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PROCEDURAL LAWS OF COMMERCIAL ARBITRATION IN TANZANIA: AN ANALYSIS

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ABSTRACT

Arbitration is defined as 'The submission of a dispute to an unbiased third person designated by the parties to the controversy, who agree in advance to comply with the award'[1] In 1923 the International Chamber of Commerce adopted the first rules on institution on arbitration and established the Institute Of Arbitration. The increase of international agreements, treaties and conventions such as UNCITRAL Model Law on International Commercial Arbitration of 1985, ICSID Convention of 1965 has lead to great impact on the growth of commercial arbitration as a mechanism of dispute settlement almost in all parts of the world[2] However in Tanzania The Act Cap 15 R.E 2002 forms formidable obstacles for any practicing arbitration lawyer in the country. Justice-in-Charge Robert Maramba of the High Court, Commercial Division of The Republic of Tanzania has opined that the current arbitration act is ancient and unlikely to be useful in resolving disputes.[3] The present paper seeks to analyze the Procedural Laws of Commercial Arbitration in Tanzania and explore if they are effective as a method of dispute resolution.

KEYWORDS: Commercial Arbitration, Tanzania, Procedural Laws

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[1] http://legal-dictionary.thefreedictionary.com/arbitration

[2] **Procedural laws governing commercial arbitration and practice commercial law** http://www.lawteacher.net/commercial-law/essays/procedural-laws-governing-commercial-arbitration-and-practice-commercial-law-essay.php

[3] **TZ arbitration laws outdated, new statutes a must, April 30 2013 at 00:00, The citizen** http://www.thecitizen.co.tz/-/1840414/1840792/-/v8bx2lz/-/index.html

ALTERNATIVE DISPUTE RESOLUTION: APPROACHES AND THEIR APPLICATION

Conflicts have existed in all cultures, religions, and societies since time immemorial, as long as humans have walked the earth. [4] In fact, they also exist in the animal kingdom. Philosophies and procedures for dealing with conflicts have been part of the human heritage, differing between cultures and societies. Nations, groups, and individuals have tried throughout history to manage conflicts in order to minimize the negative and undesirable effects that they may pose. Conflicts can develop in any situation where people interact, in every situation where two or more persons, or groups of people, perceive that their interests are opposing, and that these interests cannot be met to the satisfaction of all the parties involved. Because conflicts are an integral part of human interaction, one must learn to manage them, to deal with them in a way that will prevent escalation and destruction, and come up with innovative and creative ideas to resolve them. Dealing with conflicts – "conflict resolution" as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history. But not all conflicts in religious scriptures have been resolved by alternative/appropriate dispute resolution (ADR). One that was resolved by force and violence is the story of Cain and Abel. In *The Bible* we find among many stories of conflicts and their resolution, the story of Abraham and Lot negotiating, where Abraham, in order to avoid a fight, offers Lot a deal that Lot cannot refuse. Negotiation was conducted not only between people, but also between humans

[4] ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION
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and God. Abraham negotiated with God over the fate of the people of Sodom and Gomorra. God also acted as a mediator between Abraham and Sara when she wanted Abraham to expel Hagar and her son. In the Muslim tradition we find the story of Muhammad who negotiated with God over the number of times that the followers will pray. Muhammad managed to reduce the number from the initial fifty times a day down to five, using as his main argument the necessity to leave enough time for people to do things other than pray. Throughout history, individuals and groups used a variety of ways to resolve their disputes, trying to reach a resolution acceptable to all parties. In the twentieth century many reached the understanding that disputes are normal in human society, and not necessarily destructive, and that if they do not get out of hand they may have within them a potential for growth, maturity, and social changes, an opportunity for new ways of thinking and new experiences. Thus emphasizing the need for one to learn to manage them: to deal with them in a way that prevents escalation and destruction, and arrives at new, innovative, and creative ideas to resolve them. The field of conflict resolution gained momentum in the last three decades of the twentieth century. It has developed into a widely accepted field of study, where skills and strategies are being taught, and changes in philosophical attitudes occur through training and enhanced self-awareness. The increasing academic activity and practical training initiatives have generated a vast and expanding body of research and publications. The field is characterized by diversity and complexity. It is diverse because conflicts exist in every facet of individual and social life: between business partners, employers and employees, among employees, between trading partners, among neighbors, between parents and their children, husbands and wives, an individual and society, and between countries.

