

UNIVERSITY OF RWANDA

BUSINESS LAW

LLM PROGRAM

**ARBITRATION AND OTHER ALTERNATIVE WAYS OF
DISPUTE RESOLUTION IN RWANDA WITH THE SPECIAL
REFERENCE TO COMPARATIVE LAW**

Dissertation submitted for the degree of

Masters in Business Law by:

UWANTEGE DIANE

Supervisor: Dr Mathias NIYONZIMA

Kigali, June 2016

DECLARATION

I, UWANTEGE Diane, a student at the University of Rwanda, in Business Law, hereby declare that this dissertation entitled “ARBITRATION AND OTHER ALTERNATIVE WAYS OF DISPUTE RESOLUTION IN RWANDA WITH THE SPECIAL REFERENCE TO COMPARATIVE LAW” is my own work and it has not been submitted anywhere else. However, authors and researchers whose work was referenced have been acknowledged as indicated in references.

Signature.....

Diane UWANTEGE

Date

Done at.....

Registration number:

DEDICATION

To Almighty God, who has guided me through the whole period of my studies

To my beloved Husband, my Mother and my children, I am very grateful for their help and their moral support during my studies, I appreciate the fantastic encouragement which helped me triumph over all difficulties encountered during my research.

ACKNOWLEDGEMENT

The success of this project cannot only be attributed to me. It's the result of collection efforts of several persons.

I owe a debt of gratitude to the University of Rwanda, Business Law LLM Program Coordinator, to lectures and staff for their guidance and intellectual package they provided.

First of all, I express my sincere thanks to my supervisor Mathias NIYONZIMA, for his efforts, suggestions, critiques and guiding the present work. The current achievement would not be noticeable without his suggestions.

Special gratitude is concentrated on my husband for his remarkable moral and financial support and encouragement he provided which helped me a lot to attain this level, also my children, friends, brothers and sisters for their love and daily support in my studies.

I am very grateful for their faith and encouragement which helped me to solve over all difficulties encountered during my research. I would not have completed my work without their continuous moral support.

My special thanks go to all my classmates of our department; their valuable partnership that have embellished the years that I spent at University of Rwanda (UR).

UWANTEGE DIANE

ABSTRACT

Actually, Alternative Dispute Resolutions are mechanisms designed to solve disputes outside the scope of traditional jurisdiction. Arbitration is an ideal dispute resolution mechanism to solve disputes arising from business transactions for various reasons, among others, because it allows parties to select a specialist they both trust to solve the controversy with an award that is binding for both parties, but that respects the minimum necessary formalities of the procedure. Additionally, the use of Alternative Dispute Resolutions allows the procedure to be conducted in a faster pace, from any location, and allowing parties to get access to the documents of the procedure at any place at any time.

There is currently legal framework designed specifically for the conduction of arbitration procedures; therefore, the rules for traditional commercial arbitration should be also used. Arbitration requires a legal framework that regulates the use of Alternative Dispute Resolutions mechanisms designed in the procedure, the way in which notifications shall be performed and acknowledgement of receipt granted. The legal framework should also prescribe the obligation of the parties to take the necessary measures to ensure that the security and confidentiality of all the information exchanged in the procedure is kept. Finally, parties should be able to select the extra judicial mechanisms that they may be deemed convenient for enforcing the award in an easy and speedy way.

ABBREVIATIONS AND ACRONYMS

UR: University of Rwanda

CAER: Centre d'Arbitrage et d'Expertise du Rwanda

ADR: Alternative Dispute resolution

ADRs: Other Alternatives ways of Disputes Resolutions (ADRs)

LAC: Law of Arbitration and Conciliation

PSF: Private Sector Federation

KIAC: Kigali International Arbitration Center

O.G: Official Gazette

ICC: International Chamber of Commerce

ICA: International Commercial Arbitration

LCIA: London Court of International Arbitration

UNCITRAL: United Nations Commission on International Trade Law

AAA: American Arbitration Association

NYC: New York Convention

FIDIC: The Fédération Internationale des Ingénieurs-Conseils

WWW : World Wide Web

X : Unknown author

P. : Page

ed.: Edition

s.v.: Sub Verbo

Op. Cit : Opera Citate

Ibid. : Ibidem

Id. : Idem

Para. : Paragraph

KIAK : Kigali International Arbitration

Vs : Versus

Table of Contents

DECLARATION	2
DEDICATION	3
ACKNOWLEDGEMENT	4
ABSTRACT.....	5
ABBREVIATIONS AND ACRONYMS	6
Contents	8
1. INTRODUCTION.....	12
2. BACKGROUND OF THE STUDY	13
3. PROBLEM STATEMENT	16
4. RESEARCH OBJECTIVES.....	17
5. METHODOLOGY	17
6. SCOPE AND LIMITATIONS OF THE STUDY	17
7. ORGANIZATION OF THE STUDY.....	17
CHAPTER ONE: ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN RWANDA.....	18
1. THE HISTORICAL BACKGROUND AND CONCEPT OF ARBITRATION IN RWANDA.....	18
1.1.1. Background of arbitration.....	18
1.1.2. Definition	18
1.2. TYPES OF ARBITRATION IN RWANDA	20
1.3. REQUEST FOR AN ARBITRATION	20
1.4. ARBITRATION AGREEMENT	20
1.5. ARBITRATION AS AN ALTERNATIVE TO LITIGATION: COMPARISON.....	22
1.5.1. Cost and Expediousness	22
1.5.2. Confidentiality	24

1.5.3.	Flexibility	24
1.5.4.	Impartiality.....	25
1.5.5.	Enforcement of awards	26
1.6.	INSTITUTIONAL AND AD HOC ARBITRATION	26
1.6.1.	Institutional arbitration advantages and disadvantages.....	27
1.6.2.	Ad hoc arbitration advantages and disadvantages	28
1.7.	ESTABLISHMENT OF AN ARBITRATION AGREEMENT	28
1.8.	PARTIES TO ARBITRATION AGREEMENT	32
1.9.	COMMERCIAL NATURE OF THE DISPUTE	33
1.10.	JUDICIAL INTERVENTION IN ARBITRATION	34
1.10.1.	Judicial intervention before the composition of the arbitral tribunal.....	35
1.10.2.	Judicial intervention during the arbitral proceedings.....	37
	CHAPTER TWO: ALTERNATIVE DISPUTE RESOLUTION (ADR).....	38
2.1.	UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION	38
2.2.	BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION	40
2.3.	ALTERNATIVE FORMS OF DISPUTE RESOLUTION	42
2.3.1.	Negotiation.....	43
2.3.2.	Early Neutral Evaluation/Fact Finding.....	43
2.3.3.	Conciliation.....	43
2.3.4.	Mediation	46
2.3.5.	Mini-Trial	47
2.3.6.	Expert assessment (Engineers).....	49
2.3.7.	Dispute review board.....	50
2.3.8.	Fast track arbitration	52
	CHAPTER THREE: RECOGNITION AND ENFORCEABILITY OF ARBITRAL AWARD. 56	

3.1. REQUIREMENTS FOR AN AWARD TO BE RECOGNIZED AND ENFORCED	57
3.1.1. Formal requirement	58
i. The award must be in writing and signed by arbitrators	58
ii. The parties	59
iii. Reasons for the award.....	59
iv. The award must state the date the place of arbitration.....	60
v. Notification of the award.....	61
3.1.2. Substantive requirements.....	61
a. Cogency.....	61
b. Completeness	61
c. Certainty.....	62
d. Finality	62
e. Enforceability	63
3.1.3. Interim measures.....	63
3.2. PROCEDURE FOR RECOGNITION AND ENFORCEMENT	65
<u> Procedures of requesting enforcement formula seal of an arbitral award made in Rwanda</u>	65
Recognition and enforcement of arbitral awards in Rwanda	67
3.3. THE NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD VIS-A-VIS RWANDAN LAW ON ARBITRATION	69
3.3. 1. Grounds for the refusal of recognition or enforcement	70
a) Incapacity, invalid arbitration agreement.....	70
3.3.2. No proper notice of the appointment of an arbitrator and lack of due process	70
3.3.4. Improper arbitral composition or procedure.....	72
3.3.5. Awards not binding, suspended or set aside.....	72
3.4. ARBITRABILITY	73

a. Public Policy	73
3.4. IMPACT OF THE NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN RWANDA.....	75
GENERAL CONCLUSION	77
BIBLIOGRAPHY.....	79
APPENDICES	85

1. INTRODUCTION

With globalization, the world is more becoming like a village where people from different corners of it are very closer in daily business. States draw upon the strengths of one another for their economic, social and political development. Given such a trend, trade and commerce has increased exponentially relying on bilateral and multi-lateral arrangements amongst different States across the globe.

Today trade practices have moved beyond the traditional export import business. Investment in each other's State in diverse fields pulls a major string in the overall development of regions. Developing States look for foreign investors preferably from developed States or from semi-developed States of neighboring regions. These investors could be an outright private commercial entity or semi-state owned entity which would invest in the host-State in variety of pursuits. Such areas of investment may include the manufacturing industry, telecommunication sector, infrastructure sector, information-technology industry, etc.

In light of economic reforms and development being realized today especially in the developing countries in general, the circumstances on the ground really require a variety of alternatives to turn to; in solving commercial disputes if we are to maintain sustainable economic growth. Around the world Arbitration is becoming one of the best option for the business community to solve their commercial disputes. The advantages of using arbitration are enormous and seem to outweigh those using ordinary courts as the previous is: time effective, less costly, confidential, and more effective in using experts to resolve respective disputes¹

It is in the above respect that arbitration is an international best practice in ADR; once fully applied in Rwandan legal system, can help Rwanda to reduce caseloads accumulated in its ordinary courts as well as attracting investors. In order to be more effective, the investors must know if the foreign arbitral award will be recognized and enforced in Rwandan and the procedure which will be applicable. Rwanda is aware of the importance of arbitration in matters

¹“As we are heading towards the EAC Common Market Protocol, Customs Union, Monetary Union and a Political Federation, a lot of commercial and trade disputes are likely to be generated during the transaction process; therefore application of arbitration jurisdiction process will play a big role in solving those conflicts amicably,” Justice Johnston Busingye, president of the High Court of Rwanda and Principal Judge at EACJ said in EAC summit.

of trade and further steps have been taken: the recently adopted law n° 05/2008 of 14/02/2008 on arbitration and conciliation in commercial matters (Rwandan law on arbitration)²

2. BACKGROUND OF THE STUDY

Arbitration started in 1993 at the initiative of the Government to resolve the malfunctioning and corruption of the justice sector in commercial industry.

In this respect the stakeholders [Ministry of Industry and Commerce of Rwanda, World Bank, Traders, etc] created on January 2nd 2002, the “Centre d’Arbitrage et d’Expertise du Rwanda”, CAER A.s.b.l³ and the Code of Civil, Commercial, Labour and Administrative procedures stipulates the law that shall govern arbitration⁴. In addition, the vital milestone in the creation of an environment conducive for arbitration was the enactment of the LAC 2008 which triggered the creation, at the initiative of the Government of Rwanda and Private Sector Federation (PSF) and the Kigali International Arbitration Center (KIAC) in 2011 by the Law on KIAC 2011.

The growing need to settle disputes in a friendly manner without the usual technicalities and legal bottlenecks has brought about the search for an independent means of dispute resolution. As a matter of fact, a certain category of disputes are better resolved by some processes, depending on the circumstances and nature of each case.

Though from the very beginning, the commercial disputes, litigations later became the dominant, after facing difficult times in the hands of litigation, the new trend that emerged in the 20th century was a gradual return to the basis through the evolution and standardization of arbitration law and establishment of law No.005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters, and the law No. 51/2010 of 10/01/2010 establishing the Kigali International Arbitration Centre determining its Organization, Functioning and Competence as followed by Rwandan parliament enacted the law in February 2011 establishing KIAC as an independent body.

² The law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, *O.G.* special n° of 06. 03. 2008 (hereinafter referred as Law on arbitration and conciliation in commercial matters).

³ The Centre was granted the legal personality by the Minister of Justice’s order n° 001/17.

⁴ The law n° 21/2012 of 14/06/2012 relating to the code of civil, commercial, labor and administrative procedure, n° 29 of 16/07/2012, article 367.

In the course of arbitration, for the Rwandans to understand the potential involvement of the arbitral tribunal, the tribunal should describe the capacity and extent of its role in the settlement discussions, the parties' position would not be harmed thereby if the parties indeed request the arbitrator's assistance, then a variety of further possibilities exist to induce settlement negotiations.

The arbitral tribunals terminate the proceedings if requested by the parties and not objected, the arbitrator or arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms shall be made in accordance with the provisions of article 43 of this Law and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

In considering arbitration as an effective tool of dispute resolution in the Commercial matters, the efforts have been made to bring the practice and procedure of arbitration under Rwandan law, unless there is an agreement to the contrary, such statements may be amended or supplemented during the course of the arbitral proceedings as agreed upon by the parties or determined by the arbitral tribunal.

