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PRINCIPLE OF ARBITRABILITY IN ARBITRATION AND THE JUDICIAL ATTITUDE IN UGANDA

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Abstract

Arbitrability determines whether a dispute is capable of being settled by arbitration. When public rights, concerns, third-party interests, or procedural issues are involved, the propriety of a private proceeding may be contested or the interpretation of a contractual agreement, subject to arbitration, may occasion a contestation. At this point, the question of arbitrability comes into focus and the courts' intervention may be sought. Most times the courts have refrained from entertaining matters merely because there exists no process to determine their arbitrability. This study has been prompted by the quest to find out how the legal frameworks for arbitration practice have impacted the efficacy or otherwise of the courts' intervention in arbitration in Uganda. Using the doctrinal methodology, this study analyses arbitrability through the lens of the Arbitration and Conciliation Act 2000 and the case law regarding subject matters of arbitration. The study demonstrates that there is confusion regarding the contexture of arbitrability; there is the absence of uniform interpretation models and application of laws/conventions that constrain the courts' power to intervene in arbitration disputes and argues that the Parliament resolves the conflict of procedure issues in the Act that is, apparently, the clog in the exercise of the inherent powers of the courts.

Keywords: arbitration, court's intervention, arbitrability, frameworks, Uganda.

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Introduction

Arbitration is the procedure whereby parties in dispute refer the issue to a third party for resolution and agree to be bound by the resulting decision, rather than taking the case to the ordinary courts of law. In *Arenson v Arenson* & *Casson, Beckman, Rutley* & Company.[1] Lord Wheatly, defined the determinant features of arbitration as being:

> The existence of a dispute or a difference between the parties which has been formulated and the remission of that dispute or difference to another party to resolve judicially; the opportunity of the parties to present evidence or submission in support of their respective claims in the dispute; the agreement of the parties to accept his decision. The award must be binding. It is by virtue of the contract or the arbitration agreement that it can thus be enforced as an agreement to abide by the arbitrator's award.

The biggest development in the law of arbitration in Uganda seems to have been the enactment of the Arbitration and Conciliation Act No 7 of 2002, which was intended to cure the defects of the 1930 Arbitration Act. The Act of 2000 has continued to facilitate the practice of arbitration and provide a framework for the operation of commercial arbitration. Its biggest innovation was the establishment of the Center for Arbitration and Dispute Resolution. This Centre and the Commercial Court Division of the High Court regulate the arbitration process in Uganda and determine arbitrability issues generally.

This study relates to the legal frameworks for arbitration, the determination of the question of arbitrability, and the court's attitude in that context. Apart from matters statutorily proscribed as non-arbitrable[2], the courts, largely, have been cherry-picking what matters, in an arbitration dispute, it may entertain and what matters not to entertain without defined criteria and clear-cut basis. In the absence of a body of precedence, the court's direction is beclouded by uncertainty, the likelihood of this state of affairs impinging on access to justice in arbitration matters cannot be overemphasized.

[1](1976) I Lloyd's Rep. 179 (1977), AC405 (11).
[2] trademarks, patents, designs, and copyrights, family matters like divorce petitions, custody and guardianship, human rights created under the constitution, and all criminal matters are non-arbitrable matters

Conceptual Analysis

Arbitration

Arbitration is a private method of dispute resolution, chosen by the parties themselves as an efficient way of putting an end to disputes between them, by means of a tribunal.[3] Torgbor[4] argued that a fundamental requirement for a valid arbitration agreement apart from formal requirements is consent. In the common law tradition, consent in the sense of "assent" or more technically "consensus ad idem" is an essential element of a contract. Consent is germane to the contractual and legal bases of the arbitral process in that the absence of genuine consent not only impinges upon but also detracts from the validity of the agreement upon which the contractual and legal legitimacy of the arbitration is founded. Arbitration is convoked in different countries and against different legal and cultural backgrounds, with a striking lack of formality. It is the parties themselves who choose to arbitrate, as an alternative to litigation or other methods of dispute resolution.