The discipline is complex because it deals with conflicts at different stages of their existence, and also because it is a mix of theory and practice, and of art and science, as Howard Raiffa demonstrated so brilliantly in his book *The Art and Science of Negotiation* (1982). The "science" is the systematic analysis of problem solving, and the 'art' is the skills, personal abilities, and wisdom.

According to a study at Stanford University (Arrow et al., 1995) there are three categories of barriers to resolving conflicts:

- Tactical and strategic barriers; these stem from the parties' efforts to maximize short or long term gains.
- Psychological barriers; these stem from differences in social identity, needs, fear, interpretation, values, and perceptions of one another.
- Organizational, institutional and structural barriers; these can disrupt the transfer of information, and prevent leaders from reaching decisions that are in the interests of the parties in dispute.

DEVELOPMENT OF ARBITRATION IN TANZANIA

You cannot shake hands with a closed fist[5]

Alternative Dispute Resolution (ADR) has international recognition and is widely used to complement the conventional methods of resolving disputes through courts of law. ADR simply entails all modes of dispute settlement/resolution other than the traditional approaches of dispute settlement through courts of law. Mainly, these

[5] Indira Gandhi, former prime minister, India

modes are: negotiation, mediation, [re]conciliation, and arbitration. The modern ADR movement began in the United States as a result of two main concerns for reforming the American justice system: the need for better-quality processes and outcomes in the judicial system; and the need for efficiency of justice. ADR was transplanted into the African legal systems in the 1980s and 1990s as a result of the liberalization of the African economies, which was accompanied by such conditionalities as reform of the justice and legal sectors, under the Structural Adjustment Programmes. However, most of the methods of ADR that are promoted for inclusion in African justice systems are similar to pre-colonial African dispute settlement mechanisms that encouraged restoration of harmony and social bonds in the justice system. In Tanzania ADR was introduced in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966), and it is now an inherent component of the country's legal system[6]

LEGAL FRAMEWORK OF ARBITRATION IN TANZANIA

In Tanzania, Arbitration is governed by the Civil Procedure Code, Cap 33 R.E. 2002(CPC) and the Arbitration Act, Cap 15 R.E. 2002 and rules made thereunder[7]. Arbitration flourished as an alternative to litigation for arguably good reason i.e. arbitration has numerous advantages compared to litigation as will be seen herein below. Arbitration can be speedier than litigation, and saves time, and sometimes costs. Further, arbitration guarantees confidentiality and unwanted publicity[8].

[6] Alternative Dispute Resolution: Law and Practice By Clement J. Mashamba

[7] IS THE COMMERCIAL COURT JEALOUS OF ARBITRATION? Nuhu S. Mkumbukwa

Flexibility as to venue, manner of conducting arbitration is also an important advantage taking into account simplicity and the less technical procedure of the arbitral process. In technical disputes, it is easy to choose an arbitrator with the requisite technical knowledge and special qualifications hence, parties' dispute will be determined by one of their own, who knows the nitty gritty of their business as parties choose member(s) of the arbitral Tribunal. In addition to the above, arbitration is praised to be a more neutral process than court proceedings in multi party or state related disputes. In cases involving parties from different states, or states as parties, arbitration is essential as parties would require a neutral procedure or forum than the state courts. More so as the judiciary may not be or be seen to be wholly independent by parties hailing from outside the country. But all said and done, all is not rosy about arbitration, as this mode has its own follies as shown below.

DISADVANTAGES OF ARBITRATION OVER LITIGATION

In some cases, litigation is better than arbitration. Critics point to various weaknesses inherent in arbitration to vindicate this view. They say arbitration can be dilatory, and costly just like litigation. Newman[9] for instance, argues that litigation and arbitration will remain weak because they (a) polarise positions of parties (b) waste client's managerial time, (c) leave clients out of touch with their own dispute and turn them to be victims of the takeover of the suit by the counsel and court/arbitrator (d) damage commercial relationship between the parties (e) are expensive and may involve long drawn out proceedings due to the use of deliberate delaying tactics by a defendant who knows how to play the system (g) the final result may be a pyrillic victory for the

[9] Newman, Paul, Partnering with Particular Reference to Construction. Arbitration 66 JCI Arb1 pg. 40.