The claimant withdraws his claim, when the parties agree on the termination of the proceedings or when the arbitrators find that the continuation of the arbitral procedure has become unnecessary or impossible for any other reason. The mandate of the arbitrators terminates with the termination of the arbitral proceedings except, possibly in cases of review, correction, interpretation and the procedure of setting aside the award procedure.⁵

In case during arbitral proceedings the parties settle the dispute amicably outside the proceedings, the arbitral tribunal shall terminate the proceedings. This settlement may, if the parties so wish, be recorded in the form of an arbitral award agreed terms.⁶

The dominant effect of the evolution of new processes to resolve disputes has resulted in the proposition and application of well-established dispute resolution mechanisms like Negotiation, Mediation and Conciliation and arbitration in Rwanda and in the world as well.

⁵ Law on arbitration and conciliation in commercial matters, article 44, paragraph 2.

⁶ Law on arbitration and conciliation in commercial matters, article 42.

Dispute is indispensable part of societal interaction since the inception of human settlement. If it is not well taken and resolved early, dispute between two individuals will grow up and become a threat to national security, peace and stability, which are of the basic parameters to measure the development of a nation. With the objective of settling dispute in a more justifiable manner, national governments and the constitutions of most nations establish institutions; judiciary organs of the government. It is the natural mandate of courts of law to entertain disputes. Other than judiciary arm of the government, the necessity of establishing other tribunals with judicial power has been felt long ago. Within the executive arm of the government, quasi-judicial tribunals named otherwise as administrative tribunals have been established to settle disputes. Courts and administrative tribunals are public institutions established to resolve disputes⁷.

It should be noted that before and after the establishment of courts and administrative tribunals, there have been other private tribunals by which the society is trying to settle disputes. These are called Alternative Dispute Resolution (hereinafter 'ADR') mechanisms. ADR doesn't refer a single kind of mechanism, but it is a generic name to refer dispute settlement mechanisms other than court and administrative tribunals. Arbitration, Conciliation, Mediation, Negotiation and Mini-Trial are some of them which are referred as ADR.

With a view of making a systematic study of the subject matter, the work is divided into three chapters. The first chapter is devoted to a general understanding of ADR. In doing so, the meaning and concept, historical developments, advantages and disadvantages of ADR and similarly court litigation will be best assessed⁸.

Being Alternative Dispute Resolution Mechanisms, they contain different kinds of dispute settlement devices. The second chapter will look at all the widely known ADRs. It starts by looking at the basic characteristics of these different kinds and a very close discussion will be made on the three widely used ADR; Arbitration, Mediation/Conciliation and Negotiation with a

⁷Carbonneau and E., *Thomas Alternative Dispute Resolution: Melting the Lances and dismounting the Steeds*, Urbana:University of Illinois Press, 1989, p. 28.

⁸*Ibid.*

comparative approach. The third chapter will deal with the recognition and enforcement of an award under Rwandan law⁹.

3. PROBLEM STATEMENT

The provision of effective dispute resolution is the core concern of domestic as well as international legal system. The aim of devising mechanisms to afford effective dispute resolution is to ensure that disputes are solved through effective and efficient means for the benefits of the disputants and the society in general. For this reason, states and the international community have been searching various ways of resolving dispute than insisting on the traditional way of resolving dispute through court litigation which is mostly ineffective and inefficient.

In Rwandan society the parties in commercial disputes are not familiar with the arbitration and other alternative ways of disputes resolutions (ADRs) as effective mechanisms to settle the commercial disputes that may arise rather than through court litigation.

Nothing frustrates parties more than to discover after prevailing at a hard fought and costly arbitration that the arbitral awards cannot be performed. Parties want money, not a piece of paper. The perceived enforceability of awards will influence investor's decision whether to settle, arbitrate or litigate.

This research aims to analyze the role of arbitration and other alternative ways of dispute resolution in handling commercial disputes and the procedure of recognition and enforcement under Rwandan legal framework. The main question this work seeks to answer is: how arbitration and other alternative ways of disputes resolution are applied under Rwandan law and what is the impact of approaches of recognition and enforcement of an award under Rwandan law.

⁹D. W. Hendon and R. A. Hendon, *Negotiating Worldwide – A Practical Approach*, A Maya Gower Imprint, 1st edn. 2001, p. 21.

4. RESEARCH OBJECTIVES

This research seeks to achieve the following aims and objectives:

1. Identifying the facts of using ADR in comparison with formal litigation
2. Demarcate the scope of application of ADR in dispute settlement mechanisms
3. Demonstrating different approaches of recognition and enforcement of an award under Rwandan law.

5. METHODOLOGY

To gather information on the key concept of the research, it was necessary to use various techniques; among which documentary method was inclusive. In regard with this method, various books (with the library search technique) and other documents available on internet were consulted. In order to extend the line of thought, there will be need to use a comparative method such as the perception of different authors on the issue of performance of arbitral awards. The descriptive method will be equally used to make analysis of different elements and data collected.

6. SCOPE AND LIMITATIONS OF THE STUDY

The chosen special setting of our work is the international and national commercial arbitration and consists of introduction, three chapters and the conclusion. The first chapter is devoted to a general understanding of the subject of ADR. In doing so, the meaning and the concept, historical developments, advantage and disadvantage of ADR and similarly court litigation will be best assessed. The scope of the work is tailored on the Rwandan context.

7. ORGANIZATION OF THE STUDY

The outline of this study is structured as follows: the first chapter will deal with application of arbitration and other alternative ways of disputes resolution. Chapter 2 will focus on the impact of arbitration award under Rwandan law. Chapter 3 will analyze the enforcement of an award of arbitration under Rwandan Law.

CHAPTER ONE: ARBITRATION AS A DISPUTE RESOLUTION MECHANISM IN RWANDA

Arbitration is one of the alternative dispute mechanisms like mediation, negotiation, conciliation and adjudication. However, arbitration is different from the latter three mechanisms with respect to the roles and powers of the arbitrator compared to those of the mediator, conciliator or adjudicator. Whereas an arbitrator controls the entire process of resolving a dispute at hand, the mediator and conciliator simply facilitate the process but cannot make a binding decision but just help the parties to find and agree on the solution. An arbitrator makes a decision in form of an arbitral award which is final. Arbitration is an alternative to court litigation and it has a number of advantages over litigation in court. In the present chapter, the researcher will unearth a number of important aspects of arbitration with a considerable attention to the way in which arbitration is different from litigation. A comparative approach with the other Alternative Dispute Resolution Mechanisms shall be discussed later on in this work.

1. 1. THE HISTORICAL BACKGROUND AND CONCEPT OF ARBITRATION IN RWANDA

1.1.1. Background of arbitration

As far as arbitration in Rwanda is concerned, it came into effects in 2008 whereby the law governing arbitration and conciliation in commercial matters was enacted. In this respect the stakeholders (Ministry of industry and commerce of Rwanda, World Bank, Traders etc) created on January 2nd 2002 the “ Centre d’arbitrage et d’expertise du Rwanda”, CAER ASBL and the introduction of arbitration procedures in the code of civil, commercial, labour and administrative procedures followed suit. Another vital milestone in the creation of environment conducive for arbitration was the enactment of the LAC 2008 which triggered the creation, at the initiative of the government of Rwanda and private sector federation (Rwanda), of Kigali international Arbitration center in 2011 by the law on KIAC 2011.

1.1.2. Definition

Article 3 (2) of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters defines arbitration as ‘a procedure applied by parties to the disputes requesting an arbitrator or a jury of arbitrators to settle a legal, contractual or another related issue’.

Butler and Finsen define arbitration as ‘a procedure whereby parties to a dispute refer that dispute to third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties’¹⁰.

Arbitration is a private way of resolving disputes with binding effect that may arise from a contractual relationship or another kind of relationship¹¹.

Arbitration can also be defined as a streamlined private legal procedure used to resolve disputes between two or more parties. An arbitration proceeding is administered and managed by a knowledgeable, independent, and impartial third party and the parties to a dispute present their arguments and evidence to the arbitrator who decides the case and resolves the dispute.

In the words of Professors J. O. OLANKULE and M. A. AYODELE, arbitration is defined as “... a procedure for the settlement of disputes, under which the parties agree to be bound by the decision of an arbitrator whose decision is, in general, final and legally binding on both parties”¹². It should be noted that, as noted by A. WINSTANLEY, it is beyond any dispute resolution mechanism since it has now become the first-choice method of binding dispute resolution and taken over litigation.¹³ The recent tremendous development of trade in general and the undertaking of multifaceted and complex international commercial transactions have made commercial arbitration the most currently preferred mechanism of resolving disputes¹⁴ and currently disputes worth billions of dollars are settled by arbitrators.¹⁵

¹⁰Butler, David and F. Eyvind, *Arbitration in South Africa, law and practice*, 1993, p. 1.

¹¹About arbitration and mediation, online: < <http://www.arbitration.co.za/pages/about.aspx>>, accessed 13 May 2015.

¹²J. O. OLAKUNLE and M.A. AYODELE, *Law and Practice of Arbitration and Conciliation in Nigeria*, Lagos: Mbeyi & Associates (Nig.) Ltd, 1999, cited in B.A. TEMITAYO, “Why Arbitration Triumphs Litigation: Pros of Arbitration”, *Singaporean Journal of Business Economics and Management Studies*, Vol. 3, No. 2, 2014, pp. 32-38, 34.

¹³A. WINSTANLEY, *Why Arbitration Institutions Matter*, online: <<http://www.ebrd.com/pubs/legal/5083.htm>>, accessed on 7 May 2016.

¹⁴It is until recently with the huge development of international commerce that arbitration has become the increased mean of settling commercial disputes. Otherwise, it is argued that from the Roman Empire through the middle age arbitration was in regular use across Europe. See D. W. RIVKIN, “The Impact of International Arbitration on the Rule of Law”, 11th Clayton Utz Sydney University International Arbitration Lecture, online: <http://www.globalarbitrationreview.com/cdn/files/gar/articles/david_rivkin_The_Impact_of_International_Arbitration_on_the_Rule_of_Law.pdf>, accessed on 07 May 2016.

¹⁵For instance on July 18, 2014, an Arbitral Tribunal sitting in The Hague under the auspices of the Permanent Court of Arbitration (PCA) condemned Russia to payment of over 50 billion of damages to shareholders of Yukos Oil Company. See Shearman & Sterling LLP, *Shearman & Sterling LLP secures historic USD 50 billion award for Yukos majority shareholders*, online: <<http://www.shearman.com/en/services/practices/international-arbitration/yukos-arbitral-award>>, accessed on 07 May 2016

1.2. TYPES OF ARBITRATION IN RWANDA

There exist two types of arbitrations in Rwanda: institutional and Adhoc arbitration. In this vein, the latter was established by LAC 2008 while the former is dealt by Kigali international arbitration center (KIAC). This institution was created by the law on KIAC 2011¹⁶ with a view to satisfying the needs of economic and business operators who prefer arbitration to traditional court adjudication. In ad hoc arbitration procedures the parties resort to individual arbitrators rather than arbitral institution to settle their disputes whereas for institutional arbitration, KIAC is the only competent agency to administer the arbitration process in Rwanda on matters relating to trade.¹⁷

1.3. REQUEST FOR AN ARBITRATION

The Rwandan law on arbitration states that the decision of appointing an arbitrator is not appealable in case the competent court was seized.¹⁸ In the stark contrast, the Belgian law on arbitration provides that there are conclusive grounds that the arbitrator should not have appointed, then that decision shall be appealed.¹⁹

1.4. ARBITRATION AGREEMENT

This agreement is dependent on the voluntary harmony of the parties and for an arbitration agreement to espouse and therefore the wishes of the parties must be respected. In this case, such agreement will clarify means disputes shall be addressed in a way which is less costly, flexibility, impartiality, confidentiality and without undue delay.²⁰ At the outset of conducting arbitration, arbitration agreement is so important for the party who wishes to go through arbitration under KIAC Rules of arbitration.²¹ That party shall file a written request for arbitration.²² Once the

¹⁶The law n°51/2010 of 10/01/2010 establishing the Kigali International Arbitration Centre and determining its organisation, functioning and competence, Official Gazette n°09 bis of 28/02/2011 (hereinafter referred as the law governing KIAC)

¹⁷ The law governing KIAC, article 5,

¹⁸ The Law on arbitration and conciliation in commercial matters, article 13 paragraph 5.

¹⁹ Belgian Law, article 1680 paragraph 2.

²⁰ Supreme Court, Kigali, 06/02/2015, HYDROBATEL Ltd Vs Karekezi François Xavier, RCOMA 0007/13/CS (Unpublished).

²¹ L. Sebucensha, 'National and International Arbitration', Vol. 18, *Africa Law Study Library*, p. 20, online: <www.kas.de/wf/doc/kas_37293-1522-2-30.pdf?140401110439>, accessed on 5th July, 2016

²² KIAK rules, article 5.

respondent receives the request s/he shall, within fourteen (14) days, provide an answer in line with article 6 of the KIAC Rules of arbitration 2012.