In *Arenson v Arenson* & *Casson, Beckman, Rutley* & Company.[5] Lord Wheatly, defined the determinant features of arbitration as being:

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Party Autonomy

The freedom of the parties to consensually execute an arbitration agreement is the anchor of the principle of party autonomy. The principle is expressed and enshrined in the parties' right to decide on all matters including the choice to agree on institutional rules that will determine procedural and evidential matters[6]. UNCITRAL Model Law, in article 19 (1), provides that "subject to the provision of this Law, the parties are free to agree on the procedure to be

[3] Global journal of politics and Law Research vol. 4, No. 5 pp.10-50, September, 2016.
[4] A. Torgbor, 2013; *A comparative study of law and practice of arbitration*. P. 155.
[5](1976) I Lolyd's Rep. 179 (1977), AC405 (11).
[6] ACERIS LAW, 2019, *The Concept of Arbitrability in Arbitration*, https://www.acerislaw.com/the-concept-of-arbitrability-in-arbitration/, accessed on 1/8/22 @ 7.00 am

followed by the arbitral tribunal in conducting the proceedings:" Abdulhay[7] opines that "party autonomy" is "the freedom of the parties to construct their contractual relationship in the way they see fit". The principle provides a right for the parties to arbitration to choose applicable substantive law and these laws when chosen shall govern the contractual relationship of the parties[8]. It constitutes a template for the process and procedure for the resolution of disputes, which have arisen or may arise in the future between parties to arbitration. The Nigeria Supreme Court while interpreting this principle in the case of *MV Lupex v Nigeria Overseas Chartering & Shipping Ltd*[9] held inter alia that an arbitration clause is a written submission agreed by the parties to the agreement must be construed according to its language and in the light of the circumstances in which it is made.

Party autonomy is not without qualification or limitation. Under the ICC Expedited Procedure Rules, the Court in the course of its mandate will normally appoint a sole arbitrator, irrespective of any contrary term of the arbitration agreement[10]. Equally instructive in this context is the doctrine of *lex arbitri* (the law of the seat of arbitration) which can influence certain procedural issues in arbitral proceedings as may have been agreed by parties. For example, there may be certain powers that only the national court can exercise in that *lex arbitri* inherent in the national court is a limitation on the principle of party autonomy.

Arbitrability

Arbitrability concerns whether a type of dispute can or cannot be settled by arbitration. In practical terms, arbitrability answers the question of whether a subject matter of a claim is or is not reserved to the sphere of domestic courts, under the provisions of national laws[11]. The modern principle of arbitrability is founded on Article II, paragraph 1, of the New York Convention, which provides that each contracting State should only recognize an agreement in writing *"*concerning a subject matter capable of settlement by arbitration." and on Article V, paragraph (2)(a), which states that recognition and enforcement of an arbitral award may be refused if the court where such recognition and enforcement is sought finds that *the* "subject

[7] S. Abdulhay,2004, Corruption in International Trade and Commercial Arbitration, *Kluwer Law International*, London, 159.
[8] Sunday A. Fagbemi, 2015, *The doctrine of party autonomy in international commercial arbitration: myth or reality?*, Journal of Sustainable Law and Policy, Vol 6, N0. 1. p. 224
[9] [2003] 10 SCM 71 at 79; [2003] 15 NWLR (Pt. 844) 569.
[10] See ICC Press Release of 4th November, 2016
[11] Norton Rose Fulbright, 2021, Revised ICC Arbitration Rules, https://www.nortonrosefulbright.com/en-ug/knowledge/publications/e14838c7/revised-icc-arbitration-rules, accessed on 1/8/22

matter of the difference is not capable of settlement by arbitration under the law of that country." The domain for the determination of arbitrability of a subject matter is perforce not within the ambit of the contracting parties and, therefore, not subject to the concept of party autonomy.

