

# CRITICAL ANALYSIS ON THE CHALLENGES FACING LEGAL AND INSTITUTIONAL FRAMEWORKS ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN TANZANIA

Gabagambi Liberatus Cosmas  
College of Business Education, Dodoma Campus, Department of Business Administration,  
P. O Box 2077, Dodoma, Tanzania

## Abstract

This study is a research on the Challenges Facing Legal and Institutional Frameworks on Recognition and Enforcement of Foreign Arbitral Awards in Tanzania. The study explores the major challenges facing parties when looking for enforcement of foreign arbitral awards in national courts/local courts. The objective of the study was to analyse the legal and institutional challenges facing recognition and enforcement of arbitral award in Tanzania; by assessing whether the laws and institutions governing international commercial arbitration are effective.

In conducting this study, the researcher employed two methods: documentary review and field research. The researcher carried out an intensive review of both primary and secondary data relating to historical background to the problem and methods of recognition and enforcement of foreign arbitral awards in Tanzania.

The major problem facing the enforcement was found to be on arbitration policy formulation, laws and courts responsible for enforcement. That there has not been effective coordination among the stakeholders and the legislature has been lagging behind to amend the law and domesticate international instruments. That the government and legislature should ratify and domesticate in its arbitration law the ratified international convention so as to ensure effective settlement of commercial disputes. That the Tanzanian Government should create new institutions and promote existing local arbitration institutions like TIA & NCC so that they can work effectively in facilitation and promotion of arbitration and other ADR forms of dispute resolution.

**Key word:** Critical analysis on the challenges facing legal and institutional frameworks on recognition and enforcement of foreign arbitral awards in Tanzania

## 1.0 Introduction

The international community has resorted into international arbitration as an accessible means of resolving commercial disputes, arbitration has increased and developed because of its contractual nature, and its greater speed and confidentiality than the traditional national courts process. Parties contract to arbitrate disputes in order to avoid the courts' long proceedings and maintain amicable and confidential relationships with their commercial partners.

Despite efforts made to facilitate the enforcement of foreign arbitral awards internationally and the great success achieved<sup>445</sup> by the New York Convention (1958) for the enforcement of foreign arbitral awards within contracting states' territories. There remain issues that complicate the enforcement proceedings. Reliance on the national procedural rules for the enforcement of foreign awards, which vary in several aspects from one country to another, is one of the main issues that could undermine the effectiveness of arbitration.<sup>446</sup> The problems that complicate the enforcement of foreign arbitral awards in national courts relates to the legal system and the background of the state where the award is to be enforced and its national mandatory procedural rules. Other problems relates to the interpretation of the New York Convention's provisions by national courts.<sup>447</sup>

Therefore, the researcher examined the influence of national laws<sup>448</sup> and the New York Convention (NYC) on the enforcement of foreign award<sup>449</sup> and the practical problems that arise with respect to the interpretation of the

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<sup>445</sup> A list of 149 countries are parties to the NYC; therefore, responsible to enforce the foreign award (available at <http://www.newyorkconvention.org/contracting-states> ) accessed 13 August 2013

<sup>446</sup> WafaJanahi, "Problem and Weakness Arising from the Enforcement of Foreign Arbitral Awards in National Courts' *Journal of sharia and law*, Issue No. 47 July 2011 pg 42 (on line source accessed 13 August 2013)

<sup>447</sup> Ibid.

<sup>448</sup> The Arbitration Act cap 15 revised 2002, The Investment Act 1997, The Civil Procedure Code

<sup>449</sup> 1958

New York Convention's provisions in national courts. Likewise, the researcher analyzed the effectiveness and the weakness of the legal and institutional framework facing the recognition and enforcement of foreign arbitral awards in Tanzania. The discussion was on the domestic and international laws regulating the recognition and enforcement of foreign arbitral awards.

The discussion based on The Arbitration Act,<sup>450</sup> the legal system of the country and international instruments which Tanzania is a signatory; like the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>451</sup> International Centre for Settlement of Investment Disputes (ICSID) Convention of 1965 and Arbitration Rule of the East African Court of Justice.<sup>452</sup> In detail, the challenges facing the recognition and enforcement of foreign arbitral awards in local courts were discussed.

## 2.0 Types of Enforcement

The enforcement of international arbitral award can be of two categories, it can be enforced voluntarily by the party against whom the award is rendered.<sup>453</sup> The losing party may carry out the award voluntarily in good faith wishing to continue the relationship with the winning party and this is most accepted way as parties to arbitration agreement are business people who do not wish to affect their reputation in business as the result of not enforcing the award. Moreover, the decision to enforce an arbitral award may be to avoid sanctions that may be cast upon a losing party who refuses to comply with the arbitral award.

Also some arbitration institutions, such as the ICC, request the parties to comply with the award without delay. In this sense, Article 28(6) of the ICC Rules of Arbitration reads:

*Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their rights to any form of recourse insofar as such waiver can validly be made.*

This obligation has encouraged the parties to perform spontaneously, thus enhancing the enforceability of the award. It has been reported, for example, that over 90 percent of ICC arbitral awards are executed by the parties on a voluntary basis.<sup>454</sup>

On the other hand, if the losing party refuses to carry out the arbitral award voluntarily, the winning party can make use of pressure whether commercial or otherwise to force the losing party to carry out the award. If the losing party insists on not executing the award the winning or award holder may seek the court permit to enforce the award under compulsory execution by filling the order in national courts.<sup>455</sup> It is in the national court because the power of the tribunal is exhausted the moment the award is made. But the winning party needs first to trace where the assets of the losing party are allocated.