It encompasses the consent of the parties to submit the dispute to arbitration since such agreement serves as the milestone of the arbitration²³. The principles of contract law must be observed in order to make the arbitration agreement valid and binding²⁴ and the capacity shall be so required to make such agreement so as to make a sound contract²⁵. However, there is no standard arbitration clause for ad hoc arbitration while for institutional arbitration; the KIAC had set two standard arbitration clauses. The first is an arbitration clause destined for future dispute:

Any dispute arising out of or in connection with this contract, including any question regarding its validity or termination shall be referred to or resolved by arbitration under the KIAC Rules” and parties should consider adding²⁶

- (a) The number of arbitrators shall be ... (one or three);
- (b) The seat or legal place of arbitration shall be ... (town and country);
- (c) The language to be used in the arbitral proceedings shall be...

The second standard arbitration clause is the submission agreement which submits the existing dispute to arbitration. This refers to the dispute having arisen between the parties concerning (...), the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the KIAC rules.

The submission agreement is usually long though not a principle. This is justified by the fact that the submission agreement is on the existing matters and there is room for going into details to

²³ N. BLACKABY, et al., Redfern and Hunter on International Arbitration, Oxford, OUP, 2009, p. 85.

²⁴This argument was corroborated by Article 9 of the LAC 2008 and the one set down by A. NUSSBAUM: “the validity and effectiveness of an agreement to arbitrate depend on the existence of such prerequisites as: a meeting of the minds of the parties; the observation of prescribed formalities for the making of the agreement; the necessary capacity of the parties to the agreement; the absence of defenses rendering the agreement voidable; freedom from implied conditions which cause the arbitration agreement to lose its effect”; see A. NUSSBAUM, ‘Treaties on Commercial Arbitration: A Test of International Private Law Legislation’, Harvard Law Review, Vol. 56, N2, (1942) p. 595. In Rwanda, no person shall be appointed to hold office as a director if he is under sixteen (16) years of age, in the case of public limited company is over seventy five (75) years of age, undischarged bankrupt; is prohibited from being a director or promoter of or being concerned or taking part in the management of a company, is not a natural person, has been qualified to be of unsound mind, or by virtue of articles of associations, does not qualify for the directors (See Article 175 of the Law No07/2009 of 27/04/2009 relating to companies, O.G.

²⁵The term “capacity” here is used in its extensive meaning to include the issues of incompetence (incapacity of the minor, insane and interdicted).

²⁶ See *Supra* note 21.

include arbitrators, procedures to be applicable to the disputes, the applicable law, the place of arbitration, etc. It should be noted that arbitration mostly deals with commercial matters; under the Belgian law, the causes of non-patrimonial nature on which it is permissible to compromise may also be subject to arbitration.²⁷

1.5. ARBITRATION AS AN ALTERNATIVE TO LITIGATION: COMPARISON

Arbitration, as explained in this research work is an alternative to litigation and it is viewed as being more effective in resolving disputes especially business/commercial related disputes. In this work, the differences between arbitration and litigation shall be analysed in great depth to establish which method is better and more effective in dispute resolution.

1.5.1. Cost and Expeditiousness

It is a common but not always true assumption that arbitration is cheaper and less time consuming than litigation²⁸. Can arbitration be faster and less expensive? The answer to this question is ‘most certainly.’ However, this is not always the case.

Arbitration just like any other adversarial process may be expensive and time consuming especially if one of the parties is willing and able to spend considerable resources to defend its position and can exploit dilatory tactics to his or her benefit²⁹.

In some aspects, the very characteristics that make arbitration more appealing than litigation are the same aspects that frame its disadvantages. For instance, the fact that it is flexible and dependent on the mutual consent of both parties may create time delays and incidental costs³⁰.

Although litigation has been described as ‘a machine in which you enter as a pig and come out as a sausage’³¹ one would not be far from right by defining some international arbitration procedures

²⁷ Belgian Law on arbitration, online: <<file:///F:/Arbitration%20-Diane-LLM%20thesis/arbitrage%20LOI%20-%20WET%20belge%20%202013%20%281%29%281%29.html> bn>, accessed on 09 May 2016.

²⁸N. Charles Brower and A. Cohen Smutny, ‘Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations’ in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*, p. 41.

²⁹*Id.*, p. 42.

³⁰This is because parties can abuse the flexibility of the arbitral process to delay the proceedings.

³¹A. Bierce, *The Devil’s Dictionary*, 1911.

in the same way³². Moreover, it is not uncommon for lawyers to take control of the proceedings in complex international commercial arbitrations³³.

This may come about as a result of the arbitrators' effort to instil trust in the arbitration process. Arbitrators give both parties the opportunity to fully present their case. Unlike in litigation where a case could summarily be dismissed, arbitration does not have the remedies found in judicial systems that are created to limit the development of frivolous cases³⁴.

Consequently, there are no measures such as motions to dismiss or motions for summary judgment. The non-existence of such measures is an advantage for the claimant but a rather costly disadvantage for a defendant confronted with an unwarranted claim³⁵.

Furthermore, another factor that could lead to the high cost of arbitration is the number of extensions granted by arbitrators. Arbitrators are often very generous with the amount of time they grant parties to submit various pleadings. While this may be in line with making sure that both parties are treated fairly or that due process is adhered to, the result is that it amounts to significant delays in conducting the arbitration.

Additionally, there is usually a great amount of difficulty in arranging a timetable that will accommodate the schedule of the members of the arbitral tribunal, the legal representatives or witnesses, if the situation warrants it³⁶.

Moreover the panel of arbitrators for complex international commercial contracts is usually three; each of whom has to be well paid hence increasing the cost of arbitrations. This cannot be compared to the minimal court fees one encounters in litigation.

Although a party, who has the intention to drag out the arbitration, may have a great chance of doing so particularly at the commencement of the proceeding, the cost of arbitration is often a great advantage if parties co-operate and keep expenses to a minimum:

³²D. W. Plant, 'ADR and Arbitration' in Lawrence W. Newman, Richard D. Hill (eds), *The Leading Arbitrators' Guide to international Arbitration* p. 245.

³³*Ibid.*

³⁴ See *Supra* note 24.

³⁵*Ibid.*

³⁶*Ibid.*

1.5.2. Confidentiality

Many people view the private nature of arbitration as a main advantage. Due to the fact that court proceedings are open to the public; many business people prefer arbitration to litigation³⁷.

Unless otherwise agreed, awards in arbitral proceedings are confidential and the proceedings are closed to the public³⁸.

This is considered important especially to parties who wish to protect trade secrets. Moreover, in the interest of protecting present or future commercial transactions, many business people deem any publicity of an ongoing dispute as detrimental to their reputation³⁹.

1.5.3. Flexibility

Article 12 of the law governing arbitration and conciliation in Rwanda gives to parties the possibility to not only determine the number of arbitrators, but also to appoint them⁴⁰. The arbitration process is hailed for its inherent procedural flexibility⁴¹. Unlike court proceedings which are rigid, arbitral proceedings offer greater flexibility. Parties get to choose their own arbitrators⁴² so that arbitration proceedings suit their wishes⁴³. Although parties may choose an already established arbitral institution with its own rules of procedure, the parties still have a choice to decide on whether or not they want a totally different procedure that responds to their needs⁴⁴.

If both parties cooperate and decide that they need a speedy arbitration, the flexibility of arbitration can be used to their advantage to achieve that goal. Moreover, parties may even

³⁷See *supra* note 36.

³⁸*Ibid.*

³⁹*Ibid.*

⁴⁰The law on arbitration and conciliation in commercial matters, article 12 and 13. The European & Middle Eastern Arbitration Review 2008, The International Journal of Public and Private Arbitration, online: <<http://www.globalarbitrationreview.com>>, accessed on 21st May 2015.

⁴¹See *Supra* note 33 at p. 44. The two arbitrators chose the chairman if it is arbitration with a three member panel.

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴The parties could choose institutions such as the international Chamber of Commerce (hereinafter, 'ICC') or the London Court of International Arbitration (hereinafter, 'LCIA') just to mention a few of the institutions or simply decide on an ad hoc arbitration and use already established rules such as the United Nations Commission on International Trade Law (hereinafter, 'UNCITRAL' Arbitration Rules).

choose to have ‘fast track’ arbitration an option that is offered by institutions such as the International Chamber of Commerce and the London Court of International Arbitration⁴⁵.

Another reason for the preference of arbitration over litigation by business parties is that many legal problems may arise due to the possibility of several legal systems clashing hence complicating matters even more⁴⁶.

It may be hard for the parties to find the most ideal place to file their suit. This may lead to a party embarking on a venture in search of a jurisdiction that may be more sympathetic to its interests. ‘Forum shopping’ as this venture is often called, may be based on the search for a jurisdiction that is likely to be biased in favour of the party choosing that jurisdiction (for instance the anticipation of large amounts in damage awards)⁴⁷.

1.5.4. Impartiality

According to article 14 paragraph 2 of LAC states that if any of the parties reasonably suspects that an arbitrator lacks the necessary degree of impartiality, independence, objectivity, fairness or does not possess qualifications agreed to by the parties, then that party can object on those grounds.

Some have posited this as a disadvantage of arbitration in that a party can use this as a dilatory tactic by ‘raising unwarranted objections’ or attempt to disturb what could otherwise be a smooth arbitration proceeding by filing an application midway through the proceedings⁴⁸. However, this may not be something to worry about depending on whether the parties’ arbitration is under the auspices of an institution with rules safeguarding against such conduct. Institutions such as the International Commercial Court (ICC) have rules where parties have to follow certain procedures in making such objections (which have to be well founded). Moreover, those objections have to be made within 7 days if the party’s application is to be considered on the specified grounds⁴⁹.

⁴⁵See *Supra* note 37, p. 45.

⁴⁶G. Born & D. Westin, *International Civil Litigation in United States courts* (3rded, 1996). Also see Katherine Lynch, at p. 4.

⁴⁷William P. Park, *International Forum Selection* (1995); International dispute Resolution: The Regulation of Forum Selection, Jack L. Goldsmith (ed.1997). Also See Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, p. 5.

⁴⁸The law on arbitration and conciliation in commercial matters, article 15 paragraph 2.

⁴⁹*Ibid.*

1.5.5. Enforcement of awards

With more than 143 countries party to the New York Convention, enforcing arbitral awards is easier than enforcing foreign court judgments⁵⁰. States are under no obligation to enforce foreign judgments, particularly in the absence of a treaty⁵¹. This makes arbitration a more logical choice over litigation especially if the objective of winning the award is to have it enforced in a country where the respondent has his assets, particularly if that country is party to the New York Convention or has adopted the Model Law.

There is no doubt that both litigation and arbitration have some advantages and disadvantages for parties involved in international commercial transactions. Depending on the needs of the parties, litigation or arbitration may be suitable. However, given the ease created by the New York Convention in enforcing arbitral awards, arbitration is more friendly, flexible and has become more popular in international commercial transactions than litigation⁵².

1.6. INSTITUTIONAL AND AD HOC ARBITRATION⁵³

Normally, institutional arbitration is administered by a specialized arbitral institution under its own rules of arbitration, such as Kigali International Arbitration Center (KIAC). There are some other institutions that are better known internationally such as ICDR which is a division of the American Arbitration Association (AAA); ICC, and LCIA. The rules of arbitral institutions are expressly formulated for arbitration that is to be administered by the institutions concerned and they generally come into play under an institutional arbitration clause in the agreement between the parties.

⁵⁰ X., 'United Nations Commission on International Trade Law: Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html >, accessed on 4th July 2016.

⁵¹ Katherine Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. p.6.

⁵² Charles N. Brower and Abby Cohen Smutny, 'Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations' in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*. p. 51

⁵³ See *Supra* note 8, p. 32.

1.6.1. Institutional arbitration advantages and disadvantages⁵⁴

Basically, rules laid down by established arbitral institutions will generally have proved to work well in practice; they will have to undergo periodic revision in consultation with experienced practitioners to take into account new developments in the law and practice of international commercial arbitration. Automatic incorporation of a book of rules is one of the principal advantages of institutional arbitration. This book of rules will provide solutions for different situations. Besides, most of arbitral institutions provide trained staff to administer the arbitration. In this context, they will ensure that the arbitral tribunal is appointed and payments are made in advance. Payments shall encompass fees and other expenses of the arbitrators so that time limits shall be respected for the smooth running of the arbitration.

It is furthermore advantageous that institutional arbitration reviews the arbitral tribunal's award in draft form before it is sent to the parties. Such a review serves as a measure of "Quality Control". The institution does not comment on the substance of the award, or interfere in any way with the decision of the arbitral tribunal, but does ensure that the tribunal has dealt with all issues before it and that the award covers such matters.