Arbitrability and Absoluteness of Party Autonomy

Arbitration is conceived as an autonomous system exclusively driven by the dictates of the parties. Thus, the courts are bound to recognize arbitration agreements as well as to recognize and enforce arbitral awards without any review of the merits or the application of the law. However, both the New York Convention and the UNCITRAL model law refer to national, non-harmonized legislation in several instances and thus reduce in a few but significant instances the detachment of arbitration from national laws. National law defines: (i) what may be subject to arbitration; (ii) when an award is deemed to conflict with public policy; (iii) the criteria according to which an arbitration agreement is binding on the parties;(iv) which mandatory rules of procedure to apply; and (v) when an award is valid or not. In these situations, party autonomy is gravely impaired.

The case of *State of Ukraine v Norsk Hydro ASA*[12] demonstrates the effect of the principle of arbitrability on party autonomy. In this case, a contract between a Norwegian and a Ukrainian party was submitted by the parties to Swedish law after a dispute arose and arbitration was initiated. The Ukrainian party maintained that it was not bound by the contract, because its representatives had signed the contract in such a way that it did not meet the formal requirements of Ukrainian law. The arbitral tribunal applied Swedish law as stipulated by the contract and held that the contract had been validly signed according to Swedish law and that Ukrainian law was irrelevant. However, the award was set aside by the courts of the country where it was rendered, Sweden, because the legal capacity of a party is subject not to the law chosen by the parties in the contract, but to the law of each of the parties.

The European Court of Justice (ECJ) also in *Eco Swiss China Time Ltd v Benetton International NV*[13]found that an award would be invalid and not enforceable for violation of public policy if it gave effect to a contract that did not comply with competition law. Where the arbitral tribunal is willing to follow the terms of the contract in full, the award would not be valid or enforceable.

[12] T 3108-06, 17 December 2007
[13] [1999] ECR I-3055

Here, the closed circuit was interrupted and party autonomy was restricted. In general, therefore, the framework for arbitration is subject to national law in several significant respects, and this may have an impact on the enforceability of arbitration agreements and of arbitral awards, which in turn restricts the effects of party autonomy.[14]

Legal framework

The legal regime for arbitration in Uganda is comprised of both national and international instruments under which consensual arbitration operates.

National Instruments

a. The Constitution of the Republic of Uganda, 1995.

Article 126(b) of the 1995 Constitution provides for one of the cardinal principles of justice in Uganda which is that justice shall not be delayed and that reconciliation between parties shall be promoted.[15] The Constitution further provides that subject to its provisions, The High Court shall have unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or other law[16]. This is the underpinning for all remediation of disputes in the country including arbitration.

b. The Judicature Act, Cap 13

The Act provides for Alternative Dispute Resolution under Court's direction. It provides for situations when matters can be referred to a special referee or arbitrator to handle where such authority has been granted.[17] Under the 2020 amendment the Act[18] provides that the jurisdiction of the High Court shall be exercised subject to the Constitution:

(a) in conformity with the written law, including any law in force immediately before the commencement of this Act;
(b) subject to any written law and insofar as the written law does not extend or apply, in conformity with—(i)the common law and the doctrines of equity;(ii) any established and current custom or usage; and(iii)the powers vested in, and the procedure and

[14] See Giuditta Cordero-Moss, International Commercial Contracts (Cambridge University Press 2014) ch 5
[15] Article 126(d)
[16] Article 139(a)
[17] Sections 26 to 32 of the Judicature Act, Cap 13.
[18] Administration of Judiciary Act, 2020, Section 14(2)

practice observed by, the High Court immediately before the commencement of this Act insofar as any such jurisdiction is consistent with the provisions of this Act; and

(c) where no express law or rule is applicable to any matter in issue before the High Court, in conformity with the principles of justice, equity, and good conscience.

c. Arbitration and Conciliation Act, Cap.4

The Arbitration and Conciliation Act, 2000[19] and Arbitration Rules made thereunder, govern arbitration practice in Uganda. The principle of party autonomy is enshrined in Sections 19(1) and 28(1) of the Act, which mandates the parties to the contract to choose the laws and procedure in accordance with which the arbitral tribunal will follow to resolve their disputes. Section 28(4) stipulates that the tribunal shall not decide *ex aequo et bono* (according to the right and good or from equity and conscience)[20] *or amiable compositeur* the (friendly arbitrator)[21] unless the parties have expressly authorized it to do so. Equally, by the tenets of section 28(5) of the Act, in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall consider the usages of the trade applicable to the transaction. The Act excludes courts from intervening in matters governed by the Act except as expressly permitted by the Act.[22]