To be in a proper position of enforcement, the party has to know the type of award given as there are three types of award and are issued at different stage of the arbitration proceedings. These include *Inter alia* an Interim award, Partial award and Final award.<sup>456</sup>

## 3.0 Foreign Nature of an Award

An award is said to be foreign award if the arbitration is international, in a sense that it will give the birth of an international foreign award. To determine whether arbitration is international, conditions provided under article 1(3)<sup>457</sup> must be observed. That (a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their place of business in different states, or (b) one of the following places is situated outside the state in which the parties have their places of business:

That, the place of arbitration if determined in or in pursuant to, the arbitration agreement; that, any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

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<sup>450</sup> [Cap 15 RE 2002]

<sup>451</sup> New York Convention of 1958

<sup>452</sup> November, 2004, provide the arbitral rules for East Africa partner states (which include Tanzania, Kenya, Uganda, Rwanda and Burundi).

<sup>453</sup> UNCITRAL Arbitration Rule, Article 32(2) and ICC Rule article 28 (6) that the award shall be binding on the parties and they should carry it out without delay.

<sup>454</sup> United Nations conference on Trade and Development (dispute settlement) International Commercial Arbitration, Recognition and Enforcement of Arbitral Awards: The New York Convention. 2003 (accessed on 10<sup>th</sup> November 2013)

<sup>455</sup> Tanzania is a good example as it refused to honour the award voluntarily until the matter went to court for determination (in TANESCO versus DOWANS)

<sup>456</sup> Article 2 of the ICC Rule of arbitration

<sup>457</sup> Of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006.

From the international nature of the arbitration agreement, parties expect to refer their dispute to foreign arbitrator (s) whether ad hoc or institutional and have foreign arbitral award. The New York Convention provides what makes an award to be foreign: that recognition and enforcement of foreign arbitral award, requires the award to be nondomestic. The question what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues posed by this treaty. Article I (1)<sup>458</sup> states clearly the scope of application of the Convention as follows:

*This Convention applies 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.*

According to the cited provision, an arbitral award qualifies as foreign in two situations:

- (a) When the award is made in the territory of another state, or
- (b) When it is not considered a domestic award in the State where recognition and enforcement is sought.

In Tanzania, for an award to be regarded as a foreign arbitral award, it must deal with differences arising between parties from different nations but relating to a commercial dispute under the law in force. And, such an award must have been given in the country which is a party to the New York Convention or any other multilateral convention to which Tanzania is a party.

Therefore, both conventions and the Arbitration Act recognizes the award as foreign if it involves nationals of different states or having the place of business in the territory of another state or the award is made in the territory of another state and where the award is not domestic in the state where the enforcement is sought.

#### **4.0 Procedures for Enforcement of Foreign Arbitral Award**

Each regime clearly indicates the court that has the competence to enforce the arbitral award which falls within its jurisdiction. In Tanzania, the winning party can apply to recognize and enforce a foreign arbitral award before the High Court.<sup>459</sup> The enforcement of foreign arbitral award is governed by sections 29 and 32 of the Arbitration Act.<sup>460</sup> A foreign award is enforceable either by action or through a petition made to the High Court upon the award being filed.<sup>461</sup> Although the law does not define what “action” means, it can be construed to imply a formal suit. A party to the foreign award may rely upon it in any legal proceedings by way of defence, set-off or otherwise.<sup>462</sup>

For a person to enforce foreign award in Tanzania, the award must meet the conditions provided under section 30,<sup>463</sup> that it must:

- (i) have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (ii) have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties;
- (iii) have been made in conformity with the law governing the arbitration procedure;
- (iv) have become final in the country in which it was made
- (v) have been in respect of a matter which may lawfully be referred to arbitration under the law of Tanzania, and its enforcement must not be contrary to the public policy or the law of Tanzania.

Likewise, Section 31<sup>464</sup> of the law requires that a party seeking to enforce a foreign award must produce: (i) the original award or its copy duly authenticated in the manner required by the law of the country in which it was made (ii) evidence proving that the award has become final, and (iii) such evidence as may be necessary to prove that the award is a foreign award including certified translation of any of document if it is in the foreign language.

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<sup>458</sup>New York Convention, 1958

<sup>459</sup>Section 29 of the Arbitration Act [cap 15 RE 2002]

<sup>460</sup>Ibid,

<sup>461</sup>The arbitrator or any party to the dispute may file an award before the high court, the position was given by Lubuva, J in Tanzania Cotton Marketing Board v Cogecot Cotton Company SA [1997] TLR 165

<sup>462</sup>Section 29 of Cap 15

<sup>463</sup>Ibid.

<sup>464</sup>ibid

The recognition and enforcement of a foreign award in Tanzania is based on the Convention on the Execution of the Foreign Arbitral Awards of 1923 and The Protocol on Arbitration Clauses of 1923 for which Tanzania is a member. The two international agreements are incorporated in 3<sup>rd</sup> and 4<sup>th</sup> schedules to the Arbitration Act.<sup>465</sup>

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The requirements contained in the Arbitration Act are similar to those mentioned under the Geneva Convention 1923 which has been replaced since 1965 by the New York Convention 1958 of which Tanzania is a party. However, Tanzania is yet to domesticate the New York Convention 1958.<sup>466</sup>

Accordingly, to enforce a foreign award in Tanzania, the winner is required to supply an original or certified copy of the award and the arbitration agreement to the enforcing court.<sup>467</sup> These requirements mirror what is provided under the Tanzania Arbitration Act.<sup>468</sup>