It is crucial to note that it is not advantageous under some institutional rules since parties pay a fixed fee in advance for the cost of the arbitration. This refers to the fees and expenses of the institution and of the arbitral tribunal. This fixed amount is assessed on an *ad valorem* basis. If the amounts at stake are considerable, and the parties are represented by advisers experienced in arbitration, it may be worthwhile to apply *ad hoc* rules rather than conducting arbitration under institutional rules.

Furthermore, it is disadvantaged by the delay which results from the need to process certain steps in the arbitral proceedings through the machinery of the arbitral institution involved. Conversely, the time limits imposed by the institutions rules are often unrealistically short.

⁵⁴ See *Supra* note 8.

1.6.2. Ad hoc arbitration advantages and disadvantages

One distinct advantage of ad hoc arbitration is that it may be shaped to meet the wishes of the parties and the facts of the particular dispute. It needs the co-operation of the parties and their advisers to be done efficiently and effectively, but if such co-operation is forthcoming, the difference between ad hoc and institutional arbitration is like the tailor-made suit and one that is bought “off-the-Peg” or prêt-a-porter. It is however, a time-consuming process to draft special rules for an ad hoc arbitration.

Time and money can be saved by adopting, rules of procedure which have been specially formulated for the purpose. There are various sets of rules which are suitable, of which the best known are the UNCITRAL (United Nations Commission on International Trade Law)rules. It is not advisable to try to adopt or adapt institutional rules for use in ad hoc arbitration, since such rules make repeated references to the institutions and willnot work properly or effectively without it.

The principal disadvantage of ad hoc arbitration is that it depends for its full effectiveness on co-operation between the parties and their lawyers, backed up by an adequate legal system in the place of arbitration. As far as Rwanda is concerned, the arbitration law provided for some major issues users of ad hoc arbitration could face, such as refusal of one party to appoint an arbitrator, challenging an arbitrator; etc...

1.7. ESTABLISHMENT OF AN ARBITRATION AGREEMENT

An agreement by parties to submit to arbitration any dispute or difference between them is the starting point of the process in both national and international arbitration⁵⁵.If there is to be a valid arbitration; there must first be a valid agreement to arbitrate⁵⁶.

Arbitration is a contractual process in fact that it is based on an agreement between the parties, by opposition to some cases where arbitration is imposed in statute, such as provided for in Switzerland by article 89 of the Statute on healthcare insurance for disputes between doctors and

⁵⁵Alan Redfern and Martin Hunter, Law and practice of international commercial arbitration (2003), p. 4.

⁵⁶*Ibid.*

health insurers, or as provided for France by Article 761-5 of the labour law code for certain disputes in the field of journalism⁵⁷.

The Rwandan law on arbitration defines the arbitration agreement⁵⁸.

The long article 9 provides: “arbitration agreement is an agreement by both parties to submit to arbitration all or certain disputes which arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The arbitration agreement shall be in writing. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, in a written form basing on the conduct of the parties themselves, or based on other means. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be used for subsequent reference.”

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

It is clear that Rwandan lawmakers adopted the option two (2) of article 7 of the UNCITRAL (United Nations Commission on International Trade Law) model law⁵⁹. This provision is composed of two options, option two defines the arbitration agreement as ‘an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which arise between them in respect of a defined legal relationship, whether contractual or not⁶⁰.

⁵⁷Jean François Poudret and Sebastian Besson, *Comparative law of international arbitration*, 2nded (2007), p. 3.

⁵⁸The law on arbitration and conciliation in commercial matters, article 9 paragraph 1.

⁵⁹Samantha Lord and Rupert Baker ‘A Comparison of the UNCITRAL Model Law and the Arbitration Rules of the Stockholm Chamber of Commerce.’ (2008), *Vindobona Journal of International Commercial Law & Arbitration*, pp. 203-204.

⁶⁰*Ibid.*

The Model Law option one focuses on the form of the arbitration agreement, and provides that the agreement must be in writing and sets out various ways in which requirements can be satisfied⁶¹.

It seems that this UNCITRAL Model Law has been helpful for Rwanda and by that, it achieved its aim of assisting States in reforming and modernizing their laws on arbitral procedure so as to take into account particular features and needs of international commercial arbitration⁶².

For this agreement to be unambiguous at least three elements must be taken into consideration: a dispute between parties must exist; there must be a mutual agreement to settle the dispute by arbitration and parties must have agreed to abide by the decision of the arbitrators⁶³.

Most arbitration agreements are contained in an arbitration clause, typically included in contracts entered into before any dispute arises; they are called a pre-dispute arbitration agreement⁶⁴.

However, parties can also decide to enter into an arbitration agreement after a disputes arises, in which case their agreement is called a ‘submission agreement’⁶⁵.

Parties are free to enter into an arbitration agreement whenever they want. Just as they can decide to submit their dispute to arbitration, they can withdraw by agreement.

The arbitration agreement must be unambiguous in order to allow the arbitrators to find out easily the will of the parties. The American Arbitration association (AAA) proposes some standard arbitration clauses. The parties can provide for arbitration of any dispute by inserting the following clause into their contracts (pre-dispute arbitration agreement): Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

⁶¹See *Supra* note 60.

⁶²UNCITRAL model law on international commercial arbitration with amendments adopted in 2006, online: <www.camera-arbitrale-venezia.com/allegati/00158.pdf>, accessed on 4th July 2016

⁶³M J Stoppi, *Commercial arbitration in the Caribbean* (2001), p. 13.

⁶⁴Paul D Friedland, *Arbitration clauses for international contracts*, 2007, p. 57.

⁶⁵*Ibid.*

Rwandan users of arbitration can utilize the Kigali International Arbitration Center arbitration clause.

Here is that default clause:

“Where any agreement, submission or reference provides for arbitration under the Arbitration Rules of the Kigali International Arbitration Centre (“the Centre”) the parties thereto shall be taken to have agreed that the Arbitration shall be conducted in accordance with the following Rules and procedures (the Rules) or such amended Rules as the Centre may have adopted to take effect before the commencement of the arbitration, subject to such modifications as the parties may agree in writing.”⁶⁶ Arbitration of existing disputes may be accomplished by use of the following (submission agreement)⁶⁷:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following controversy: (describe briefly) we further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

The American Arbitration Association is not the only one that provides some standard clauses. The London Court of International Arbitration (LCIA) suggests following clauses for submission of an existing dispute to LCIA⁶⁸. Any dispute arising between the parties concerning (....), the parties hereby agree that the matter shall be referred to and finally resolved by arbitration under the LCIA rules, the number of arbitrators shall be (one/three), the seat of arbitrators shall be (city and/or country), the language to be used in the arbitral proceedings shall be (....).

⁶⁶Arbitration Rules, Kigali International Arbitration Center, article 7 paragraph 1.

⁶⁷*Ibid.*

⁶⁸*Ibid.*

1.8. PARTIES TO ARBITRATION AGREEMENT

As seen above, arbitration is a contractual agreement, and this means that there are at least two parties in that contract. The parties to the arbitration agreement can be private individuals or legal persons or even public entities to the extent that they are capable of submitting to arbitration. For the arbitration agreement to be valid, legal entities must be represented by their legal representatives, otherwise the agreement may be voided by the court. It is prudent for the other contracting party to look at the constitutive act of the legal person in order to avoid entering into avoidable contract. Few arbitration laws deal directly with the issue of the capacity of the parties to enter into an arbitration agreement especially when it is an international commercial arbitration. The Rwandan law on arbitration is not an exception. In Rwanda, anyone can enter into a contractual agreement unless if he/she is declared incapable by law⁶⁹.

In addition, article 7 of the Rwandan law on contracts makes 'capacity' one of the conditions of the validity of a contractual agreement besides the consent of parties, the legal purpose and certainty of subject matter⁷⁰. Any contractual agreement where one of the parties is incapable of contracting is null and void. To conclude a valid contract, the party must be at least 21 years.

But this applies to Rwandan parties who enter into an arbitration agreement because the capacity of parties to enter into an arbitration agreement is governed by their laws related to capacity.

This is confirmed by article 10 and 11 of the Law n° 42/1988 on the preliminary title and persons and family. The two legislations respectively state that the capacity of Rwandans is regulated by Rwandan law; the state and capacity of foreigners are regulated by the laws of their countries. This means that in an arbitration agreement, different legal systems regulating matters related to the capacities of the parties can co-exist.

For example, if a South African citizen enters into an arbitration agreement with a Rwandan and a problem arises concerning the parties' capacity to contract, and the case is to be resolved in Rwanda, Rwandan private international law would be applied to determine which law to use in

⁶⁹ The law n° 45/2011 of 25/11/2011 governing contracts, *O.G.* n° 04 bis of 23/01/2012, article 7 (hereinafter referred to as the law governing contracts).

⁷⁰ The law governing contracts, article 8.

that matter, according to article 11 of the law n° 42/1988, the South African law regulating the state and capacity of persons would be applied to the South African party and Rwandan law on the Rwandan party. For Rwandan government institutions, because parties can enter into arbitration agreements without obtaining any authorization from another body. If they enter into an arbitration agreement, they can also be represented and be party to proceedings. In matters other than criminal, the government of Rwanda is represented by state attorneys⁷¹.

Nevertheless, state attorneys do not have capacity of entering into arbitration agreements on behalf of the government.

1.9. COMMERCIAL NATURE OF THE DISPUTE

As far as commercial dispute resolution is concerned it is important to talk about the commercial character of the disputes that are to be settled by arbitration and article 2 of the Rwandan law on arbitration states that it shall apply to domestic and international commercial arbitration. Besides, article 1 arrogates to itself the power to determine arbitration and conciliation procedure to be followed in commercial matters but does not define what is commercial. A footnote to the UNCITRAL Model law provides guidelines on how the term commercial should be interpreted.

This footnote reads:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

In Rwandan law, the Royal decree of 2nd August 1913 related to commercial acts and commercial engagements in its articles 1 and 2, respectively defines who is considered as a merchant and gives a list of acts that are considered as commercial.

⁷¹ Prime Minister’s Order no 18/03 of 10/09/2007 establishing the Mandate and Structure of the Attorney General’s Office/Ministry of Justice, article 8.

According to article 1, transpose those who perform commercial transactions as a usual professional exercise and considered as commercial by law. Moreover, article 2 gives a list of acts that are considered by the law as commercial one. In addition, article 1 of the Rwandan law on arbitration states that this law determines the establishment of arbitration and conciliation in commercial matters. Only acts that are considered as commercial shall be regulated by this law. It is unfortunate that the Rwandan law on arbitration is only limited to commercial matters. It would be better if the law did not specify the matters to be regulated by this law so that it could regulate other matters such as labour disputes and removing the need for another arbitration law for use in these areas⁷².

It is important to know the commercial nature of a dispute if for instance, it involves the enforcement of a foreign award according to the New York convention of 1958 on recognition and enforcement of foreign arbitral awards, each State according to article I (3), can make reservation applying the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law⁷³. Rwanda has not made any reservation⁷⁴.

1.10. JUDICIAL INTERVENTION IN ARBITRATION

It is common that once dispute has risen, immediate protective action is required and it would be commercially damaging to wait until the arbitral tribunal has been constituted. For instance, evidence has to be preserved or rights of a party protected from irreparable harm. In that case if parties and arbitral process need protection, there is nowhere else to turn but the national court, since the arbitral tribunal is not yet in existence and subsequently parties' cannot turn to it (arbitral tribunal) to request those measures⁷⁵.

There are a certain number of scenarios provided by Rwandan law on arbitration where the judicial intervention before the composition of the arbitral tribunal is possible. Firstly, the

⁷²In South Africa, the arbitration act 42 of 1965 regulates all kinds of arbitration, it is the same act used for commercial matters and labor matters.

⁷³ Status of 1958 -Convention on the recognition and enforcement of arbitral awards, online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html>, accessed 24May 2015.

⁷⁴*Ibid.*

⁷⁵See *Supra* note, 66, p. 355.

national court can intervene in order to enforce the arbitration agreement⁷⁶. A party to an arbitration agreement might decide to issue proceedings in a court of law, rather than take the dispute to arbitration and without the consent of the other party⁷⁷.

According to article 10 of Rwandan law on arbitration, national courts are ordered to refer the parties to arbitration when seized of a dispute that is the subject of an arbitration agreement unless the court finds it null and void, inoperative or incapable of being performed⁷⁸. By doing so, the court intervenes in enforcing the arbitration agreement. Secondly, the court is supposed to intervene in establishing the arbitral tribunal and act as appointing authority in case parties or appointed arbitrators fail to constitute an arbitral tribunal. Article 13 paragraph 3 litera 1 and 3 of Rwandan law on arbitration deals with this intervention.

Thirdly, the judicial or national court may intervene in matter of challenges of arbitral tribunal jurisdiction. Any challenge to the jurisdiction of an arbitral tribunal may be dealt with initially by the tribunal itself, the final decision on jurisdiction rests with the relevant national court⁷⁹. In Rwandan law on arbitration, this kind of judicial intervention is not provided for. The arbitral tribunal will have to handle it and take the decision on its own jurisdiction⁸⁰.