successful litigant with monies recovered representing a mere fraction of actual expenditure, a judgment or award that may be impossible to enforce (h) a belated realization by the plaintiff that the whole reason for the litigation or arbitration was the impecuniousness of the defendant. Another disadvantage is that arbitration is unsuitable for cases in which all or one of the parties requires interpretation of a particular statute or law, or wish to litigate in order to avoid a pandora's box of similar claims in the future, or just want to stall and or prolong the dispute by way of elongating trial, and the consequential appellate avenues. There is also one notable weakness, that is, the difficultly of joining third parties to arbitral proceedings/multiple parties, and the frequent difficulty to obtain interim preservatory orders pending reference to or finalization of arbitration. Inability to create binding precedent is also cited as a weakness.

Courts' jealousy and tendency to readily intervene and set-aside arbitral awards, or refusal to stay suits in contravention of submission clause are also cited as a negative spots in the quest for arbitration in Tanzania. The latter weakness is the main preoccupation of this paper with reference to case law emanating from the Commercial Court and other courts, how the Commercial Court has been, in some ways, a hindrance to parties in their quest to pursue arbitration.

COMMERCIAL COURT'S PRACTICE AND ARBITRATION

With due respect to the court, one may safely say that in some cases the court has not been very supportive towards applications aimed at facilitating and enabling parties to Pursue arbitration. Instead, in most cases, the court tends to be unusually technical, and refuse to relinquish jurisdiction even amidst clear contractual intentions to the contrary

exhibited by parties. This can be seen in the court's practice regarding the following aspects:

TAKING A STEP IN THE PROCEEDINGS

In the event a party to an agreement with a clause to resolve disputes through arbitration decides to abrogate his undertaking and decides to take the dispute to the court, the other party is allowed at law to apply for stay of proceedings, with a view to refer the matter to arbitration. This power is adumbrated in section 6 of the Arbitration Act[10]. That right is qualified, in that the applicant or defendants must not have filed a written statement of 8 Section 6 of the Arbitration Act reads:

"Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant

was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings."

There are a plethora of authorities on the interpretation of that phrase. Suffice to note that judges differ considerably as to the scope and extent of the provision and the kind of steps that are deemed to be capable of being interpreted as a waiver of the undertaking and desire to solve the dispute vide arbitration. For instance, in the case of

[10] Section 6 of the Arbitration Act

Transnet vs Spoornet[11], the plaintiff was suing on a contract, which has a submission clause, which mandate parties to pursue arbitration in the event of any dispute. Upon being served with a plaint and chamber application for interim injunction, the defendant refused to file his defense, noting that he intends to pursue arbitration and issued a notice to that effect, but filed a counter affidavit contesting the application for the issuance of interim injunctive orders, noting that the parties ought to go to arbitration and simultaneously moved the court for an order for stay of proceedings. Counsel for the Plaintiff opposed the application for stay arguing that the Defendant had already taken a step in the proceedings, disentitling her for an order for stay.

The Commercial Court indeed refused the application for stay on the ground that the defendant had already taken a step in the proceedings by filling a counter affidavit and arguing the application for interim INJUNCTIVE ORDERS.

This is a very unfortunate decision for the cause of ADR and arbitration in particular. A step in the proceedings should be limited to those steps which further or support the existence of the suit in court and not otherwise. A backward step is no effectual step. Disputing an application for interim injunction, without filing a defence, while making it clear all along that you intend to go to arbitration, is surely not a step in the proceedings. In this case, the Commercial Court has stifled the parties' desires to go to arbitration without a good cause. More so, considering the rationale behind section 6 of the Arbitration Act. Not every step taken in proceedings constitutes a waiver of right

[11] Commercial Case No. 55 of 2006.

to pursue the matter through arbitration. In Capital Trust Investment Ltd vs. Radio Design11 Jacob, J[12] noted that a party takes a step in the proceedings to answer the substantive claim when two conditions are fulfilled;

a) The conduct of the applicant must be such as to demonstrate an election to abandon its right to a stay in favour of allowing the action to proceed; and

b) The act in question must have the effect of invoking the jurisdiction of the court.

The learned judge further noted that a party who has initiated an application for a stay does not take any step in the proceedings to answer the substantive claim "if he, simultaneously or subsequently, invokes or accepts the court's jurisdiction provided he does so only conditionally" upon the application for stay failing.