The law requires a party to supply an arbitral award and arbitration agreement, which serve as evidence for the recognition and enforcement proceedings.<sup>469</sup> For a foreign arbitral award to be enforceable in Tanzania, it must not conflict with public policy.<sup>470</sup> This means that an award tainted with or affected by fraud or corruption cannot be recognised nor enforced in Tanzania. Failure to meet public policy condition, a foreign arbitral award will be refused on the ground that it is contrary to the public policy of Tanzania. It has been argued that an arbitral award may be considered as contrary to the public policy of country if it is contrary to fundamental policy or interest of that country.<sup>471</sup>

In Tanzania, there is provision for setting aside a foreign arbitral award.<sup>472</sup> Accordingly, a Court in Tanzania is required to enforce or to refuse to enforce an award made in a foreign country and can set it aside. These powers bode well with international standards and best practices. This is vital that courts in Tanzania are empowered to set aside an award which is made by a foreign court.<sup>473</sup>

### **5.0 Ground for Refusing to Recognize and Enforce Foreign Arbitral Award**

Like in litigation where judgements are subject to appeal or review by superior court, in arbitration, an award can be challenged by one of the parties before the enforcement. The party refusing to enforce foreign award has to prove before the enforcing court the ground provided under the Arbitration Act, New York Convention and those provided under the ICSID but relating to refusal of enforcement.

Under Article V (1), the Convention<sup>474</sup> sets out the limited grounds upon which contracting states may refuse to recognize and enforce foreign arbitral awards. That, the 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:

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

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<sup>465</sup> Cap. 15 revised 2002

<sup>466</sup> This has made the court to refer the Geneva Convention which is still reflected in the Act while it has been replaced by the New York Convention 1958

<sup>467</sup> Art.35 (2), *supra* note 38, provides “The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language. Under Art. IV (1) (a) of the New York Convention 1958 provides that if recognition and Enforcement is sought in a member state of the New York Convention, a duly authenticated original or a duly certified copy of the award has to be brought in front of the competent court.” See, R. B.V. Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/COMM 147, (1998) 156-57.

<sup>468</sup> See section 31 of [cap 15 RE 2002]

<sup>469</sup> D.D. Pietro et al.; *Enforcement of International Arbitration Awards*; The New York Convention of 1958, Cameron, London May 2001,124.

<sup>470</sup> Section 30 (1) (e) of the Arbitration Act, [Cap Revised 2002].

<sup>471</sup> See, S. Kachwale; “Enforcement of Arbitration Awards in India,” *Asian International Arbitration Journal*, Volume 4 No.1, 2008, 64-82.

<sup>472</sup> Section 16 of the Act reads; where the arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award.

<sup>473</sup> Provided that the award fall under the grounds of section 31(2) of [cap. 15 RE 2002]

<sup>474</sup> New York 1958

- 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:

- 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.”

Arbitration agreement can be challenged if it is on matters which are not arbitrable, per the public policy which is always upon the judge to determine what public policy is. The same grounds are provide under the Act<sup>475</sup> and the ICSID Convention,<sup>476</sup> although with slight difference but does not affect the content.

## **6.0 Challenges Facing the Recognition and Enforcement of Arbitral Awards in National Courts (Tanzania)**

Despite the efforts made by the international community by adopting different international conventions on arbitration and establishing different arbitration institutions to facilitate the enforcement of foreign arbitral awards there still some issues that complicate the enforcement proceedings. The progress made by the New York Convention in harmonizing the enforcement of foreign awards, still the enforcement process is facing challenges. Indeed, these challenges have been because of depending on national rules, which differ in many aspects in different parts of the world.<sup>477</sup> It is these national courts which are authorized to enforce the award by applying their national rules even though the award is foreign and not domestic award.<sup>478</sup>

### **6.1 The Application of National Enforcement Rules and Procedures**

The main issues that complicates the enforcement is the application of national enforcement rules and procedures of the enforcing state which governed mostly by legal system (by the *lex fori*) or on the legal system of the state court where the award is to be enforced.

It is the reliance on the national procedural rules for enforcing foreign award which differs from one country to another that led to difficulties during the enforcement of the arbitral award. Example an award from civil law countries and the claimant wants to enforce the award, while the award debtor has asset in common law countries or from Arabic countries where the legal system is different.

Here, the claimant may choose to enforce the award in any of the country; however, the award can be refused by one country and be accepted in the other due to different applicable law and procedures. And this has been a problem of using national laws in absence of a universal accepted enforcing institution. That being the case, this research addressed the problem facing the enforcement of arbitral award in national courts. Whereby one of the respondent from TIA gave his opinion that the NYC, being regarded as universal standard on enforcement due to number of states ratified it, it should be accepted by member states that once an award has been given under the NYC it should not be subjected to national law either for challenging or setting aside the award, rather the national court should have the duty of facilitating the enforcement.<sup>479</sup>

### **6.2 The Law Applicable**

Parties being required to submit the duly authenticated original award or a duly certified copy thereof, the original agreement or a duly certified copy thereof and to have an award or agreement interpreted in the official language if not made in an official language of the country in which the award is relied up.<sup>480</sup> With this

<sup>475</sup> See section 30(2) of [cap. 15RE 2002] Subsection 2 provides the reasons for refusal of foreign award when brought for the enforcement in Tanzania

<sup>476</sup> Article 52 provides the ground for refusal of enforcement of the arbitral award

<sup>477</sup> Example rules of procedures in common law countries and civil law countries differs and it becomes worse when it comes to mixed type of legal system

<sup>478</sup> Article 1 of the New York Convention 1958

<sup>479</sup> The opinion given by one arbitrator from the TIA when interviewed by the researcher on 26<sup>th</sup> February 2014

<sup>480</sup> Article IV (2) NYK 1958

requirement the enforcing court is faced with the question of which national law the award should be authenticated or the copy certified. While the convention on the recognition and enforcement of foreign arbitral award and the Act is silent on this matter, the view prevails in legal scholarship that the court may apply either the *lex fori* (the law of the court of recognition and enforcement) or the law of the country where the award was made.<sup>481</sup>