1.10.1. Judicial intervention before the composition of the arbitral tribunal

Actually, in commercial contracts parties agree on the clause pertaining the conflict resolution. It is possible that they agreed to resort to arbitration in case of any disputes that may arise. This makes a valid contract that is binding and executed in good faith between parties.⁸¹ The spirit of the legislator to enact the law governing arbitration and conciliation in commercial matters was to settle disputes without seizing courts. This result from the contractual obligations as stated earlier. For this reason, jurisprudence had stated that arbitration agreement should be respected

⁷⁶See *Supra* note 66.

⁷⁷*Ibid.*

⁷⁸*Ibid.*

⁷⁹*Ibid.*

⁸⁰*Ibid.*

⁸¹ The law aw governing contracts, article 64.

as long as there was a clause of resolving a dispute via arbitration.⁸² This is also underpinned by the judgment rendered by the Commercial tribunal that rejected the case arguing that it is not its competence and ordered the case to be settled arbitral tribunal as agreed in memorandum and articles of association.⁸³ The way the commercial tribunal decided the case is logical since the agreement concluded legally becomes a law between parties.

In addition, the commercial tribunal in the case of *Victor HASSON and Judith HASSON Vs KONSTANTINOS FRAGAKIS and BENALCO Ltd* decided that it should not decide the case that should have been heard in arbitration since parties agreed to refer the dispute to arbitration in case it arises.⁸⁴ Therefore, there should not be the judicial intervention before the case was not brought to arbitration. It should be brought to courts in appeal level and the competent court shall be the Commercial High Court. It is the latter that hears cases of appeal for the decisions that were rendered by arbitrators.⁸⁵ This is in contradictions with article 106 of the law governing the organization, functioning and jurisdiction of courts where the High Court hears also appeals on civil cases on decisions taken by Arbitration Committees.⁸⁶ One may question whether there are civil cases that can be brought to arbitration because the Rwandan law of 2008 on arbitration states that it is done in commercial matters. Thus, arbitration procedures must be respected if the contract stated so.

⁸² Supreme Court, Kigali, 20/06/2012, RUKERIBAYE Raphael Vs Golf Course Estate, RCOMA 0041/11/CS, paragraph 18, online: <www.judiciary.gov.rw/fileadmin/Publications/Case_Law.../Icyegeranyo_n_15.pdf>, accessed on 5th July 2016

⁸³ Commercial tribunal, Kigali, 10/07/2012, BEN BENZINGE Vs NATURAL RESOURCES DEVELOPMENT RWANDA (NRD), R.COM 0349/12/TC/Nyge, unpublished.

⁸⁴ The commercial tribunal, 12/10/2012, Victor HASSON and Judith HASSON Vs KONSTANTINOS FRAGAKIS and BENALCO Ltd, R.COM 0332/12/TC/Nyge, unpublished.

⁸⁵ Organic law n°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts, Official Gazette n°45 of 05/11/2012, article 13 paragraph 2 (4°)

⁸⁶ Organic Law n° 51/2008 of 09/09/2008 determining the organization, functioning and jurisdiction of courts, JO n° sp.10/09/2008, modified and complemented to date by the organic law n°02/2013/OL of 16/06/2013 determining the organization, functioning and jurisdiction of courts.

1.10.2. Judicial intervention during the arbitral proceedings

During the arbitration proceedings issues may arise where the arbitral tribunal lacks necessary coercive powers to conduct the arbitration in an appropriate way, protect the rights of parties or preserve existing evidences, therefore the judicial intervention is more than necessary. The national court may intervene in matter of challenge of procedure. Article 15 of Rwandan law on arbitration sets out when the court intervenes in this matter. It provides:

The parties who sought assistance from the arbitration are free to agree on a procedure for challenging an arbitrator, in according to the provision of paragraph 3 of this article. if a challenge under any procedure agreed upon by the parties or under the procedure of paragraph 2 of this article is not successful, one of the parties that sought assistance from arbitration may request, within fifteen (15) days after having notice rejecting the challenge, the court specified in article 8 of this law to decide on the challenge, and the decision shall be subject to no appeal. In case of absence and incapacity to act by the arbitrator, the national court also intervenes upon request of one party and terminates the mandate of the arbitrator who became *de jure* or *de facto* unable to perform his functions⁸⁷.

⁸⁷ Alan Redfern et al., *Law and practice of international commercial arbitration*, 2004, p. 25.

CHAPTER TWO: ALTERNATIVE DISPUTE RESOLUTION (ADR)

The traditional way of resolving disputes is normally by Litiagtion in courts of law. Alternative disputes resolution mechanisms (ADR) were introduced as an aternative to litiagtions in court as alrerady mentioned elsewhere in the preceding chapter. In this chapter, the researcher will discuss the alternative dispute resolution mechanisms with particular attention to negotiation, mendiation and conciliation which seem to be the most common mechanisms.

2.1.UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION

ADR is composed of different words: Alternative, dispute and resolution. Thus to clearly understand or define the phrase, it is paramount important to understand each word separately thereof. And then what Alternative can mean to you? What about dispute? Is a dispute synonymous with conflict? What about resolution?

The word ‘Alternative’ refers to a thing that you can choose to or have out of two or more possibilities.⁸⁸ Therefore, it is used as an adjective and refers to all permitted dispute resolution mechanisms other than litigation, be it in court or administrative tribunal. The phrase dispute resolution, in the absence of alternative as prefix, is simply a collection of procedures intended to prevent, manage or resolve disputes. This means that “Alternative” connotes the existence of dispute settling mechanisms other than formal litigation. Though the word Alternative‘in ADR seems to connote the normal or standard nature of dispute resolution by litigation and aberrant or deviant nature of other means of dispute resolution mechanisms, it is not really the case. ADR is not an alternative to the court system but only meant to supplement the same aiming on less lawyering. The court does not order ADR because the court is seized when such dispute resolution mechanisms have failed. In this vein, it should be noted that arbitration is one of the best mechanisms of dispute resolution specifically in commercial matters.

Nowadays, there are arguments that ADR does not include arbitration and the proponent of this position say that alternative dispute resolution encompasses various amicable dispute

⁸⁸Oxford Advanced Dictionary, 6th ed., S.V: ‘Alternative’.

resolutions other than litigation in court and arbitration. Indeed, ADR rules of the International Chamber of Commerce follow this approach. The preamble of the same rule reads as:

Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of third party (the neutral) acting in accordance with these rules⁸⁹.

Needless to say most of literatures and laws consider alternative dispute resolutions as methods of dispute resolution which accommodates all the traditional dispute settling mechanisms other than court litigation. As arbitration shares many characteristics with other dispute resolution mechanisms than court litigation ADR in this material connotes all dispute resolutions out of litigation. The below table summarises the difference between arbitration and litigation.

The difference between litigation and arbitration

LITIGATION	ARBITRATION
Generally longer to conclusion	Generally quicker to conclusion
Generally more expensive	Generally less expensive
Generally right to appeal ruling	Rarely able to appeal a ruling
Extensive discovery permissible	Limited discovery allowed (depositions interrogatories may be precluded)
Extensive motion practice often	Limited motion practice in general
Rules of evidence apply (limits information to judge/jury)	No rules of evidence apply (Arbitrator generally hears everything)
Random decision maker	Parties have input into who decision maker is
Trials usually go day to day until completed	Arbitration often scheduled with single days over extended period of time
Court schedule often causes delays	Arbitrators are more accommodating on schedule

⁸⁹ Alan Redfern et al., Law and practice of international commercial arbitration (2004) p. 25.

Initial Judge may not decide the case as fact-finder or be the referee during a jury trial	Arbitrator or panel of arbitrators will be the same throughout
Almost all hearings in Court	Many preliminary hearings by phone
Less chance of getting a compromise ruling	More chance of getting a compromise ruling
No payment for judge/jury	Parties pay arbitrator(s)
Limited secrecy via protective orders	More comprehensive secrecy
Precedential outcome	Non-precedential outcome
Minimal filing fees	Filing fees can vary with case value
Private - between the two parties	Public - in a courtroom
Civil – private	Civil and criminal
Limited evidentiary process	Rules of evidence allowed
Parties select arbitrator	Court appoints judge - parties have limited input
Informal	Formal
Usually binding; no appeal possible	Appeal possible
At discretion of parties; limited	extensive use of attorneys
As soon as arbitrator selected; short	Must wait for case to be scheduled; long
Fee for arbitrator, attorneys	Court costs, attorney fees; costly

2.2. BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION

Historically, arbitration and mediation have been used to settle many different types of disputes. These disputes have typically fallen into one of the following categories - international disputes, commercial disputes, and labour disputes. A recent example of the successful employment of an international mediation is that conducted by former President Jimmy Carter in Bosnia. Additionally, there are numerous examples of the historic resolution of international conflicts by arbitration, such as it uses by warring Greek city states and by various Catholic Popes who acted as arbitrators of conflicts between European countries during the Renaissance.

International attempts to provide a foundation for lasting, global peace have also incorporated arbitration. Two examples of this are the Permanent Court of Arbitration, which resulted from

international meetings conducted between 1899 and 1907 in The Hague, Netherlands and the development of the League of Nations in 1918 which employed arbitration as one mechanism of dispute resolution.

Outside the political arena, arbitration and mediation have been used by businesses worldwide to settle their commercial disputes. In Europe, businesses of differing national origin have frequently submitted their disputes to arbitration. In the United States, arbitration and mediation are often used to settle labour disputes arising from conflicting interpretations of existing employment contracts, construction disputes between general contractors and subcontractors relating to construction damage claims,

or between contractors and owners relating to the interpretation of work and payment clauses in construction contracts, and shareholder disputes concerning the valuation of stock in closely held corporations, to name but a few examples⁹⁰.

One well known effort in the search for alternatives occurred in 1976 when former Chief Justice Warren Burger (USA) convened the Roscoe E. Pound conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference) in Saint Paul, Minnesota. Academics, members of the judiciary, and public interest lawyers joined together to find new ways of dealing with disputes. Some of the papers that emerged such as Professor Frank Sander's classic, "Varieties of Dispute Resolution", formed the basic understanding of dispute resolution today.

Today, most state bar associations have ADR committees. Law schools have gradually been adding ADR to the curriculum and now the majority of the law schools offer one or more ADR courses or specialized courses in areas such as mediation and negotiation. Several law reviews are devoted solely to the study of ADR. Similar developments have occurred in graduate and business schools, etc.

⁹⁰Alan Redfern et al., Law and practice of international commercial arbitration (2004) p. 25.

Many law firms in the USA have developed ADR departments and offer similar services to the private providers. ADR use has been expanded to on-line disputes between parties who are separated geographically. The most recent marketing development of ADR is on the internet with a growing number of dispute resolution services available to parties on-line. Finally, with increasing globalization, ADR has had a significant impact on commerce.

Over the last two decades, in the USA there has been evidence of the beginning of a systematic implementation of ADR in the Legal system as a result of the combination of statutes and court rules. Judges may order parties to participate in summary jury trials. Court rules require parties to arbitrate in specified categories of cases. In some courts, parties are required to try mediation process before being permitted to have a trial.

The growth of mandatory ADR raises a host of public policy issues. Some critics have charged that in our eagerness to adopt alternatives to litigation, we risk losing the protection of the rule of law. The truth is that the advantages of ADR are more numerous than its disadvantages.

2.3. ALTERNATIVE FORMS OF DISPUTE RESOLUTION

The shortcomings in the adjudicatory system of resolving disputes led to the emergence of other methods of dispute resolution now popularly referred to as ADR. The value of ADR over and above the common adjudicatory system is that any of the techniques can be implemented very early in the dispute thereby giving the parties an opportunity to air their views and to involve decision makers within their respective organizations long before the subject of dispute eats deep into the fabric of the relationship and cause irreparable damage.

ADR methods vary and their processes overlap but are all designed as alternatives to litigation and complement arbitration which is the most popular form of ADR. The methods include negotiation, early neutral evaluation or neutral fact finding, conciliation, mediation, mini trial, med-arb etc. The key factor is that all these methods are designed to assist the parties resolve their differences in a manner that is creative and most suited to the particular dispute. Some people see ADR methods as supplanting the adjudicatory system but if considered from the angle that the courts in many jurisdictions are unable to resolve all disputes in a manner

appealing to litigants, and then ADR methods will be accepted as complementary to the litigation system.

2.3.1. Negotiation

This is a voluntary and informal process by which the parties to a dispute reach a mutually acceptable agreement before the parties resort to litigation.⁹¹ As the name implies the parties seek out the best options for each other which culminates in an agreement. At their option, the process may be private. In this process, they may or may not use counsels and there is no limit to the argument, evidence and interests, which may be canvassed.

