of the Appellate Jurisdiction Act, under which an intended appellant does not require leave to appeal, the filing of the application for leave to appeal by the applicant was not necessary.'

It is my humble submission that, *lacunae* in the arbitration laws and/or rules make it necessary for courts of law to apply the provisions of the Appellate Jurisdiction Act, 1979, and as seen above some of the orders are appellable without leave of the court. It desires to see whether such a procedure does not open up a *Pandora's Box*, as we may witness frivolous appeals on enforcement of arbitral awards. A recalcitrant litigant may use this window to delay the successful party from getting his remedy on time. It may be desirable to look at this angle and reform the arbitration laws to promote the integrity of the arbitral process.

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264 The Appellate Jurisdiction Act, 1979, [Cap. 141 R. E. 2002], section 5(1) (b) (i).
265 *Ibid*, section 5(1) (b) (ii).
266 *Ibid*, section 5(1) (b) (iii).
267 *Ibid*, section 5(1) (b) (iv).
268 *Ibid*, section 5(1) (b) (v).
269 *Ibid*, section 5(1) (b) (vi).
270 Misc. Civ. Case 8 of 2011, High Court of Tanzania at Dar es Salaam (Unreported).

5.3 Circumstances where Leave is required

It would be appreciated that section 5 (1) (c) of the Appellant Jurisdiction Act, 1979 is the most relevant as far as leave requirement is concerned. It is to the effect that in civil proceedings except where any other written law for the time being in force provide otherwise, an appeal shall lie to the Court of Appeal, against every orders, decrees, judgment, decision or finding of the High Court. This provision has been interpreted with regard to arbitral awards to include orders, decrees, judgment, decision or finding on remitting the award; setting aside of the award and refusing enforcement of the arbitral award.

It is now settled that, in civil proceedings where leave to appeal is required, failure to obtain leave renders the intended appeal incompetent and bad in law. In the case of *Blueline Enterprises Limited v. East African Development Bank*[271] an application to strike out a notice of appeal and the appeal which the respondent filed in court was allowed, and the respondent's appeal was held to be incompetent and struck out because no leave was sought and obtained. In this case, the respondent intended to appeal against the decision of the High Court to set aside an arbitral award.

In another case where the intended appeal was against the decision of the High Court to remit an award, the court held that the intended appeal was incompetent as leave to appeal was not sought and obtained under section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. This was in the case of *Shinyanga Region Cooperative Union (1984) Limited v. Pan African Corporation Limited*,[272] where the court found that the appeal against the High Court order came under section 5 (1) (c) and that in such a case leave was necessary. This position is not novel for even in the United Kingdom, it was long ago held in *Moran v. Lloyd's*[273] that an order made on an application to remit an award is at least as interlocutory as one made on an application to set award aside, and leave to appeal is required.

It is strongly argued here that in arbitral challenge and enforcement proceedings, leave to appeal should be required against every order, decree, ruling, judgment or decisions. It is so submitted on understanding that arbitration is opted for in order to expedite the dispute resolution process and thus it is logical that its enforcement process should not be tempered with superfluous appeals. As it will be submitted in the next part that there is a need to uphold the integrity of the arbitral process, and therefore the arbitration laws should not allow vexatious applications and appeals that would prolong the enforcement process. Arbitration laws therefore should aim at making the whole arbitral process including its enforcement as smooth as possible. Appeals and applications should only be entertained on limited grounds.

271 Civil Application No. 103 of 2003, Court of Appeal of Tanzania at Dar es Salaam (Unreported).
272 Civil Appeal No. 70 of 1999 (Unreported).
273 [1983] 2 ALL ER 200.

6.0 Promoting the Integrity of the Enforcement Process

> "Inherent in judicial review is a tension between two rival goals of efficient dispute resolution, which underlie most aspects of arbitration laws. Finality, promoted by freeing awards from challenge, competes with community confidence in control mechanisms that protect against enforcement of aberrant decisions. Finality of awards enhances political and procedural neutrality which is compromised if the winner must re-litigate the case." William M. Park.[274]

This part seeks to provide for some recommendations on how the arbitral enforcement process can be streamlined. This would be relevant if one desires that arbitral laws do not put many obstacles than what is necessary in the enforcement process. It should be appreciated that once an award is properly rendered; its enforcement should be smooth. In this regard, there would be a need to streamline the process, managing appeals and consolidate arbitral laws.