That decision was reviewed by Altaras in his paper titled "A Step in the Proceedings: Capital Trust Investment Vs. Radio Design"12 who noted that if, however, the other application is made unconditionally then the defendant is likely to lose its right to a stay, "for it would then be blowing hot and cold" The above view is quite progressive and supportive of arbitration, and is in sharp contrast with the view expressed in Transet's case, which apparently is supported by Georges C.J. who in Motokov vs Auto Garage Ltd. And others, [1970] EA 249 at pg 252 held that "a step is no less a step, because it is sideways rather than forward"

ISSUANCE OF PRESERVATORY ORDERS PENDING COMMENCEMENT, OR DISPOSAL OF ARBITRATION

There is another instance which shows the court's somewhat ant-arbitration tendencies. This relates to the question of issuance of preservatory orders pending arbitration. In

[12][2001] 3 All E.R. 756, Ch. Div. 62

Nor Consult A/S vs Tan Roads[13] the applicant moved the Commercial court by way of a chamber summons supported by an affidavit14 under section 95 of the Civil Procedure Code, section 2(3) of the Judicature and Application of Laws Act, and under Article 26(3) of the UNICITRAL Rules of Arbitration. A preliminary objection was raised to the effect that the applicant cited wrong provisions of the law in moving the court. The court agreed, and noted that the applicant ought to have cited section 3 of the Arbitration Act15. The learned judge noted "This section is a bedrock on which a process to access arbitration is based", and that it can be used to grant interim reliefs of protection. The application was thus struck out with costs. Later the applicant filed a fresh application that is Misc. Commercial Application No. 16 of 2008 this time by way of petition, citing section 3 of the Arbitration Act and Rule 5 of the Arbitration Rules16. The Court entertained the application, and set out a very progressive view as regards the role of courts in preserving the subject matter of arbitration. The14 It is wrong to move the court by way of chamber summons and affidavit, instead of a petition as stipulated by Ruler 5 of the Arbitration Rules. 15 Section 3,subtitled Application of Part II, provides: This Part shall apply only to disputes which, if the matter submitted to arbitration formed the subject of a suit, the High Court only would be competent to try: Provided that in regard to disputes which, if they formed the subject of a suit would be triable otherwise than by the High Court, the President may, with the concurrence of the Chief Justice, confer the powers vested in the court by this Part either upon all subordinate courts or any particular subordinate court or class of court. 16 Rule 5, subtitled Mode of application, provides:

[13] Misc. Commercial Application No. 10 of 2008

"Save as is otherwise provided, all applications made under the Act shall be made by way of petition." decision in this case gives us the following principles, to mention just a

relevant few:

- The court can entertain an application for the, and grant preservatory reliefs pending arbitration if moved under section 3 of the Arbitration Act, and Rule 5 of the Arbitration Rules.
- In its supervisory role, courts may penalize and should endeavour to prevent parties from becoming mischievous, and exercise delaying tactics to stall or make impotent the dispute settlement process, noting that arbitration proceedings must be fast tracked, and that a show of professionalism and good faith is vital in this aspect.
- The court can give timelines within which to access arbitration. In this case, the court gave parties 30 days within which all processes to accede to arbitration must be completed. Notably, the above decision (Norconsult II) is very progressive, although the procedure used is okay (in terms of originating documents), but the laws cited were/are inappropriate. Section 95 and Order XXXVII of the Civil Procedure Code, Section 21(d) of the Arbitration Act and Section 2(3) of JALA are the proper enabling authorities. Section 3 of the Arbitration Act is totally silent on the question of issuance of 11 preservatory orders in the absence of a suit or pending arbitration, and Rule 5 merely provides for the procedure for filing applications under the Act. Since the issue of issuance of preservatory reliefs before the commencement of arbitration proceedings is not provided for by any law, resort to section 95 and Order

XXXVII of the Civil Procedure Code, Section 21(d) of the Arbitration Act and Section 2(3) of JALA, is certainly justified. Section 95, Order XXXVII and Section 2(3) were duly cited in the previous application (Norconsult I case) that was struck out on account of wrong citation of enabling provisions of the law.