2.3.2. Early Neutral Evaluation/Fact Finding

This is an informal process whereby a neutral third party is selected by the disputants to investigate the issue in dispute and submit a report or come to give evidence at another forum like a court or arbitration.⁹² The outcome of a neutral fact finding is not binding but the result is admissible for use in a trial or other forum. The method is particularly useful in resolving complex scientific, technical, sociological, business or economic issue. Using a neutral fact finder eliminates the strategic posturing which characterizes the litigation or even arbitration process.

2.3.3. Conciliation

Article 3, 2° of the Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, defines conciliation as:

“A process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties to the dispute request a conciliator to assist them in their attempt”. Conciliation process is governed by the above mentioned law that also governs arbitration in commercial matters⁹³.

⁹¹ X., ‘Alternative Dispute Resolution: Negotiation’, online: < <http://www.au.af.mil/au/awc/awcgate/army/jagcnet/adr-negotiation.pdf>>, accessed on 2nd July, 2016

⁹² X., ‘Early neutral evaluation’, online: < <http://www.adrservices.org/other-processes.php>>, accessed on 2nd July, 2016.

⁹³Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, Official Gazette n° special of 06. 03. 2008, article 53.

The Law on arbitration and conciliation does not distinguish conciliation from mediation. Are these methods identical? Can we use those terms interchangeably?

It should be noted that, conciliation is the process by which one or more independent person(s) selected by the parties to an agreement generally by mutual consent, either at the time of making the agreement or subsequently when a dispute has arisen between them, to bring about a settlement of their dispute through consensus between the parties by employing various persuasive and other similar techniques. The Rwandan law on arbitration and conciliation in commercial matters defines conciliation as “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties to the dispute request a conciliator to assist them in their attempt.”⁹⁴ It is a process of confidence and faith. Conciliation is an effective means of alternative dispute resolution and can be usefully deployed for both international as well as domestic disputes, except that in the conciliation of an international dispute certain facts assume greater importance than they would in a domestic conciliation.

United Nations Commission on International Trade Law (UNCITRAL) has prepared and circulated “Conciliation Rules”. These Conciliation Rules were adopted by the UNCITRAL at its thirteenth session after consideration of the observations of Governments and interested organizations. The General Assembly of the United Nations has also adopted them through a Resolution 35/52 on 4 December, 1980. The U.N. has recommended, “the use of the Conciliation Rules of the United Nations Commission on International Trade Law in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation”. The UNCITRAL Conciliation Rules contain 20 Articles.

The countries that have adopted the Model Law on International Commercial Arbitration of UNCITRAL have also adopted the Rules of Conciliation of the UNCITRAL or other international institutions and have enacted a composite law called Arbitration and Conciliation Act. Such statutes provide for the resolution of disputes through either of these methods, that is, arbitration or conciliation.

⁹⁴ Law on arbitration and conciliation in commercial matters, article 3 (2°).

Many other international organizations and institutions have issued conciliation rules for the resolution of disputes between the parties. The International Chamber of Commerce has promulgated, “ICC Rules of Optional Conciliation”. The Preamble to these Rules says that, “Settlement is a desirable solution for business disputes of an international character. The International Chamber of Commerce therefore sets out these Rules of Optional Conciliation in order to facilitate the amicable settlement of such disputes”. The conciliation process can be commenced by either party to the dispute. When one party invites the other party for resolution of their dispute through conciliation, the conciliation proceedings are said to have been initiated. When the other party accepts the invitation, the conciliation proceedings commence. If the other party rejects the invitation, there are no conciliation proceedings for the resolution of that dispute.

Generally, there shall be one conciliator, unless the parties agree that there shall be two (2) or more conciliators.⁹⁵ If the parties fail to arrive at a mutual agreement, they can enlist the support of any international or national institution for the appointment of a conciliator. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent.

Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not termed as Presiding conciliator. He is just the third conciliator. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. He/she tries to bring an acceptable agreement as to the dispute between the parties by mutual consent. The agreement so arrived is signed by the parties and authenticated by the conciliator.

⁹⁵ The law on arbitration and conciliation in commercial matters, article 54 paragraph 1.

In some legal systems, the agreement so arrived at between the parties resolving their dispute has been given the status of an arbitral award. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can resort to arbitration.

A conciliator is not expected to act, after the conciliation proceedings are over, as an arbitrator unless the parties expressly agree that the conciliator can act as arbitrator. Similarly, the conciliation proceedings are confidential in nature. It is important to note that all information relating to the conciliation proceedings shall be kept confidential, except where disclosure is required under the Law or for the purposes of implementation or enforcement of a settlement agreement and when parties have agreed to disclose that information.⁹⁶

2.3.4. Mediation

Parties to a dispute seek mediation when they are ready to discuss a dispute openly and honestly.⁹⁷ Usually in a dispute, there are varying degrees of interests and concerns; therefore it is usual that a trade off may be made in a creative manner which a court may not consider. The underlying factor in mediation is that the parties have bargaining power and that a continuing relationship is essential after the dispute therefore trial is to be avoided.⁹⁸

In view of the factors recounted above, a neutral party, the mediator, is brought in to help the parties find a solution to a dispute. The person controls the process while the parties control the outcome. A mediator cannot impose a decision on the parties. In a typical mediation session, the mediator opens the session by declaring how the session will run, who will speak, when, for how long and the length of the session.

The parties are requested to confirm their good faith and trust in the process and to agree that all that will be said will be confidential and therefore inadmissible in any subsequent proceeding. After this, parties take turn to state their views of the dispute.

⁹⁶ The law on arbitration and conciliation in commercial matters, article 58.

⁹⁷ Bennett G. Picker, 'Preparation: The Key To Mediation Success', online: <http://www.mediate.com/articles/preparation_the_key.cfm>, accessed on 2nd July, 2016

⁹⁸ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd ed., (San Francisco: Jossey-Bass Publishers, 2004, p. 30.

The mediator asks for clarification as may be necessary. If necessary, the mediator may meet with the parties separately in a confidential caucus to assess position, identify real interest, consider alternatives or help generate a possible solution. This is called shuttle mediation. The process may involve several sessions before a solution is arrived at. Mediation may be of different types but three popular variations are the rights based mediation which focuses on legal rights of the parties, the interest based mediation which focuses on the interests and compelling issues of the dispute and therapeutic mediation which focuses on the problem solving ability of the parties or the emotional aspects of the dispute.

A successful mediation affords the parties an opportunity to generate a creative solution to their dispute in a manner that focuses on the future and not the past. Its major benefits include that they control the process, choose their mediator and avoid trial.

2.3.5. Mini-Trial

The resolution of disputes through this alternative dispute resolution method is called mini-trial. It is relatively a new device for the resolution of disputes. Sometimes it is also called as “exchange of information”. It has nothing to do with a criminal or any other trial. This procedure is only named as a mini-trial. In fact, in this process, no adjudication process takes place. Various national and international institutions engaged in providing arbitration and mediation facilities have made rules for “mini-trial”.

The parties to a dispute can select and adopt any such institution and its rules for the resolution of their dispute through mini-trial. It is also a time bound process. It is expected that under normal circumstances, the entire process of mini-trial should be completed within 90 days from the date of its commencement.

The major difference between the conciliation and the mini-trial is that in conciliation, the conciliator tries to bring about an agreement between the parties. In mini-trial, the neutral adviser tells the senior management personnel of the parties of the respective strengths and weaknesses of the case to the parties. Thereafter, the senior management personnel of the parties can take an appropriate decision about their dispute.

According to American Arbitration Association's Mini-trial Procedures, "The mini-trial is structured disputes resolution method in which senior executives of the parties involved in legal disputes meets in the presence of a neutral adviser and, after hearing presentations of the merits of each side of the dispute attempt to formulate a voluntary settlement."

The process of mini-trial can be commenced by either party to the dispute. When one party invites the other party for mini-trial and sends a written invitation identifying the subject of dispute, the process of mini-trial is said to have been initiated. When the other party accepts the invitation in writing, the mini-trial proceedings are deemed to have commenced. If the other party rejects the invitation, there is no mini-trial proceeding. Generally, only one neutral adviser is appointed to resolve the dispute between the parties. The parties if they so desire can have more than one neutral adviser also. The neutral adviser(s) is appointed by the parties by mutual consent. If the parties do not wish to appoint their own neutral adviser(s) or do not reach agreement on any particular name, they may enlist the support of any national or international institution for the purpose. The neutral adviser is expected to possess special legal or technical knowledge and experience about the subject matter of dispute. A mini-trial is also a time bound process.

In mini-trial, first, the parties explain their respective cases and then the neutral adviser discusses the nature of dispute with the senior executives of both the parties.

If necessary, he/she may also discuss the matter with the experts, if any, proposed to be produced by the parties. Thereafter, he/she indicates his views of the respective strengths and weaknesses of each side, the aspects of the case which are reasonably clear and those which are uncertain. The neutral advice also answers the questions or doubts the senior executive may have. This process helps the parties to gain a better understanding of the issues and the merits of their respective case. The senior executives are then expected to enter into a mutual discussion with a view to arriving at a settlement. The neutral adviser only assists them in such discussions, as a facilitator, and not as a judge of the dispute. The mini-trial terminates when the parties have arrived at an agreed settlement or the neutral adviser makes a written

declaration to the effect that further efforts at settlement of the dispute through mini-trial are no longer justified.⁹⁹

2.3.6. Expert assessment (Engineers)

Certain contracts, particularly those involving complex and long term construction projects, adopt the system of appointing “Experts” for the resolution of disputes that may arise there under. Such experts are generally construction or civil engineers who are regularly available at the construction site and are expected to resolve disputes between the parties within a reasonable time. “Experts” can also be appointed for the resolution of disputes arising under other kinds of contracts. The qualifications and experience of an Expert depends on the nature of contract and the dispute that has arisen there under.

The Experts are expected to be impartial. They undertake to interpret the provisions of the contract and/or explain their practical application. Generally, only one expert is appointed but there is no legal bar for the appointment of a Board of experts consisting of two or three experts. In construction contracts, generally the Expert is appointed by the Employer. Before making any such appointment, it is desirable that the contractor is consulted and his opinion is given due consideration. The Expert can give his opinion or determination during the progress of performance of the contractor even after the termination of the contract. The Experts appointed in pursuance to this provision are not bound by the rules of procedure or evidence. They do not give award or judgments. They express their opinion or give their determination depending on the facts and circumstances of dispute between the parties. The opinions given by the experts are not binding on the parties, unless the parties have by their agreement given an authority to the Expert to make binding determinations. In such a case, the decisions given by the Expert will be binding on the parties. An Expert is expected to give his opinion or determination within the time prescribed by the parties in the relevant clause.

The major advantages of this system are that if a dispute arises between the parties, the Expert, for the resolution of the same, is instantly available. The time taken for the process of appointment of the Expert is avoided. It is also a time bound system.

⁹⁹ L. Edelman, ‘The Mini Trial, Pamphlet’, 1989, p. 20, online: <<http://www.dtic.mil/dtic/tr/fulltext/u2/a224260.pdf>>, accessed on 2nd July, 2016.

Further that, if a dispute arises between the parties to the contract, the work does not suffer. The contractor is required to continue with the performance of the contract with all due diligence during the period the determination of the said dispute takes place. Thus, with the arising of a dispute between the Employer and the contractor, the contractual relationship does not come to an end.

The International Chamber of Commerce has founded an organization called the International Centre for Technical Expertise. The functions of the Centre include collaboration with similar international organizations or institutions and to identify and make available experts in various technical fields for the resolution of disputes between the parties.

The Federation Internationale des Ingenieurs-Conseils (FIDIC) has prepared “Conditions of Contract for Works of Civil Engineering Construction”. Condition 67.1 of the said Conditions contains an “Expert Assessment” clause. It provides for the resolution of dispute through an Expert Engineer. Those interested to have an “Expert Engineer Assessment” clause in the agreements for the resolution of their disputes can refer to it or adopt it.¹⁰⁰

2.3.7. Dispute review board

The settlement of disputes through Dispute Review Boards, also known as Dispute Resolution Boards, is another method of alternative dispute resolution system. It is common in long term contracts involving construction works and similar contracts.

Resolution of disputes through Dispute Review Board is fast, inexpensive and avoids disruption of the construction work. Dispute Review Board is generally set up or established immediately after the contract is made. It functions with relative informality.

¹⁰⁰ Dubai Municipality, CONDITIONS OF CONTRACT FOR WORKS OF CIVIL ENGINEERING CONSTRUCTION, PART I GENERAL CONDITIONS (GC) May 20, 1999, p. 146, online: <<https://www.dm.gov.ae/wps/wcm/connect/ae115571-0862-465b-a3d7-d97d5ca1399f/CONDITIONS+OF+CONTRACT+FOR+WORKS+OF+CIVIL+ENGINEERING+CONSTRUCTION.pdf?MOD=AJPERES>>, accessed on 2nd July, 2016.

It has many interesting features which are generally not found in other alternative dispute resolution methods. First, the Dispute Review Board generally consists of three members. There is no procedure of having a Dispute Review Board consisting of only one member like sole arbitrator.