However, the respondent from the High Court of Tanzania Commercial Division acknowledged the weakness of the Arbitration Act, but demonstrated that the issue of which law the authenticity should be done has not been the case before the court that the court has been always positive to accept the documents supporting the award regardless to whether the authenticity is by the law of the country of enforcement, or of the country where the award was made.<sup>482</sup>

### 6.3 Time Limit for the Enforcement

The New York convention sets no time limit for the enforcement of foreign arbitral award. A party seeking to enforce its arbitral award should, therefore, be aware of the limitation period for recognition and enforcement of arbitral award in Tanzania.<sup>483</sup>

It has already been stated that enforcement proceedings are left to the local laws in the place where the enforcement is sought. These laws normally provide a time limit within which the winning party should seek the recognition and enforcement of the foreign arbitral award. Since the matter of time is left to the local laws in the forum place, these laws normally provide different periods within which an award should be enforced and about from which date this period should begin.<sup>484</sup> To this effect, the working group of UNCITRAL Model Law points out that:

*Many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonization of these rules would be difficult to achieve since they were based on the differing national policies closely linked to the procedural law as aspects of State.*<sup>485</sup>

Therefore, there is no agreed period among the enforcing regimes. It is, for example, three years in the USA, and one year or six months in Mainland China,<sup>486</sup> in Tanzania the Arbitration Act does not provide on the time limit for the application of the recognition and enforcement rather the law of Limitation Act may apply to plug the gap.<sup>487</sup> Therefore, under Tanzanian law, the parties are free to agree binding limitation periods in the arbitration clause. In addition, the High Court can extend any time period specified in an arbitration clause to alleviate any undue hardship.<sup>488</sup>

Regarding to the time limit for the enforcement, the respondents argued to find out reasons for opting arbitration if the Act does not specify the limitation of time for enforcement and yet applies the Law of Limitation Act which is the same in litigation cases. Continued arguing that, parties choose arbitration with the reasons that it is quick and the enforcement is timely done, they added that, to make sure that the award is timely enforced, there

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<sup>481</sup> As quoted in the united nations conference trade and development new York (2003) pg. 25

<sup>482</sup> This was the response from the panel of officers from the High Court of Tanzania Commercial Division at Dar es salaam

<sup>483</sup> The Act does not cover on time limit for the enforcement of an award but the law of limitation Act has been used, however, the rules which applies to local arbitral awards applies the same to foreign arbitral awards

<sup>484</sup> An exception to this fact is the Moscow Convention 1973. It is provided in art IV (5) that the award should be enforced within two years from the date of serving an award to the party applying for enforcement, and in cases when an award had been sent by post, from the date of the postmark indicating acceptance of a registered letter for delivery. In the case of an agreed award, the period reckoned from the date of agreement on such settlement.

<sup>485</sup> As cited in FP Davidson *International Commercial Arbitration, Scotland and the UNCITRAL Model Law* (Sweet and Maxwell Edinburgh 1991) 257.

<sup>486</sup> S. Gary 'International Enforcement of Arbitral Awards' (2000) 11(7) *International Company and Commercial Law Review* 253, 259.

<sup>487</sup> A dispute that had become time-barred by operation of the Law of Limitation Act (Cap. 89 Revised Edition 2002) would also become time-barred for arbitration. Under the Law of Limitation Act, the relevant limitation period commences at the point when the cause of action accrues (*section 4*). A cause of action is deemed to accrue when all events entitling a claimant to take legal action have occurred. The applicable limitation periods for different claims are specified in a Schedule to the Law of Limitation Act. Generally, a limitation period is six years.

<sup>488</sup> section 7, Arbitration Act cap 15

is a need to have the time limit for enforcement and execution of the award in the Arbitration Act as for the case in USA and China.<sup>489</sup>

#### 6.4 Inadequacy Experience with Enforcement of Foreign Awards by the Court

The information collected from respondents specifically lecturers and legal practitioners revealed that some judicial personnel have basic knowledge regarding arbitration which does not help in the application and interpretation of arbitration agreement as well as the conventions; thus, it makes the enforcement of arbitral awards difficult.<sup>490</sup> The same argument rose during the High Court of Tanzania (Commercial Division), The Third Round Table Discussion “Contract Enforcement through Judicial System in Tanzania.”<sup>491</sup>

Furthermore, the respondents in this study argued that lack of arbitration expatriate in Tanzania is due to the fact that arbitrations were not taught at higher learning; neither to especially to lawyers nor other professionals and where it happened, it used to be elective subject, and hence lack of expatriate in the field. They added that most judges and advocates partly learnt arbitration in practice and particularly in 1994 where ADR was introduced in our legal system.<sup>492</sup> One of the respondent continued arguing that in the ICC proceedings no Tanzania law, case or any experience thereof cited by the counsel to the extent that the chairperson raised the alarm that no case to study in the side of the respondent.<sup>493</sup> Therefore, when it comes to enforcement of the award the court finds it lacking experience and expertise in arbitration.<sup>494</sup>

Also, the enforcement of arbitral award being done at the High Court<sup>495</sup> and considering the arbitration laws, which do not exhaustively cover some important issues in arbitration like confidentiality, issues of cost, rights of the third party and the arbitration rule of 1957 with only 13 sections which do not capture the ICC Rule, UNCITRAL rule it makes the enforcement more difficult as the judge need to look for cross sectional laws in order to meet international standards.