In Hodi (Hotel Management) Company Ltd vs Jandu Plumbers Ltd[14], the Commercial court noted that it can intervene to facilitate arbitration by taking interim measure of protection or conservatory measures to safeguard the subject of arbitration. The Court further noted that it has a supportive as well as a supervisory role in matters of arbitration. The court cited the case of G. K Hotels & Resorts Vs Board of Trustees LAPF18, in support of these progressive pronouncements. Despite acknowledging the above roles, the Court noted that there is no law in the country, including the Arbitration Act, which provides for a relief of injunction pending reference to Arbitration, and undertook to bring this state of affairs to the attention of the responsible relevant Minister[15]. The court further noted that section 3 of the Arbitration Act is therefore the very foundation upon which a party wishing to access arbitration can come to the court seeking for conservatory or interim measures but only subject to there being a submission of reference to arbitration. In other words, access to court for interim or conservatory measures has to be proceeded by submission of reference to arbitration, the court surmised. In the end, section 3 of Arbitration Act therefore presupposes the existence of arbitral proceedings. The court was thus satisfied that the application was premature and proceeded strike out the application for preservatory orders with costs.

[14] Misc. Commercial Application No. 15 of 1009

[15] 19 Note that section 21 of the Act provides that the High Court(and not the Minister) shall make rules.

Commercial Court's stance in the Norconsult cases and Hodi case is fundamentally inconsistent as regards the applicability of section 3 of the Arbitration Act. Reading the case law referred to herein above, one notes that in the Norconsult cases the court found that interim preservatory orders pending arbitration are issuable under section 3 of the Arbitration Act, regardless of the pendency of arbitration proceedings or suit. This is clear at Pg 24 of the type script of Norconsult I ruling and at page 20-22 of the typescript of Norconsult II ruling, when the Learned Judge granted interim preservatory orders before arbitral proceedings were actually commenced, and gave parties 30 days within which to commence arbitration proceedings. On the other hand, reading Hodi's case, one may note that the Commercial Court is apparently of the view that section 3 of the Act indeed empowers the court to grant interim reliefs, but there must be arbitral proceedings already in motion. With due respect, the learned deciders in both cases are misdirected in various ways and extents. In Norconsult II case, the ultimate conclusion is justified, but trouble with the reasoning leading to that conclusion As section 3 presupposes the existence of pending arbitration, and that the matter submitted to arbitration must otherwise fall in the jurisdiction of the High Court, had it not been for the arbitration clause, for part 2 of the Arbitration Act to, and will apply. There is nothing magical about this section. Now a million dollar question is whether section 3 is or can be the 14 basis of an application for interim protection reliefs or conservatory measures. Here are the reasons;

Section 3 does not confer any rights. It does not create rights or empower courts to issue the reliefs in issue. It simply provides for the application of part 2 of the Arbitration Act. In the entire part 2 of the Act, and indeed the whole Arbitration Act there is no provision giving the court powers to grant interim reliefs in the absence of

arbitration proceedings so it is untenable to say that section 3 of the Act can be used to empower the court to grant interim reliefs, whether before or after the commencement of arbitral proceedings or suit.

In view of the above lacuna, section 95 and Order XXXVII of the CPC, section 21(c) and (d) of the Arbitration Act and section 2(3) of JALA are crucial and can be applied to further the cause of arbitration, together with Rule 5 of the Arbitration Rules. Rule 5 merely provides for the mode of preferring applications in arbitration matters. It is not a jurisdiction creating provision. It is just like Order 43 Rule 2 of CPC. These two provisions are not power creating provisions. Hence, if one fails to cite section 95 and Order 37 of the CPC (as there is no enabling law), section 21(c) and (d) of the Arbitration Act and or section 2(3) of JALA, then the application will be incompetent for non or wrong citation of proper provisions of the law. In other words, citing Rules 5 of Arbitration Rules or section 3 of the Arbitration Act without more is not a panacea either. The said Rule 5 and section 3 only need to be complied with, as they provide the Vehicle/modality within which to access the court, but the court cannot use them to grant interim preservatory orders. Other jurisdiction creating provisions i.e provisions conferring the court with power to give the orders sought must be cited. Indeed, the entire part 2 of the Arbitration Act do not contain provisions for the issuance of preservatory orders, whether before or after the commencement of arbitral proceedings. As such if the issue of non citation of proper law is anything to go by, no pre or post arbitration injunctive relief can be given by the court on the basis of section 3 of the Arbitration Act. Mbwambo notes that whereas in England, India and Kenya, the law expressly provides for powers to issue preservatory measures