d. The Civil Procedure Act (Cap. 71) and the Civil Procedure Rule S.I 71 – 1

Order XII (12) of the Civil Procedure Rules titled "Scheduling Conference and Alternative Dispute Resolution" sets out in clear terms the court's role in arbitration. Rule 1 (1) thereof provides that "...the courts shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any form of settlement." Order 12 rule 2, in emphasizing the court's role in this regard states: "(1) where the parties do not reach an agreement under rule 1…. The Court may, if it is of the view that the case has a good potential for settlement, order alternative dispute resolution before a member of the bar or the bench, named by the court. Equally of significance to the court's role in arbitration is Order

[19] Ibid Cap 4 (as amended)

[20] In the context of arbitration, it refers to the power of arbitrators to dispense with consideration of the law but consider solely what they consider to be fair and equitable in the case at hand.

[21] Amiable composition refers to power given by the parties to arbitrators to seek an equitable solution to their dispute, by setting aside, if necessary, the rule of law which would otherwise be applicable or the strict application of the contract.

[22] Section 9

XLVII (47) also provides for Arbitration under Order of Court, also referred to as "court, annexed arbitration"[23].

International Instruments

Uganda is a signatory to many international conventions on international commercial arbitration. Prominent among these are:

a. the New York Convention

The New York Convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[24] The Convention is concerned with the enforcement of foreign awards, which is one of the main reasons parties find the law attractive.[25] Article II (1) provides that "contracting states shall recognize the agreement made in writing by the parties where they agree to submit to arbitration all or any of their differences, whether presently or in the future."

The Convention provides for the doctrine of arbitrability under Article V(1)(a) which states that 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 recognition and enforcement is sought proof and the competent authority in the country where enforcement and recognition is sought finds inter alia that, the subject matter of the difference is not capable of settlement by arbitration under the law of that country[26].

b. European Convention on International Commercial Arbitration

The European Convention on International Commercial Arbitration, hereinafter, referred to as (the "European Convention") was designed to treat obstacles such as "archaic and divergent" aspects of national laws that were compromising the efficiency of international arbitration during the stages prior to an arbitral award.[27] The European Convention is a regional

[23] Rule 1 (sub-rule 1) of this Order, for instance, provides that – "where in any suit all the parties interested who are not under a disability, agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference." Rule 2 of the same Order goes on to provide that the "Arbitrator shall be appointed in such manner as may be agreed upon between the parties".
[24] The Convention was made in June 1958 but was not open for signature until 31 December 1958.
[25] The Convention was enacted in 1958 but came into force on 7 June 1959.
[26] Article V clause (2) (a), Clause (2) (a)
[27] Ibid (n 29)

convention, but its application is not limited to arbitration within Europe.[28] Any state can join the convention by becoming a signatory.[29] It addresses the three stages of arbitration, namely arbitration agreements, arbitral procedure, and awards.[30] The convention is the first international instrument to cater to all spheres of international commercial arbitration and it also provides rules that are specific to all stages of this type of arbitration.[31]

Article VII (1) of the European Convention "embodies" the principle of party autonomy. Accordingly, parties have the freedom to choose which law will be applicable to the substance of their dispute:[32]

> (1) The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.
>
> (2) The arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration.

c. UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985, (amended in 2006), against a background of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice. It covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

Article 1 provides that the Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States[33]. An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places

[28] See European Convention on International Commercial Arbitration article. X, Apr. 21, 1961, 484 U.N.T.S. 349 (hereinafter "European Convention).
[29] Ibid
[30] Ibid
[31] Ibid(n 35) Paragraph 277
[32] D T Hascher, Commentary on the European Convention on International Commercial Arbitration of 1961, 36 Y.B Comm Arbitration 504, 532 (2011)
[33] UNCITRAL, 1985 (as amended), Article 1(1)

is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country. For this purpose: (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; (b) if a party does not have a place of business, reference is to be made to his habitual residence[34].