The discussion in this article has shown that awards may be filed under the provisions of the Arbitration Act or of the Civil Procedure Code Arbitration Rules. The Arbitration Act mentions foreign awards, which would appear to suggest that the Act was specifically for foreign awards, as it does not provide for domestic awards. On the other hand, the Civil Procedure Code Arbitration Rules applies to arbitration in suits and in any other arbitral awards without the intervention of the court. There would be a forceful argument that domestic awards would be enforceable under these provisions. The presence of these two approaches has led to some confusion as there has been an attempt to mix the approaches. It was even suggested by the applicants counsel in *Tanzania Electrical Supply Company Limited v. Dowans Holdings Costa Rica (SA) and Dowans Tanzania Limited*,[275] that there are two distinct procedures. One is the filing of an award by arbitrators under the Arbitration Act, Cap 15, and two, seeking assistance of the court to give effect to an arbitral award where none is filed by the Arbitrators in arbitration without the intervention of court under the provision of rule 20 of the second schedule of the Civil Procedure Code.

It is also illustrated by the case of *Blueline Enterprises Limited v. East African Development Bank*.[276] In this case it was sought to apply section 5 (1) (a) of the Appellate Jurisdiction Act of which it would mean that no leave to appeal was required against the decision to set aside an award. Such an argument was rejected on the ground that proceedings under the Arbitration Act were not governed by the provisions of the Civil Procedure Code. In this respect it was stated:

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274 W. M. Park, 'Duty and Discretion in International Arbitration'; *the American Journal of International Law*, Vol. 93, No. 4 (Oct. 1999), pp. 805-823. American Society of International Law; accessed at http://www.jstor.org/stable/2555345 on 11/04/2012 06:20.

275 Misc. Civ. Case 8 of 2011, High Court of Tanzania at Dar es Salaam (Unreported).

276 Civil Application No. 103 of 2003, Court of Appeal of Tanzania at Dar es Salaam (Unreported).

> 'It seems to me, therefore, that proceedings under the Arbitration Ordinance are governed by Rules of Court which were made under section 20 of the Ordinance and not by the Civil Procedure Code, 1966. It follows that where an appeal is preferred against a decision of the High Court given under the provisions of the Arbitration Ordinance as was the case in the matter which is the subject for this application, paragraph (a) of sub-section (1) of section 5 of the Appellate Jurisdiction Act, 1979 is inapplicable. I am satisfied that the relevant provision would be paragraph (c) of sub-section (1) of section 5 of the Act. This means that respondent; in its appeal to this court against the decision of Luanda, J. should have obtained leave of the High Court.'

It is proposed, therefore, that there should be a uniform procedure in the enforcement of arbitral awards. Domestic awards as well as foreign awards should be enforced in a similar manner as such there would be no reason as to why there should be parallel laws governing enforcement of arbitral awards. Streamlining the enforcement procedure would be in line with the requirement of the Convention which requires member states not to impose more onerous conditions in the enforcement of foreign awards than those applicable to domestic awards.

It is also submitted that the law should limit as far as possible appeals against enforcement proceedings. It is admitted that the grounds for appeal are limited and would be recommendable in safeguarding the integrity of the arbitral process. However, allowing appeals without leave of the court is questionable as this would result into frivolous appeals, hence delaying remedy to the successful party. It is recommended that the law should provide that in all arbitral enforcement and challenge actions, leave must be obtained if one intends to appeal to the Court of Appeal. This will ensure court's scrutiny of the intended appeals and satisfy itself whether there is any triable issue in the intended appeal. Short of that, the underlying motive of arbitration of speed and economy cannot be achieved.

Lastly, it appears that there is a need to modernize arbitral laws and come up with a consolidated piece of legislation that would cover all aspects of arbitration. More importantly in respect of this article is the necessity of having a uniform procedure for the enforcement of arbitral awards. The reforms should aim at making arbitration well governed and that its enforcement is smooth. This measure will help to keep our laws up to date and relevant to the current developments.

7.0 Conclusion

To conclude, it has been noted that, enforcement of arbitral awards in Tanzania does not have up to date provisions of the law. The rules are scattered and do

not sufficiently cover the essential aspects of the enforcement process. As the area did not experience a flood of arbitral enforcement awards, its reforms had also been either slow or completely neglected. The recent surge of parties to commercial transactions opting for arbitration will see a colossal rising of arbitral enforcement actions and it is expected that depending on such experience, the government will get some senses in reforming its arbitration laws. Kenya, for instance had in 1995 enacted its Arbitration Act. Tanzania seems to find more flavors in a 1930's colonial piece of legislation with minor modifications mainly renumbering of the sections. It is my humble submission that it is high time that Tanzania reforms its arbitration laws.