#### 6.5 Absence of International Center for Arbitration in Tanzania

In Tanzania, there are two arbitration Institutions; Tanzania Institute of Arbitration (TIA) and National Construction Council (NCC)<sup>496</sup> with these institutions, one of the respondent argued that, in Tanzania, the institutions responsible for arbitration are still young/infants in terms of strength, resource and coverage to enable them to arbitrate cases of international nature. He (the respondent) added that not even all Tanzanians have ideas of these institution, sometimes even some lawyers are not well informed of the available local institutions specifically established for arbitration.<sup>497</sup>

He kept arguing that, despite the efforts the TIA is taking still arbitration in Tanzania is not made common to people that is why the Country still refers their disputes to normal courts rather than TIA. Bad enough, our law does not promote the local institutions because some of the laws provide for disputes to be referred to international arbitration institutions; for example the Tanzania Investment Act.<sup>498</sup> That it could have been much better first to refer the dispute to local institutions as one way of capacity building.<sup>499</sup> With the National Construction Council (NCC), a statutory institution established to deal with settlement of construction disputes. It has been doing a great work since 1980’s and construction disputes have increased to due to the current development of trade and commerce. This institution has its own arbitration rules which in large extent it reflects the UNCITRAL Model rules. The NCC potential customer has been persons in construction industry; however,

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<sup>489</sup> Answers obtained from the questionnaires filled by eight out of twenty, fourth year UDSM law students (data collected on 15<sup>th</sup> January 2014).

<sup>490</sup> Information obtained from lecturers from different university e. g. RUCO, SAUT, UDOM and UDSM

<sup>491</sup> <http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/RAPOTEUR-THIRD-ROUND.TABLE-2011-REPORT.pdf> (where Hon. (Judge) F. M. Werema Attorney General. Presented a topic; on the enforcement of foreign arbitral award in Tanzania) accessed on 14<sup>th</sup> December 2013

<sup>492</sup> This is the summary of the responses of lecturers from UDOM, RUCO, OUT and the senior advocate from TANESCO who compared what happened in TANESCO vs. DOWANS CASE. Commented that when local advocates are hired to represent the company they also sub contract to foreign advocates who are not familiar with our law as result fails to convince the tribunal on the violation of Tanzania law

<sup>493</sup> Requested the researcher to read from page 149 of DOWANS ICC award to the last paragraph on matters related to costs

<sup>494</sup> This is caused by the legal system we have, the insufficiency of the Arbitration Act and the reluctance of Tanzanians to prefer the court rather than the tribunal

<sup>495</sup> Section 30 of cap. 15

<sup>496</sup> The former is nongovernmental organisation(TIA) and the later being the statutory institution(NCC)

<sup>497</sup> One Law Lecturer from the University of Dodoma (UDOM) interviewed on 14<sup>th</sup> January, 2014

<sup>498</sup> Section 23 of the Tanzania Investment Act, 1997 provides for settlement of investment disputes in an amicable way through negotiation and arbitration in accordance with arbitration laws of Tanzania or in accordance with the arbitration rules of the centre ICSID

<sup>499</sup> Advise by third year Open University of Tanzania law students when interviewed by the researcher

non construction disputes have been dealt with and they are looking to extend arbitration services to foreign companies.<sup>500</sup>

Therefore, both being local based institutions, the court has not been able to find experience and complicated awards from these institutions. This is said to be the reason for the Tanzania court to find itself in hard time when faced with international awards and starts to make reference to outside arbitral awards issued by international institution like LICA, ICC, and AAA and ICSID. One of the respondents in this study advised that TIA and NCC should take reference from Rwanda where Rwanda International Centre for arbitration is established. He added that, by having international centre for arbitration centred in Tanzania, our courts will be in a position of receiving many awards for enforcement and become more competent.<sup>501</sup>

#### **6.6 Reluctance of the Legislature to Enact and Domesticating Implementing Legislation**

Arbitration and Arbitration Agreement are the results of forum shopping rules adopted by the parties to the agreement. Its enforcement needs to be done in a country whose legislation already covers the international conventions like the New York Convention,<sup>502</sup> ICSID<sup>503</sup> and UNCITRAL Model Law.<sup>504</sup>

The model law is said to be the most current law on arbitration, because it covers everything left by the New York Convention, yet Tanzania has not ratified it.<sup>505</sup> Tanzania has ratified the New York Convention but it has not yet promulgated specific implementing legislation in its local laws. Having the law which does not acknowledge the international instruments and the court has been receiving the awards for enforcement some of which are being governed by the instrument which is not part to our law makes it a challenge for the court to make the decision.<sup>506</sup>

The same was observed during the High Court of Tanzania (Commercial Division), The Third Round Table Discussion on “Contract Enforcement Through Judicial System In Tanzania”<sup>507</sup> among the discussant Mr. Mohamed, Dr. Luhangisa and Mr. Mlaki commented on the recognition and enforcement of foreign arbitral award, that Tanganyika in 1958 under colonial power was a signatory to the UN Convention on recognition and enforcement of foreign arbitral award because British ratified it on behalf of its territories. Despite convention formerly ratified in 1965, the arbitration law is not in harmony with that convention and makes it difficult at the time of enforcement for parties with international or foreign award who decides to have their award enforced under the Arbitration Act of 2002.

In addition, Dr. John Luhangisa commented on frustrations of people on the inadequacy of the laws on enforcement of the arbitral awards because the law is out of date and there are no progresses in place to update the laws.<sup>508</sup> Under these circumstances, will the agreements be prejudiced; can an award be challenged as being not valid.<sup>509</sup> Therefore, the issue of harmonizing our laws in line of what is stated in the convention is still a challenge at the time of enforcement. This is because the Arbitration Act recognizes Geneva Convention of 1927 and not the 1958 Convention.