The principle of party autonomy is addressed under *Article 19(1) of the UNCITRAL Model Law*, which provides that: subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. Reinforcing this provision, Article 5(1) of the Model Law states inter alia that in matters governed by this law, no court shall intervene except where so provided in this law. However, it recognizes the principle of arbitrability when it stated that the law shall not affect any other law of a State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law[35].

d. The International Chamber of Commerce (ICC) Arbitration Rules, 2012

The ICC Arbitration Rules provide for dispute resolution procedure similar to the New York Convention. The intention of the ICC Rules is to ensure transparency, efficiency, and fairness in the dispute resolution process while allowing parties to exercise their choice over many aspects of the procedure.[36] Under Article 21(1) of the Rules,[37] parties are free to determine the law to be applied by the arbitrators to the merits of the dispute. However, in the absence of any indication by the parties as to the applicable law, the arbitrators shall apply the rules of law which it determines to be appropriate. Here, the only requirement is that the arbitrators should consider the application of the selected conflict rules appropriate in the particular situation.

The International Chamber of Commerce (ICC) has undertaken another revision of its arbitration rules. The 2021 version of the rules (2021 Rules) will apply to arbitration proceedings initiated as of January 1, 2021, irrespective of the date of conclusion of the contract in which the arbitration agreement is included or of the date of conclusion of the special

[34] ibid, Article 1(3) & (4)
[35] Ibid, Article1(5)
[36] See the Introduction to the Booklet of ICC Arbitration Rules, 2012, www.iccwbo.org.
[37] ICC Arbitration Rules of 2012

agreement to submit a dispute to arbitration (subject to the specific provisions pertaining to the applicability of the emergency arbitrator and expedited procedure provisions)[38]. The 2021 Rules also codified certain practices of the Court of Arbitration of the ICC and introduced new measures aimed at improving the flexibility, efficiency and transparency of ICC arbitration proceedings[39].

The Regime of the Principle of Arbitrability in Uganda

The Court's Mandate

The notion of party autonomy is enhanced by the exclusion of national courts and the referral to arbitration instead. Notwithstanding what parties may have agreed prior to the conflict the exclusion of the courts ceases where third-party interests or public interests are affected and where mandatory rules or policies override the parties' agreement; or if the agreed terms or legal framework may be interpreted in more than one way or need specification by external sources. The House of Lord in the case of *Coppee – Lavalin vs. Ken – Ren Chemicals and Fertilizers Ltd*,[40] laid down the clusters of instances where the Courts must be involved in an arbitration dispute. House of Lords per Lord Mustill thus:

> "…whatever view is taken regarding balance of the relationship between international arbitration and national Courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial".[41]

There is no doubt that one of the beneficial roles the courts perform is the determination of the arbitrability of the subject matter of the arbitration to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.

Exercise of Jurisdiction

The law governing arbitrability, in most respects, is rooted in the doctrine of jurisdiction. A challenge to the validity of the arbitration agreement should be raised at the beginning of arbitration. The UNCITRAL Model Law on International Commercial Arbitration[42] states in

[38] Norton Rose Fulbright, 2021, *Revised ICC Arbitration Rules*, https://www.nortonrosefulbright.com/en-ug accessed on 30/7/22 at 4.30am
[39] ib id
[40] [1994] 2 Lloyd's Rep. 109.
[41] B. Adolf, 2017: "*Court intervention in international commercial Arbitration: support or interference,* p.24.
[42] Of June 21, 1985

this connection in Article 16(2) that: "A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. …"[43] This is equally the tenor of section 16 of the Arbitration and Conciliation Act;[44] though with a proviso that the arbitral tribunal may admit a later plea if it considers the delay justified. Either way, the law affirms the power of the arbitral tribunal to determine questions of its jurisdiction[45]. Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party aggrieved by the ruling may apply to the court, within thirty days after having received notice of that ruling, to decide the matter and the decision of the court shall be final and shall not be subject to appeal[46].