"The Ordinance does not give courts in Tanzania such power. Yet, the position is still unclear from the Judge made law point of view"[16]. He cited Tanesco Vs IPTL case in support of his point for a judge made law. Judges can rise to this occasion and make such law, instead declining jurisdiction. They can make such law formally(as the High Court) or through case law. This seems to rhyme with section 21 of the Arbitration Act, which says:

"The High Court may make rules as to–

(a) the filing of awards and all consequent or incidental proceedings;

(b) the filing and hearing of special cases and all consequent or incidental proceedings;

(c) the staying of any suit or proceedings in contravention of a submission to arbitration; and

(d) the general conduct of all proceedings in court under this Act."

In Covell Matthews Partnership vs TRC[17], Katiti J, as he then was, and in Kobil Tanzania Ltd vs Mariam Kisangi[18], Massati J, as he then was, invoked inherent jurisdiction and gave various orders in arbitration related matters. So there is no question of reinventing the wheel here, as this has been the practice of the court.

In Kisangi's case, the court grappled with the question of res subjudice, in particular the issue whether it can order a stay of petition to appoint an arbitrator, pending determination of a similar substantive suit in the Land Court in line with section 8 and section 95 of the CPC. The court held that the CPC is applicable in arbitral related applications. More so, when there is no specific remedy. The court reasoned thus:

[16] Rosan Mbwambo, Efficacy and Adequacy of Arbitration law in Tanzania Mainland, Dissertation LLM, 2004

[17] Civil case No 106 of 1996

[18] Misc. Commercial Application No12 of 2007

"It has also been held that it is impossible for the legislator to contemplate all sorts of litigation and provide the procedure for them. In a situation where there is no procedure to cater for a certain situation, the court is obliged to use its common sense, justice, equity and good conscience and resolve the problem before it to further the interests of justice and prevent abuse of the process (SARKAR ON OCODE OF CIVIL PROCEDURE 10th ed. Pg. 9). And that is the philosophy behind the court's inherent powers under s. 95 of the Civil Procedure Code Act 1966."

The court then concluded thus;

"From the above, it appears to me that although a petition is not a suit, it is nevertheless a civil proceeding, and in the absence of any provision for stay of such petition in the Arbitration Act, or which prohibits the application of the provisions of the Civil Procedure Code Act, the court is free to use the provisions of the Code in such exceptional circumstances. And it may do so under its inherent powers, if it is in the interests of justice or to prevent abuse of process."

Let us survey position in other Jurisdictions. In the UK, in Halki Shipping Corporation Vs. Sopex Oils Ltd (the Halki), it was held that "the arbitrators have power to make interim awards, and that the court is bound to grant a stay "unless satisfied 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 matter agreed to be referred."[19] Indeed, in the same spirit in Villa Denizalik Sanayi Ve Ticaret As vs. Longen S.AC (the Villa)[20] it was held that the court may be prepared to support arbitration by appointing an arbitrator where that would give effect to an agreement to resolve disputes by arbitration.

[19]Timothy Jones, Judicial Interpretation of the Arbitration Act,1996,(1999) 65 Arbitration1,pg 35-31.
[20]Ibid

In Singapore, the position is: court's powers to make interim orders should only be used in support of arbitration, and it will thus be mindful that its processes are not used to bypass an arbitral tribunal or abused to gain a procedural advantage. In particular, Wang Partnership LLP notes in its earticle titled "Interim Relief in Arbitration Proceedings: Courts to play a Supportive Role only" that:

"The primary source for interim relief should be the arbitral tribunal. Accordingly, help from the courts should only be sought when arbitration is inappropriate, ineffective, or incapable of securing the particular form of relief sought speedily

CERTIFICATION OF SUBMISSION

Another, scenario in which the court has proved to be hindering the cause of arbitration, and ADR generally, and protecting its jurisdiction is exhibited in Kobil Tanzania Ltd vs Mariam Kisangi[21] where the court refused an application for stay of proceedings pending arbitration on the technical ground that the submission is not certified as per rule 8 of the Arbitration Rules[22] The Rules says: "Every petition shall have annexed to it the submission, the award, or the special case to which the petition relates or a copy of it certified by the petitioner or his advocate to be a true copy"