#### **6.7 Absence of Standard Arbitration Clause**

The Tanzania law, specifically the Arbitration Act and the Arbitration Rules do not provide the standard of the arbitration agreement to both international and domestic arbitration.<sup>510</sup> The Act does not speak anything about

<sup>500</sup> Information obtained from NCC officials when interviewed on 11<sup>th</sup> Dec. 2013

<sup>501</sup> Senior lecturer at the Faculty of Law, University of Dares Salaam; he referred to ICC award in the DOWANS case that there was no Tanzania case cited as reference.

<sup>502</sup> 1958

<sup>503</sup> 1965

<sup>504</sup> Tanzania is a not party to the UNCITRAL Model Law.

<sup>505</sup> Though the local institutions like NCC and TIA has the arbitration rules taken from UNCITRAL arbitration rules

<sup>506</sup> Information obtained from interview conducted with AG advocates, Dodoma office (on 3<sup>rd</sup> February, 2014)

<sup>507</sup> <http://www.comcourt.go.tz/comcourt/wp-content/uploads/2013/08/RAPOTEUR-THIRD-ROUND-TABLE-2011-REPORT.pdf> (where Hon. (Judge) F. M. Werema Attorney General. Presented a topic; on the enforcement of foreign arbitral award in Tanzania) accessed on 14<sup>th</sup> December 2013

<sup>508</sup> The Arbitration Act No. 10 of 1971 revised 2002 has only 32 sections and its rules of 1957 and no progress is taken to come up with the new law which will reflect the current arbitration trend

<sup>509</sup> A question posed during the High Court of Tanzania (Commercial Division), The Third Round Table Discussion “Contract Enforcement through Judicial System in Tanzania” Dar Es Salaam International Conference Centre, PPF, Tower 5th Floor-Dar Es Salaam Tanzania: Where Hon. (Judge) F. M. Werema Attorney General. Presented a topic; on the enforcement of foreign arbitral award in Tanzania. Information obtained from, (<http://www.comcourt.go.tz/comcourt/wpcontent/uploads/2013/08/RAPOTEUR-THIRD-ROUND-TABLE-2011-REPORT.pdf>) accessed on 14<sup>th</sup> December, 2013

<sup>510</sup> Section 3 & 4 of the Kenya Arbitration Act provides on how the arbitration clause should be

how the arbitration clause/ agreement should be; it leaves the designing of the arbitration clause to parties while being known that arbitration depends on the arbitration clause.

This is taken as the challenge as it is not easy for the parties to design the arbitration agreement that encompasses everything in a contract as a result parties opt to choose arbitration clause from the ICC, LICA or UNCITRAL Model Rule which do not reflect our local jurisdiction. Thus, becomes difficult at the time of enforcement of the award due to the fact that at the time of writing the arbitration clause parties did not consider the national arbitration law.<sup>511</sup> Commenting on the importance of having the provision under the Act, providing a format or sample of the arbitration clause.

When interviewed on the same question, one of the respondent said that it will help the government or its instrumentalities from being subjected to legal technicalities of other jurisdiction when entering contracts with foreign companies as the case was in the IPTL, Biwater and DOWANS contracts were the Tanzania Government found itself in dispute which if the arbitration clauses were a result of local law could have been avoided.<sup>512</sup>

### **6.8 Where the State is a Party to the Dispute (Issues of State Immunity)**

The enforcement may be affected by the defence of state immunity; this is considered as another reason for not enforcing the award, especially where the losing party is a state or state agency. The defence is on the ground that the contract between the state and foreign investor is governed by public and not private law, or that the subject matter of the contract is of public nature.

Where a contract is to be made with a state or one of its instrumentalities,<sup>513</sup> consideration should be given to the express waiver of any immunities or privileges attaching to that party which might impact upon the resolution of disputes. In particular, whilst entering into an arbitration agreement will itself is often treated as a waiver of any immunity from suit, an express waiver will normally be required to deal with immunity from enforcement of any award.

*In my opinion, the enforcement of arbitration award against the assets of the state in which the enforcement is sought, and especially against those used for the state's public functions, is not always easy; it may cause diplomatic difficulties and affect relationships between the countries.*<sup>514</sup>

In *Creighton vs. Qatar* the dispute involving the state shows how difficult it is to enforce the award against the state. In this case; the Qatar authority argued, before the first instance and on appeal in France, that such enforcement would violate Qatar's sovereign execution immunity.<sup>515</sup>

### **6.9 Non Appealable of the Award**

The Tanzania arbitration laws like international instruments, the New York Convention, the UNICTRAL Model Law and the Convention on Settlement of Investment Disputes do not provide appeals against arbitral award on the basis of mistake of facts or law or any judicial review of the award on its merit.<sup>516</sup> If the tribunal has jurisdiction and followed the correct procedure and formalities, the award, of whatever quality is final and binding on the parties.<sup>517</sup>

Some states with long tradition of arbitration have taken the view that it should be open to the parties to appeal against foreign arbitral award, if the arbitration contains serious mistake of law.<sup>518</sup> This is reflected in the English 1996 Arbitration Act. As such, English law allows a party to appeal on a question of law arising out of an arbitral award. The right of appeal is provided for under section 69 of the Act, but it is not without restrictions. Apart from requiring a right of appeal to be granted only on question of English law, and the question to be one of "general importance," however, by allowing appeals on the point of law, it makes the enforcement of the award

<sup>511</sup> Good example is the **DOWANS CASE** which seems to have violated the local law like the Public Procurement Act and being contrary to the public policy as it was connected to corruption because Richmond was a non-existing company, as revealed by special Parliamentary committee report

<sup>512</sup> The respondent referred to Kenya Arbitration Act as an example because it provide the content of arbitration clause

<sup>513</sup> **Humphery Construction LTD V. Pan African Postal Union (PAPU)** where the property of PAPU was immuned from attachment or execution as provided under article II(I) and III(I) of the headquarter agreement(the diplomatic and capsular immunities and privileges Act [Cap. 356R. E 2002]

<sup>514</sup> **Creighton Ltd vs Ministry of Finance of the State of Qatar**, French Court of Cassation, 1<sup>st</sup> Civil Chamber, 2000 (Pourvoi A 98-19.068).