In an application to the court on the claims that the tribunal lacks authority to determine a dispute because the dispute is non-arbitrable or is not contemplated by the arbitration agreement, the court may only entertain such an application if it finds—(a)that the arbitration agreement is null and void, inoperative or incapable of being performed; or(b)that there is not, in fact, any dispute between the parties with regard to the matters agreed to be referred to arbitration[47]. The court in the case of *East African Development Bank v Ziwa Horticultural Exporters Ltd*[48] reaffirmed this position when it held that:

> Section 6[49] of the Arbitration and Conciliation Act, provides for mandatory reference to arbitration of matters before court which are subject to an arbitration agreement; where court is satisfied that the arbitration agreement is valid, operative and capable of being performed, it may exercise its discretion and refer the matter to arbitration.

It should be noted, however, that a reference to the court to determine the arbitrability of the subject matter of arbitration does not act as a stay to proceeding at the arbitral tribunal[50].

In the exercise of this function, the court takes cognizance of the separability principle which treats an arbitration clause in the underlying contract as distinct from the contract, allowing the clause and therefore jurisdiction, to survive invalidity or termination of the contract[51]. This

[43] Ibid(n 10)
[44] Cap 4 of the laws of Uganda
[45] Section 16(1)
[46] ibid @ (6)&(7)
[47] Section 5(2)
[48] High Court Misc. Application No. 1048 of 2000 arising from Companies Cause No. 11 of 2000
[49] *Impari materia* with section 5 of the Arbitration and Conciliation Act, 2000 (as amended)
[50] ibid
[51] Section 16(1)(a)

doctrine was recently considered in the case of *British American Tobacco (U) Ltd v Lira Tobacco Stores*, [52]where Justice Christopher Madrama Izama, while relying on the case of *Heyman v Darwins Ltd*,[53] held that an arbitration clause shall be treated as an autonomous agreement that survives the invalidity or termination of the main underlying contract and that an argument on a challenge to jurisdiction should be addressed to facts and law relevant only to the validity of the clause.

The court can also be called upon to determine questions of subjective arbitrability, which deals with capacity of the parties, and objective arbitrability, which deals with the subject matter at the stage of enforcement of arbitral ward. Section 34 of the Act stipulates the recourse to the court against an arbitral award may be made only by an application for setting aside the award. Sub section (2) provides that an award may be set aside if the party making the application furnishes proof that:

(a) a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda; the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case; the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act; the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or(vii)the arbitral award is not in accordance with the Act;

(b) the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or the award is in conflict with the public policy of Uganda.

[52] HCMA NO.924 of 2013 arising from HCCS No.70 of 2013
[53] [1942]1 All.ER 337

The Scope of the Court's Powers under the Principle of Arbitrability

The Law

To properly distil the issues in this paragraph regard must be had to the two legislations; the Judicature Act and the Arbitration and Conciliation Act, which in our opinion, govern the power of the court in arbitration matters in Uganda. The kernel of the provision of the Judicature Act[54] in the 2020 amendment[55], in section 14, is to the effect that the court must exercise its unlimited original jurisdiction in all matters in conformity with any written laws in force. In this respect, therefore, the provision in section 9 of the Arbitration and Conciliation Act remains pivotal in the analysis of the scope powers of the court in arbitration matters in Uganda. The said section ousts the jurisdiction of the court in all material respects when it emphatically declared that "Except as provided in this Act, no court shall intervene in matters governed by this Act".

Aside from this close-circuited derogation of the universal powers of the court certain subject matters are not arbitrable by reason of public policy and so the courts are restrained from ordering for submission to arbitration over such subject matters. These matters *inter alia* include; matters relating to taxation,[56] intellectual property for example trade mark, patents, designs, and copyrights,[57] family matters like divorce petitions, custody and guardianship, human rights created under the constitution,[58]and all criminal matters. This position is true of arbitral tribunals. In *Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd. & Ors*,[59] the Indian Supreme Court carved established that six categories of cases are not capable for being decided by private arbitration even though parties agreed for their settlement through private arbitration namely: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal child custody; (iii) guardianship matters; (iv) insolvency and winding up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction.