Second, the Employer and the Contractor, both have a right to select one member each on the Dispute Review Board. The member of the Dispute Review Board selected by the Employer should be approved by the Contractor and the member selected by the Contractor should be approved by the Employer. Indirectly, it means that in fact the Board is constituted by both the parties to the agreement with their mutual consent. It eliminates any subsequent dispute or disagreement between the parties about the selection of members of the Board. The purpose and object of this approval is that the parties should have faith and confidence in the Dispute Review Board and its recommendations.

Third, the third member of the Dispute Review Board is selected by the two selected Members but he/she should be approved by the parties. Fourth, most of the actions like selection of a Member, appointment of a Member, etc., have to be taken within the prescribed time frame. If any party fails to take action within the prescribed time, it loses the right to select the Member and in his place, the Appointing Authority selects the Members. Fifth, the Members of the Dispute Review Board, before they can assume office, have to sign a Declaration of Acceptance. Once a Declaration of Acceptance is signed by a Member, he/she is presumed to be properly selected according to the procedure prescribed by this clause. Sixth, the Dispute Review Board has power only to make "Recommendations" to the parties. These recommendations do not have the binding force. The parties are at liberty to disagree with the recommendations of the Board. In such an event, the dissatisfied party can have recourse to arbitration.

Seventh, it is not bound by the rules of procedure or evidence. Eighth, if either party does not express its disagreement with the recommendations of the Board within 14 days of its receipt, the recommendations become final and binding on the parties to the agreement. Ninth, the recommendations of the Dispute Review Board are not considered secret or confidential. The clause specifically provides that the recommendations of the Board shall be admissible as

evidence in any subsequent legal or judicial proceedings between the parties like arbitration, litigation, etc. This is not the case with the findings of a conciliator. The conciliation proceedings are considered to be secret and confidential and cannot be disclosed in any legal or judicial proceedings between the parties. Tenth, it consists of members who are expected to be specialists or technically qualified in the construction projects. Last, if the parties so agree, a Dispute Review Board can also act as an arbitral tribunal.

There is no law, rules or regulations in any country about the constitution and working of the Dispute Review Boards. It is also not administered by any international or national institution engaged in providing arbitration facilities or other alternative dispute resolution methods. The Dispute Review Board is purely a contractual institution. Therefore, the clause providing for the Dispute Review Board in an agreement should cover all aspects of its constitution and it has to be comprehensive.

The best illustration of the clause regarding the Dispute Review Board can be found in the Standard Bidding Documents for Procurement of Works prepared and issued by the World Bank. Those who are interested in having Dispute Review Board as a method of dispute resolution in their agreement can adopt this clause with suitable or appropriate modifications. It is a self-contained clause in every respect.

2.3.8. Fast track arbitration

Fast track arbitration is nothing but a kind of arbitration. In fact, fast track arbitration is time bound arbitration. Fast track arbitration can be adopted for the resolution of international as well as national disputes. Many international and national institutions engaged in providing arbitration facilities have promulgated fast track arbitration rules. These rules provide, in detail, the fast track arbitration procedure. The parties can adopt the fast track arbitration rules of any international or national body or institution for the speedy and time bound resolution of their dispute. The agreement for the resolution of dispute through fast track arbitration is same as for the ordinary arbitration, except that, in addition to the provision for arbitration, it provides that the parties have agreed for fast track arbitration.

Generally, subject to the agreement between the parties, the fast track arbitral tribunal consists of sole arbitrator. However, there is no legal bar to the arbitral tribunal consisting of more than one arbitrator, that is, three arbitrators, if the parties so decide.

If the fast track arbitration is by three arbitrators, the third arbitrator is called the “Presiding arbitrator”. The procedure for the appointment and challenge of arbitrator(s) is the same as in the case of ordinary arbitration, except that all such actions must be taken within the prescribed time limit. Fast track arbitration commences when one party gives notice of its intention to commence fast track arbitration and the said notice is received by the other party. The claimant is required to submit his statement of claims within 15 days from the date of constitution of the arbitral tribunal. Similarly, the other party is required to submit its statement of defense, including counter claim, if any, within the next fifteen days. In another 15 days, the parties may submit their rejoinders. The arbitral tribunal decides about the time limit for hearings of the case. It is also expected to deliver its award not later than 15 days from the close of the arbitration proceedings. It should be a reasoned award, unless otherwise agreed by the parties.

The essence of the fast track arbitration is that the time limit is fixed for every action to be taken by the parties or the arbitrator(s). The parties are not permitted or allowed to seek extension of time or postponement of any matter by the arbitral tribunal. The parties are expected to adhere to these time limits. If the claimant fails to observe the time limits without convincing reason, the arbitral tribunal is competent to terminate the proceedings. If the respondent fails to observe the time limits without sufficient cause, the arbitral tribunal is competent to proceed ex parte in the absence of the defaulting party. Both the Rwandan law and Belgian law on arbitration stipulate for the parties to be informed of arbitration agreement by using electronic communication.¹⁰¹

¹⁰¹Belgian Law on arbitration, article 1678 paragraph 1 & 2 and article 9 paragraph 3 of LAC

Commercial courts activities in Rwanda.

(15 May 2008 - 31 May 2014)

	Pending cases 15-05-08	New Cases	Total filed in cases	Cases disposed off	Total pending cases 31/05/2014
CHC	551	4.108	4.659	4.547	112
CC MUSANZE	278	2.625	2.903	2.857	46
CC HUYE	469	2.229	2.768	2.723	45
CC N'YGE	2.041	6.023	8.064	7.858	206
TOTAL	3.339	15.055	18.394 (100%)	17.985 (97,8%)	409 (2,2%)

Actually, arbitral proceedings are held in private sessions which give arbitration matters to be confidential. For this reason, it is so scarcely to find such cases to be arbitrable in courts since that are tried in arbitral tribunal to keep their confidentiality. Amongst the numbers of cases held in the above mentioned table, there is only one case that was tried in arbitral tribunal and even

since the period one of the judges had been a judge; only one case was tried by him.¹⁰² In addition, there is no arbitral tribunal that hears cases of appeal rendered by arbitration tribunal. It is therefore the Commercial High Court that hears cases of appeal for the decisions that were rendered by arbitrators.¹⁰³ In this context, it is worthwhile to note that arbitration is one of alternative dispute resolution mechanisms and then it is understandable to have a small number of cases that are appealable in courts. Therefore, the purpose of ADR is achieved since courts are not overloaded and issues that are private are dealt confidentially.

¹⁰² E. KAMERE, The President of the Commercial High Court, interview of 5th May, 2016.

¹⁰³ Organic law n°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts, *O. G.*, n°45 of 05/11/2012, article 13 paragraph 2 (4^o)

CHAPTER THREE: RECOGNITION AND ENFORCEABILITY OF ARBITRAL AWARD

In fact, the legislator of the law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters (hereinafter referred to as LAC) has not defined the concept of the arbitral award. Neither had it been defined in the UNCITRAL Model Law on International Commercial Arbitration which is one of authorities with regard to international arbitration. However, this does not relieve one from defining this concept, but instead the resort has to be made to other authorities.

Under the Code of Civil Procedure of California, the arbitral award is defined as “...any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes an interim, interlocutory, or partial arbitral award.”¹⁰⁴

The concept of arbitral award has also been defined by Paris Arbitrage in its *Glossaire des termes de l'arbitrage*, where it is (in French words) put that an arbitral award is a «*Décision écrite du tribunal arbitral ou de l'arbitre unique qui tranche en dernière instance un litige, en tout ou partie, sur le fond, sur la compétence ou sur toute autre question de procédure pouvant aboutir à la fin de tout ou partie de la procédure.*»¹⁰⁵ This is literally translated as a written decision of an arbitral tribunal or single arbitrator that settles at the last resort the dispute in whole or in part, on the substance, the jurisdiction or any other procedure related question that may lead to an end of the whole or part of proceedings.

From this one may put that the definition of *Paris Arbitrage* is a bit different from the one under the Californian Code of Civil of Procedure, since it seems to exclude some decisions that may be taken by the arbitrators like interlocutory measures and this view is shared by Dr W.F.KEONG who asserted that the arbitral award does not include interlocutory orders.¹⁰⁶ In this regard one falls for the definition under Californian Code of Civil Procedure, since albeit interlocutory orders intervene in the middle of arbitration proceedings, they are subject to enforcement.

¹⁰⁴ Californian Code of Civil Procedure, Section 1297.321 a), online: <http://www.leginfo.ca.gov/html/cp_table_of_contents.html>, accessed on 16th May 2016

¹⁰⁵ S. Brudo, *Dictionnaire du Droit Privé*, S.V ‘sentence’, online: <<http://www.dictionnaire-juridique.com/definition/sentence-d-arbitrage.php>>, accessed on 16th May 2016.

¹⁰⁶ W.F. KEONG, *The arbitration award*, p.1. online:<<https://www.international-arbitration-attorney.com/wp-content/uploads/the-arbitration-awards-talk-for-iem-members-by-dr-wong-fook-keong-sc-civil-strathcl.pdf>>, accessed on 09th May 2016.

More importantly, the arbitral award is equivalent to the judgment in the court of law and it can be made for payment of a sum of money, declaration upon any matter to be determined in the arbitration proceedings, injunctive relief and specific performance of a contract and for rectification and setting aside or cancellation of a deed or other document.

3.1. REQUIREMENTS FOR AN AWARD TO BE RECOGNIZED AND ENFORCED

This part analyses the requirements of a valid award, then deals with the procedure for recognition and enforcement, the grounds for refusal of recognition and enforcement and finally, deals with the impact of the New York Convention on Recognition and enforcement of foreign arbitral award in Rwanda.

Recognition and enforcement are two different concepts¹⁰⁷. It is necessary to distinguish recognition from enforcement¹⁰⁸. Recognition indicates that the award is accepted by the courts of a country as having been validly made¹⁰⁹ whereas, enforcement is a positive action to recover or claim whatever the award has ordered¹¹⁰. This means that the award has to be valid for it to be recognized and enforced. An award is the decision of the arbitrator(s) based upon submission or submissions made to him/her/them in arbitration¹¹¹. To be enforceable an award must be valid and enforceable in nature.¹¹²

For an award to be valid, it must fulfill some requirements. They are categorized into formal requirements (sect.1) and substantive requirements (sect.2). The law to be applied for issues of recognition and enforcement of arbitral award'; shall be the law of the state where this recognition is sought. In a large number of states this will be governed by 1958 New York Convention which harmonizes the recognition and enforcement of foreign arbitral awards. Pursuant to the law applicable to recognition and enforcement of the foreign award under Rwandan law, Rwanda has yet ratified this convention and the convention has become part of

¹⁰⁷A. TWEEDDALE, and K. TWEEDDALE, *Arbitration of commercial disputes*, Oxford University Press, New York., 2005, p. 408.

¹⁰⁸A. REDFERN and M. HUNTER, *Law and practice of international commercial arbitration*, Sweet & Maxwell, London, 2003, p. 448

¹⁰⁹A. TWEEDDALE and K. TWEEDDALE, *Op. cit.* p. 408

¹¹⁰*Ibid*

¹¹¹R. TURNER, *Arbitration awards*, Blackwell publishing, Oxford, 2005, p. 8

¹¹²*Ibid*.

Rwandan law since its entry into force in January 19th, 2009. Rwanda has also established the law governing the arbitration issues which is the law n°005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters. Besides, Rwanda is a member of East African Community and has been established an arbitral court.¹¹³

3.1.1. Formal requirement

There are some formal requirements necessary for relying on an award or for its enforcement¹¹⁴

i. The award must be in writing and signed by arbitrators

The award will normally be in writing and signed by arbitrator(s).¹¹⁵ Having the arbitral tribunal decision in writing facilitates both the enforcement of the award and any challenge to it.