<sup>515</sup> Ibid.

<sup>516</sup> Article 53 of the ICSID provides that the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this convention

<sup>517</sup> Article 5 of the UNCITRAL Model Law

<sup>518</sup> Section 69 of England Arbitration Act 1996

to take long time and becomes difficult. Furthermore, the UNICTRAL Model laws proclaim that, in matters governed by this law, no court shall intervene except where so provided in by this law.<sup>519</sup>

The respondents argued that the enforcement being subjected to the law and procedures of national court it is better all procedures like in normal litigation to be observed where appeal should be allowed and thus parties being free to choose the court of enforcement, if it happens that one legal regime does not allow appeal while the other provides for appeal the party may opt the one providing for appeal. They added that by denying parties right to appeal is like denying them right to access the court which is the constitutional right.<sup>520</sup>

#### **6.10 Wide Court Interpretation of Public Policy**

The interpretation of the word public policy in international commercial disputes has brought a challenge to court of enforcement as it has been differently interpreted. The enforcing court, when faced with the issue of public policy, is difficult to interpret exactly what is public policy. Because in some jurisdiction, it refers to public interest, public order and others think of public morality and justice. Therefore, with the diversified interpretation of the term public policy, it may lead to the refusal of enforcement of the arbitral awards as every court in each legal system has its own interpretation.

Another issue is whether the term of public policy is to be interpreted in the same way in both domestic and international cases; the court may make a distinction between these two situations.

Applying public policy defense depends greatly on whether the national court of the state where the enforcement is sought gives a wide or narrow interpretation of the scope and meaning of public policy. Many national courts tend to apply domestic public policy rather than international public policy.<sup>521</sup>

Undoubtedly, reliance on the broad interpretation of public policy defense as a means of refusing enforcement for political reasons could lead to unjustified non-enforcement of international awards.<sup>522</sup> With the issue of public policy Hon (Judge) F. M. Werema Attorney General said “*the determinant of public policy is not the people of Tanzania but the judge.*”<sup>523</sup> Thus, by not having the exact definition on what amounts to public interest either at domestic level or international level makes it difficult for the court/judges to determine when faced with the enforcement of foreign arbitral award.

#### **6.11 Absence of Confidentiality**

Although the degree of confidentiality<sup>524</sup> afforded by the arbitration law of different jurisdictions varies, there can be no doubt that arbitration provides greater privacy and confidentiality than litigation. Further, parties can provide for the required degree of confidentiality in their arbitration agreement.

Since international commercial arbitration was traditionally between two commercial companies that could have settled their dispute by negotiation or other private and confidential means, it became something of an article of faith that the private nature of arbitration also led to confidentiality.<sup>525</sup> It was understood that neither the parties, arbitrators, witnesses, experts nor any supporting personnel would reveal anything about the arbitration, including its existence.

There was an obvious exception if one of the parties had to invoke the aid of a court in regard to the arbitration or to set aside or enforce an arbitral award. An example of this understanding is found in Article 30 of the LCIA Arbitration Rules.

*Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not*

<sup>519</sup> Op cit, Article 5

<sup>520</sup> This was the response given by law students from UDSM during an interview conducted on 16<sup>th</sup> January 2014

<sup>521</sup> WafaJanah, Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts *Journal of sharia & law issue* No 47 July 2011; accessed on 26 September, 2013

<sup>522</sup> As the defense raised in the Richmond/ DOWANS case that the contract between the parties was contrary to the public policy and violated the Public Procurement Act

<sup>523</sup> High Court of Tanzania (Commercial Division), The Third Round Table Discussion “Contract Enforcement Through Judicial System In Tanzania” Dar es Salaam International Conference Centre, PPF Tower 5th Floor-Dar es Salaam Tanzania: Where Hon. (Judge) F. M. Werema – Attorney General. Presented a topic; on the enforcement of foreign arbitral award in Tanzania. Information obtained from (<http://www.comcourt.go.tz/comcourt/wpcontent/uploads/2013/08/RAPOTEUR-THIRD-ROUND-TABLE-2011-REPORT.pdf>) accessed on 14<sup>th</sup> December 2013

<sup>524</sup> The Arbitration Act Cap 15 does not provide the rules on confidentiality rather the chance is left for the parties to determine in their arbitration agreement

<sup>525</sup> Example in Biwater case, it was claimed by the petitioner that there was breach of confidentiality by the United Republic of Tanzania by merely disclosing the proceedings and contending that it was for the public interest and it was declared the tribunal that Tanzania was in breach of the principle of confidentiality

*otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.*

The case is different in Tanzania because the Act does not provide anything on confidentiality of the award, something which is important as the dispute is in private arrangement. And this has been a challenge to parties enforcing their awards in Tanzania taking example from Biwater case where the proceedings were made public while in agreement everything supposed to be confidential.