[54] Cap 13 Laws of Uganda
[55] Administration of Judiciary Act, 2020
[56] See Article 152 of the 1995 Constitution of the Republic of Uganda
[57] See section 62 of Trademarks Act,2010 on Court's Power to review registration
[58] See Chapter 4 of the Constitution of Republic of Uganda of1995 as amended.
[59]19 SCCA of India No.8164 of 2016 (2011) 5 SCC 532

Judicial Attitude

It is not in doubt that the tenor of the law is peremptory and this is the law Ugandan courts are to apply. The scope of courts intervention in arbitration can be gleaned from the decision in the following cases:

1. In *International Development Consultants Ltd. v Jimmy Muyanja & Others*[60], the question for determination was whether section 9 of the Arbitration and Conciliation Act operated as an ouster clause and therefore robbed the High Court. Of its jurisdiction of judicial review. The court affirmed that the section operated as an ouster that prohibited courts from intervening in matters there are subject to arbitration, but the provision would not operate to oust the jurisdiction of courts in judicial review where the subject matter of the complaint is an ultra vires decision and therefore a nullity in law[61]. Ssekaana, J. held importantly:

   > The wrongful exercise of any power by the Executive Director or CADER can be brought into question by way of judicial review. The exercise of power by persons not authorized by the Act can indeed be a subject of judicial review and does not in any way conflict with section 9 which bars intervention in matters governed by the Arbitration and Conciliation Act[62].

2. In *Global Industries Ltd. v Trident Infratech Ltd*.[63], the matter arose from a tenancy relationship in which had a tenancy agreement with an arbitration clause in it. Reviewing the role of the court, the learned Judge held that the rights and obligations of the parties were settled in the tenancy agreement as governed by the Arbitration and Conciliation Act. The court stated the position thus:

   > Once the parties in their contract executed on 1st July 2017 agreed to have their disputes resolved by arbitration, both of them must follow the law and rules thereunder that govern arbitration proceedings right from the manifestation of a dispute, and throughout the whole dispute resolution process under the Arbitration and Conciliation Act Cap 4[64].

3. In the cases of *Swabri Ali Abu-Bakr Mukungu vs. Kobil Uganda Ltd,*[65] and *Fountain Publishers v Nantamu & Another*[66], the court was of the opinion that where the subject

[60] Misc. Cause No 133/2018, CADER Misc. Application No 67/2017
[61] Christine Byaruhanga, 2020, *Judicial Review and Arbitration: Delineating the Scope of Court's intervention in Arbitration in Uganda,* ALP LAW REVIEW SERIES Article No 1/2020, p.1, https://uploads-ssl.webflow.com/5c4c5e6cc49ea6918baff0fb/5e5015dd4227fd66ccc4f873_ALP%20Law%20Series_Article-Judicial%20Review%20and%20Arbitration%20i, accessed on 4/8/22 @ 8.30 am
[62] *id fn59*
[63] Misc. Application No 250/2019
[64] ib id, per Mutonyi, J
[65] High Court (Commercial Division) Miscellaneous Cause No. 41 of 2015.
[66] Arb. Cause No 1/2011

matter of arbitration is arbitrable and the agreement valid, it shall not interfere but refer the dispute to arbitration. In the latter case in particular the court maintained that even where there is sufficient ground for the court's intervention it would still refuse to intervene except within the ambit of section 34 of the Arbitration and Conciliation Act.

The decisions in the above cases, though representative, illustrate the interpretative mindset of the court in Uganda as to what the law is.

Observations

1. The Arbitration and conciliation Act specifically defines arbitration agreement to mean an "agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not[67]". This makes the class of arbitrable cases in Uganda wide and seemingly limitless which makes contextualizing applications for the court's review within the close confines of section 34 odious for parties. To compound this is the judicial attitude that conveys the impression that the statutes to be applied were cast in concrete and broker with no discretion.
2. Section 28(4) of the Act,[68] provides that the arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law except if the parties have expressly authorized it to do so. This presents an opportunity for the courts to scrutinize arbitration proceedings beyond the close circuit provision of section 34 of the Act; particularly having regard to the Constitutional injunction that in adjudicating cases of both a civil and criminal nature by the courts substantive justice shall be administered without undue regard to technicalities.[69]In such instances, it is submitted, the court should reach for its discretionary powers which are to be exercised judiciously and judicially. In the American case of *Rent-a-Center West Inc. v. Jackson*[70], the Court Appeal held that where the issue of arbitrability itself has been expressly delegated to the arbitrators, the question of whether the arbitration agreement was unconscionable was to be decided by the tribunal and not by the courts. The Supreme Court in reversing the judgment of the Court of Appeal affirmed that the delegation of the issue of