In the case at hand, the petitioner had filed an Application by way of petition, supported with a verifying affidavit. The affidavit and petition refers to the submission clause, which was duly annexed. In her answer to the petition, and counter affidavit, the respondent did not dispute the existence or genuineness of the submission clause, but only put up a preliminary objection that the submission is not certified by the petitioner. The court agreed and struck out the application with costs. It should be noted that, the

[21] Misc. Commercial Application No. 4 of 2007

[22] The Commercial Court relied heavily in High Court Misc. Civil Cause No 142 of 2005: EADB vs BluelineEnterprises Ltd

petitioner in this case, verified the contents of the petition (which includes all the annextures) to be true in the petition itself, and in the verifying affidavit. The validity/genuineness of the submission was not disputed at all and certification is all about showing authenticity and genuineness of documents. No one challenged the authenticity of the arbitration clause. Now one may ask: what does this decision serve in these circumstances, more so when the law itself allows the petitioner himself to certify the submission. Isn't it a blow to arbitration? Why would the rollercoaster of arbitration and ADR generally be stopped on such a flimsy technical ground? While we appreciate in full the rationale of the requirement for certification, we are still of the view that it should be flexibly applied, more so when the parties clearly recognize the agreement in issue and do not doubt its authenticity

CONCLUSION

The problem is not the absence of new rules but how to use them. The Bench and the Bar should take a proactive role on how to apply the rules.

- The Bench has been much trained on mediation compared to the Bar. So it is a challenge for the advocates to be more trained on mediation.
- Lack of knowledge in the commercial field brought in by new trends/fields e.g gas and oil field. So the bench and the Bar should also be trained on these areas to ensure the administration justice.
- Our laws should be amended to allow the admissibility of electronic evidence because practice is ahead of the law.
- Fast tracking of commercial cases should not bear any fruit unless there are special divisions in the Court of Appeal for fast tracking Commercial

Appeals.

Commercial cases should be heard on continuous basis, since long adjournment burdens the judges hence causing delays[23]. The sky on the cross examination should be limited. Parties should ask only relevant question to an issue. The act of asking any question during cross examination causes delays, therefore court should control this. Commercial Court should think on the regulating the admissibility of electronic evidence, since currently most of business are electronically conducted. Other delays are caused on the service of summons. There are few court process servers who cannot manage to go around all parties within a short period of time. Court should take control to determine who will serve the summons and within which time.

An order for striking out the plaint for citing wrong provision of law cause delays since the Plaintiff could still brought back the matter to court. Court could make orders for an amendment with costs rather than striking out the matter. Execution processes also cause delays. Judges have given powers to control court proceedings. Such powers could be used to control the abuse of processes during execution. The major purpose of introducing new draft of commercial rules is to expedite the resolution of commercial disputes. The golden thread is the issue of curbing delays and preventing unnecessary interference. Rule 9 which allow parties to file either a plaint or originating summons. Rule 13 on the assignment of cases to a particular judge which is going to be within a day. Rule16 which allows substituted service of summons to be made electronically. Rule 19 which reduce an extension of time to file a Written Statement of Defense. Rule

[23] THE JUDICIARY The High Court of Tanzania [Commercial Division]
THE 5TH ROUND TABLE DISCUSSION THEME: "Curbing Delays in Commercial Dispute Resolution; Arbitration as a Mechanism to Speed up Delivery of Justice

23 which allow the court to amend pleadings suo motu on typographical errors which cannot prejudice parties to a suit. Rule 24(3) which allow the court to make orders or strike out the defense or claim in case of non-appearance at the PTC. Speed tracks are not applicable in the commercial disputes. Mediation to be settled within 14 days and registrars can mediate commercial cases. Also a case can be dismissed in absence of parties at mediation. Rule 45 requires continuation of hearing commercial cases. A witness should file a witness statement and that a witness will be called to Court if the opponent party wishes to cross examine witness on the testimony provided for in the filled witness statement. Judgments are supposed to be abiding with decree. Precaution should be taken to judges in commercial Court that the 60days and 30 days for judgment and rulings should not affect the quality of decisions so that should not harm justice.