### **6.12 The Public, Media and Political Influence**

In Tanzania, there is attendance of nongovernmental organizations, politicians; general public through media to raise their concern so as to influence the court not to enforce the award.<sup>526</sup> Here, we find that the court has been interfered or forced to consider the social out carry when enforcing the award especially where the parties to the disputes involves state institutions.<sup>527</sup>

Mr. Mlaki had a question on the feelings of the general public, and how the knowledge of the public on foreign judgments and what should be done to make the public accept those awards.<sup>528</sup> In response, Hon (Judge) F. M. Werema, Attorney General of Tanzania, said “as of public feeling he referred it as ‘mhemuko’” the ultimate goal is the rule of law which must prevail. He said, however, that the judge should be left alone to make judgment on his own.<sup>529</sup>

When responding on the same point respondents said the society has no problem with the award, if it is the result of a valid contract, out of fraud, misrepresentation and not surrounded by acts of corruption. They kept arguing that the solution is not refusing to honour the award but being smart enough at the time of negotiation and acting in good faith.<sup>530</sup> He added that this behaviour may have negative impact to our legal regime as parties will not be able to bring their award in states where the enforcement is difficult and sometimes the parties are advised not to honour the award just for political reasons.<sup>531</sup>

### **7.0 Conclusion**

The study findings revealed that the Tanzania legal and institutional framework on recognition and enforcement of foreign award is facing number of challenges as the law governing commercial arbitration is insufficient to cover the modern business changes. The weak legal framework has resulted into inadequate arbitration institutions, which have not managed to advise and arbitrate domestic and international commercial disputes hence provides the problem at the time of recognition and enforcement and provides the loopholes for foreign companies to win the case when brought before the high court.

Generally, the research findings revealed that the current Arbitration Act does not align with the current development of both economic and social aspects as result difficult to administer of justice and laws governing enforcement of foreign arbitral awards in Tanzania is weak when compared to other laws governing international commercial arbitration in other jurisdiction. Moreover, the lack of strong arbitration institution in the country is also taken as a big challenge.

All these can be achieved through domesticating ratified convention and providing training for national judges on the interpretation and application of international conventions.<sup>532</sup> It is also essential to consult lawyers experienced in the arbitration law of the state in which enforcement is sought. Moreover, to ensure that an award

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<sup>526</sup> The general public stands on the public policy though the court has been stable to stand on legal principles and determines justice

<sup>527</sup> Take example the dispute between TANESCO and DOWANS/ RICHMOND, TANESCO and IPTL in both disputes. The public has been blaming the Government and the court based on issue of public interest. The same raised by DR. Mvungi in DOWANS case when petitioning to challenge the execution of the award.

<sup>528</sup> The question asked during the High Court of Tanzania (Commercial Division), The Third Round Table Discussion on the enforcement of foreign arbitral award in Tanzania. Where Hon. (Judge) F. M. Werema Attorney General of Tanzania Presented a topic; on the enforcement of foreign arbitral award in Tanzania (Information obtained from (<http://www.comcourt.go.tz/comcourt/wpcontent/uploads/2013/08/RAPOTEUR-THIRD-ROUND-TABLE-2011-REPORT.pdf>) accessed on 14<sup>th</sup> December 2013

<sup>529</sup> Information obtained from (<http://www.comcourt.go.tz/comcourt/wpcontent/uploads/2013/08/RAPOTEUR-THIRD-ROUND-TABLE-2011-REPORT.pdf>) accessed on 14<sup>th</sup> December 2013 Where Hon. (Judge) F. M. Werema Attorney General. Presented a topic about the enforcement of foreign arbitral award in Tanzania, During the High Court of Tanzania (Commercial Division), The Third Round Table Discussion

<sup>530</sup> Information obtained from respondents by way of interview and from the collected questionnaires (advocates, businessman, law students and from Legal and Human Rights Centre.)

<sup>531</sup> As it happens in the 11<sup>th</sup> and 12<sup>th</sup> parliamentary session where MPS advised the Government not to honour the arbitral award given against TANESCO

<sup>532</sup> The new York Convention, ICSID, UNCITRAL Model Law on commercial arbitration

is enforceable, we have to draft the arbitration agreement carefully and conduct the arbitration while having the New York Convention in mind.

### **8.0 Recommendations**

On the basis of the study findings, the following are the recommendations

Tanzania government and legislature should ratify and domesticate in its Arbitration law, the ratified international conventions so as to ensure effectiveness in settlement of commercial disputes. Apart from compliance with the international conventions on arbitration, the revising of its arbitration law and rules will enable Tanzania to step on the same footing with her neighbours and trading partners under the East Africa Community, i. e. Kenya,<sup>533</sup> Uganda, Rwanda and Burundi whose laws have been revised in line with the UNCITRAL Model Law.

It is also recommended that the Government of Tanzanian should create new and promote existing local arbitration institutions like TIA & NCC so that they can work effectively in facilitation and promotion of arbitration and other ADR forms of dispute resolution in the construction industry.<sup>534</sup> Moreover, we need special training of expert in the area, outreach programs, public sensitization programs and more important is adopting regular training to judges, magistrates and advocates for them to suit the international dynamism of trade and commerce.

Further, it is recommended to governmental and non government institutions, like TIC, TLS, TIA and NCC, to advise the Government on the emerging issues related to legal and investment so as to enable the government officials to avoid committing mistakes at the time of negotiation and when signing contracts.<sup>535</sup> Also to adopt a system of doing research on new trends related to commercial dispute resolutions and finally to provide seminars to stakeholders as one way of capacity building. Likewise, it is recommend that the judiciary should take all necessary means to support the high court commercial division so as to enable quick delivery of judgements, training its officials, and making sure that arbitration skills are offered to all judges and magistrates and more attention should be given to international arbitration due to the increase of foreign investments in our country.

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<sup>533</sup>Arbitration ActNo. 4 Of 1995Revised Edition 2012 [2010]

<sup>534</sup> Tanzania has two arbitration institutions (NCC & TIA) which are localized and have not gained experience to arbitrate international disputes. Therefore, a need to establish an international centre for arbitration which is based in Tanzania

<sup>535</sup> Refer what inspired in Richmond saga

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