[67] Section 2(1)(c)
[68] Cap.4
[69] Article 126 of the Constitution
[70] 130 S. Ct. 2772 (2010)

arbitrability to arbitrators notwithstanding, it is for the courts to decide on the validity, enforceability, and scope of the arbitration clause—and not for the arbitrators[71]. Ugandan courts are commended to take a cue from this.

3. The provisions in section 5 of the Act presents a conflict of procedure issue. It is difficult to understand why a stay of proceeding cannot issue where a judge finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration. An added section 9 of the Act to the mix clearly breeds an inchoate framework.

Lamenting this state of affairs *Okumu Wengi, J*. in the case of *East African Development Bank vs. Ziwa Horticultural Exporters Limited*,[72] He stated:

> "*…Firstly, it appears to make arbitration and conciliation procedures mutually exclusive from court proceedings as for instance to make court based or initiated mediation or arbitration untenable. Secondly, it seems to divorce or restrict alternative dispute resolution mechanisms from court proceedings. Thirdly, it tends to greatly curtail the courts inherent power which is fundamental in judicature. By so doing the judiciary is easily emasculated in its regulation of arbitration and conciliation as adjudication processes; its remedial power in granting and issuing prerogative orders of mandamus and certiorari is not addressed if not side-lined. Clearly, empowering people to adjudicate their own disputes need not oust the core mandate and functions of courts in the context of governance…*"

Conclusion

The conception that arbitrability as being mainly a jurisdictional issue and therefore left in the forte of the arbitration agreement and arbitrators is misconceived. It is submitted that it touches on the fabric of the subject matter of the dispute. In the Arbitration and Conciliation Act as presently constituted it is difficult to assess what subject matters are arbitrable. The approach

[71] Horacio A. Grigera Naón, *Unified National Legal Treatment of International Commercial Arbitration: A continuous Challenge*, Paper presentation made on 11 October 2011 at the Eighth Annual Seminar on International Commercial Arbitration held at the Washington College of Law, American University, Washington D.C https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1025&context=ab accessed on 4/8/22 @ 9 am

[72] High Court Misc. Application No. 1048 of 2000.

to the issue of arbitrability in Uganda is thus tangential at best. Although defining a uniform rule on the type of issues capable of being settled by arbitration and therefore arbitrable might be a difficult task, it is recommended that the Arbitration and Conciliation Act be amended to provide for criteria to assess arbitrability in arbitration to assure legal certainty. Secondly the parliament, as a matter of urgency, should resolve the conflict of procedure issues identified in this article which are apparently the clog in the exercise of the inherent powers of the courts.

Though it would appear that the contract or arbitration agreement and power of arbitrator rule, the dominant jurisprudence upon which Ugandan courts anchor their pronouncements, and the Act[73]curtail and emasculate the exercise of the court's inherent powers, however, the limitation posed by the judicial system particularized by the generally reluctance of the courts to interfere in the affairs of arbitrators and the arbitral process raises the bar of frustration faced by parties and practitioners in dealing with disputes relating to their relationships submitted to arbitration. It is recommended, therefore, that a Practice Direction be issued by the Judicature to guide judges, parties and practitioners to achieve the spirit and letter of the Arbitration and Conciliation Act and related statutes to make arbitration the affordable and simplified means of access to justice it ought to be. It is submitted that the judges can exercise their powers under the Constitution and their Procedure Rules to mitigate the hardship inherent in the obtuse perception that they are hamstrung by the law.

[73] Cap 4 Laws of Uganda