Article 43 of the law on arbitration in Rwanda states that the award should be in writing and signed. There are different approaches in laws and rules as to whether all arbitrators should sign the award but the majority of them stipulate that the award is signed by the presiding arbitrator.¹¹⁶

Some rules expect the majority of arbitrators to sign the award with reasons stated for non-signature, because if national laws or arbitration rules were to require that all arbitrators sign the award, this would enable a dissenting arbitrator to undermine the arbitration by refusing to sign the award¹¹⁷. This issue is addressed by Rwandan law on arbitration whereby the signatures of the majority of all members of the arbitral tribunal shall suffice and the reason for any omitted signature stated.¹¹⁸

¹¹³See arbitration rules of the east African court of justice at <http://www.eac.int>, available on May 27th 2015

¹¹⁴ BINDER, International arbitration and conciliation in UNCTRAL model law jurisdiction, 2ed Sweet&Maxwel, London. 2005, p. 284

¹¹⁵ F. KNOEPFLER and P.SCHWEIZER, Making of awards and termination of proceedings, in Essays on international commercial arbitration, edited by PETAR SARCEVIC, London, p.161

¹¹⁶ D. M. LEW, JULIAN et al. Comparative international commercial arbitration, Kluwer law international, The Hague, 2003, p.645

¹¹⁷ *Ibid.*

¹¹⁸ Law on arbitration and conciliation in commercial matters, article 43

ii. The parties

Parties should be properly named initially and not simply referred to by general terms such as “the owner”, “the tenant”, “and the supplier”, “the purchaser” and so on¹¹⁹. It is usual to name and identify the parties and their status (“claimant” and “respondent”)¹²⁰. However, there is no reason why one of those other terms such as the “tenant” could not thereafter be used once the party had been properly and such term defined (e.g. the claimant is Nadine Uwineza, the tenant of the premises in question (“the tenant”)) and that would in general circumstances only be done where such term helped in the understanding of the award¹²¹. Where the parties appear or have contracted through intermediaries, it is the parties themselves who should be named and not the intermediaries.¹²²

iii. Reasons for the award

The condition that arbitral awards state their reasons which is imposed by most developed arbitration statutes, has motivated more discussion than other formal requirements because this requirement typically involves questions more readily considered to be matters of substance, and not form. The obligation to provide reasons is an important aspect in the arbitration process, particularly where the law of the seat of the arbitration allows the parties to appeal on a point of law. A reasoned decision is also seen as fundamental in providing justice to the parties for two reasons. Firstly, when the parties arbitrate a dispute they are entitled to be told why they have won or lost. Secondly, the giving of a reasoned judgment is a safeguard against arbitrariness, private judgment or an irrational splitting of the difference between what one party claims and the other admits.¹²³

Article 43 paragraph 2 of Rwandan law on arbitration obliges the arbitrator(s) to state the reasons on which they based their decision, unless the parties agreed otherwise. It states, in its relevant part, “...The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 42”

¹¹⁹R. TURNER, *Op. Cit.* p.8

¹²⁰*Ibid.*

¹²¹*Ibid.*

¹²²MUSTILL, MICHAEL J and STEWARD C BOYD QC, *Commercial Arbitration*, 2ed, Butterwoths, London, 1989, p. 383.

¹²³GARY B BORN, *International commercial arbitration*, vol. 2, p. 2449.

iv. The award must state the date the place of arbitration

To reduce uncertainties, most arbitration legislations require arbitrators to confirm the place of arbitration by specifying it in the award. In Rwanda, articles 43 paragraph 3 of Rwandan law on arbitration sets out that rule and oblige arbitrators to specify the place of arbitration in the award. In addition to that, article 32 of Rwandan law on arbitration gives freedom to parties to choose the place of arbitration and also specifies the default provision. The place of signing the award has to be distinguished from the place where the award is made. The act of signing an award is an expression of agreement with its content and endorsement.¹²⁴

In case of international arbitration, may be domiciled in different places or countries and the award may be signed at their localities because the award does not normally need to be signed at the place of arbitration. The place of arbitration is important in the context of recognition and enforcement of any international award.

It also determines the grounds for challenges and refusal, and the seat or place of arbitration is specifically relevant to certain of those grounds concerning the date, the article 43 paragraph 3 of Rwandan law on arbitration obliges arbitrators to state the date of the award. Most arbitration legislation requires that awards be dated. The date of the award is important, inter alia, for the running of statutory time limits for the challenge of the award and for determining when the award gets res judicata effect. The date on which the award is made may have consequences for the commencement of the time period for seeking to annul (or stop) the award under applicable national law¹²⁵. The date also establishes the starting point where that particular award becomes final and binding, it fixes the date at which the 11 arbitrator(s) become(s) what is termed *funtus officio* meaning when the arbitrator(s) powers and functions ceased.

¹²⁴.LEW D M, Julian et al. Comparative international commercial arbitration, Kluwer law international, The Hague, 2003, p.646

¹²⁵BORN, *Op.cit.* p. 244.

v. Notification of the award

The parties to arbitration are free to agree on how the arbitral award should be notified to them. If there is no such agreement between the parties then the award must be notified to the parties by giving them copies of the award and this must be done without delay once the award is done. The award must be provided to the parties in some fashion, if this does not occur, it is impossible to see how the parties could be bound by or are able to challenge the award. In case of institutional arbitration, the award is generally notified by the institution itself, after the costs of the arbitration have been dealt with.

Article 43 para4 of law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters prescribes this requirement of notification or delivery of the award. It provides: "...After the award is made, a copy signed by the arbitrators in accordance with paragraph 1 of this article shall be delivered to each party"

3.1.2. Substantive requirements

The court will not enforce an award unless it is cogent, complete, certain, final, and enforceable.

a. Cogency

An award must be based upon, and show convincing, persuasive and consistent reasoning. Although it is not necessary for the arbitrator(s) to use technical language when drafting the award, it is essential that the document contains adjudication on the matter in dispute, and not merely an expression of expectation, hope or opinion. Thus, the award should contain this statement: "I award that the buyer is entitled to reject the goods note". "I consider that the seller ought to accept the return of the goods.

b. Completeness

A final award should contain adjudication on all the disputes submitted to the arbitration. An award which disposes of some of those disputes and leaves others of them undecided, or leaves it in doubt, cannot be maintained. In brief, the award deals with all matters with which it purports to deal with and no more than those.

c. Certainty

An arbitral award must be certain in the sense that the arbitral tribunal's decision on the matters dealt with must be clear, and also the nature and extent of the duties it imposes on the parties because if the effect of the award is uncertain or ambiguous, it will be susceptible to challenge. In other words, the certainty of the award means that it must show exactly what is required to be done and by whom.

d. Finality

An award must not leave an opportunity for reopening the issues resolved by that award. In *Charles M Willie and Co (Shipping) Ltd v Ocean Laser Shipping Ltd*, Justice Rix held that a final award is made when the arbitral tribunal makes a ruling that finally disposes of the claim and all the issues¹²⁶. The arbitrator(s) should dispose of all the issues and should not leave some of them to be decided by a third party.¹²⁷

In principle and according to the law N^o 005/2008 of 14/02/2008, an arbitral award is final and binding to the parties. According to Article 6 of the Law N^o 005/2008 of 14/02/2008 regarding the arbitral proceedings in the commercial matters says that a party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement that has not been complied with and yet proceeds with the arbitration without stating his objection to such a non-compliance without undue delay or, if a time-limit is provided therefore, within such a period of time, shall be considered to have waived his or her right to object.

According to the above provision of this law, it should be noted that HYDROBATEL Ltd by raising that the period given to the arbitrators to be given out the judgement was ended and yet proceeded without raising the objection while continue even attending and signing on all the execution this considered as rejected his or her right to the Arbitral proceedings.

By knowing all the requirements under the arbitration agreement on both sides as agreed on terms in case of disputes that may arise, they shall be resolved under the arbitration process as

¹²⁶See *Supra* note 97.

¹²⁷See *Supra* note 111.

mode of less cost, flexibility, impartiality, confidentiality and without undue delay as stated above.

Therefore, HYDROBATEL Ltd Vs Karekezi François Xavier by raising the objection of the jurisdiction Competence of the High Commercial Court as an appellate, in commercial organic law No. 06/2012 of the 14/09/2012 article 13 paragraph 4 states that the Commercial High Court shall have appellate jurisdiction in the cases heard in the first instance by Commercial Courts, and decisions rendered by arbitrators.

In the act of mission (*Acte de mission*), the arbitration law governing commercial matters cannot contradict with the constitution since the constitution states that a law cannot contradict another law that is higher in hierarchy.¹²⁸ Article 28 paragraph 7 of the Organic law N° 03/2012 of the 13/ 06/2012, determining the Organisation, functioning and jurisdiction of the Supreme Court, the Judge in respect of an award of at least fifty million Rwandan Francs (50,000,000 RWF) or when the value of the case, as determined by the judge in case of a dispute, is at least fifty million Rwandan Francs (50,000,000 RWF).

e. Enforceability

An award must be in a form that is capable of being enforced. For instance, if the tribunal makes a financial award, it must clearly state the exact amount awarded, to be paid by whom, when, and in what currency. If it orders performance of a contract, it must state precisely what is to be performed and the time period in which it is to be performed.

3.1.3. Interim measures

Not so very long ago, interim relief-that is relief granted before the final award, generally to ensure that once the award is rendered, relief would still be possible. Moreover in some jurisdictions, once a party sought such relief from the courts, particularly if the relief was sought in an arguable basis before the tribunal was constituted, the party would be held to have waived its

¹²⁸ The constitution of the Republic of Rwanda of 2003 revised in 2015, *O. G. n°* Special of 24/12/2015, article 95 paragraph 2.

right to arbitrate. In other jurisdictions, it was believed that once a party agreed to arbitrate, it had no right to seek court ordered provisional relief in support of arbitration.¹²⁹

✓ **Kinds of interim measures**

The kinds of interim measures that a party to an arbitration agreement generally would seek are measures that would prevent the other side, for example, from hiding or removing assets, from using licensed intellectual property in a way that would devalue the licensor's interest, or from dispersing or destroying evidence that the party needed to prove the case.

The term "interim measures" has traditionally been used without a very precise definition, but UNCITRAL has provided one in its amended Model Law on international commercial arbitration. The UNCITRAL definitions of interim measures are as follows:

An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at anytime prior to the issuance of the award by which the dispute is finally decided the arbitral tribunal orders a party to:

- a) Maintain or restore the status quo pending determination of the dispute,
- b) Take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself,
- c) Provide a means of preserving assets out of which a subsequent award may be satisfied, or
- d) Preserve evidence that may be relevant and material to the resolution of the dispute¹³⁰.

By this definition, interim measures, also sometimes referred to as conservatory measures, are basically those measures intended to protect the ability of a party to obtain a final award.

¹²⁹ MC Creary Tire and Rubber Co.V. CEAT, SPA, 501F.2nd.1032(3rd Cir.1974)

¹³⁰ UNCITRAL Model Law, art. 17(2) (2006), online: <
http://www.uio.no/studier/emner/jus/jus/JUS5852/h13/undervisningsmateriale/4_the-procedure_111022-1.pdf>,
accessed on 4th July, 2016.

3.2. PROCEDURE FOR RECOGNITION AND ENFORCEMENT

Article 50 paragraph 2 of Rwandan law on arbitration deals with the procedure for recognition and enforcement of an arbitral award. It provides:“...The party relying on an award taken or applying for its enforcement shall supply the duly authenticated original award or its duly certified copy, a copy original arbitration agreement referred to in article 9 of this law or its duly certified copy. If the award or agreement is not made in an official language of the Republic of Rwanda, the party shall supply a translated copy in one of the recognized languages in Rwanda”. It is worth noting that there is an error in this paragraph of English version. This paragraph corresponds with article 35 (2) of the UNCTRAL Model law on international commercial law adopted by Rwanda. The mistake is where the paragraph says “...a copy original arbitration agreement...” in corresponding paragraph it is stated “... and the original arbitration agreement...”

As far as official languages are concerned, in Rwanda, there are three official languages: Kinyarwanda, French and English. The procedure to be followed when seeking recognition and enforcement of award is also regulated by article IV of the New York Convention on recognition and enforcement of foreign arbitral awards ratified by Rwanda in 2008.

It was mentioned above that the party seeking for recognition and enforcement is merely required to produce to the relevant court the duly authenticated original award or duly certified copy thereof; and the original agreement or duly certified copy thereof , The logical questions that arise are: who can recognize and enforce an award (domestic or international) in Rwanda? Who executes arbitral awards in Rwanda?

Procedures of requesting enforcement formula seal of an arbitral award made in Rwanda

Normally, the arbitration tribunals are not under the judicial order but decisions rendered by them are binding. In this context, decisions that were rendered by the arbitration tribunal have the binding power as the courts’. Decisions that were rendered by arbitrators are not appealable.¹³¹ It should be noted that when one of the parties to arbitration is not contended with

¹³¹ M.L.MOSES, *The principles and practice of International Commercial arbitration*, Cambridge, University Press, New York, USA 2008, p. 2. Cited in the case law rendered by the Supreme Court, Kigali, 20/06/2012, RUKERIBAYE Raphael Vs Golf Course Estate, RCOMA0041/11/CS, paragraph 15, online: < www.judiciary.gov.rw/fileadmin/Publications/Case_Law.../Icyegeranyo_n_15.pdf>, accessed on 5th July 2016.

the decision rendered by arbitration tribunal, he/she may seize the competent court that had to deal with the matter if they had not chosen arbitration as a mechanism of dispute resolution.

As far as enforcement is concerned, *the execution of judgments and acts are intended to provide their beneficiary with the privileges of his/ her right, either in kind or the equivalent.*¹³² In this context, the winning party is subjected to request for enforcement with a view to gaining his/her rights. In addition to this, there should not be an enforcement order that may be an arbitral award¹³³ so as to get an enforcement formula¹³⁴ since there is no enforcement formula seal. For this reason, the competent court shall be the court that should have dealt with the case if the parties had not chosen arbitration. Therefore, administrative authorities and security forces, legally requested to enforce the judgment shall assist court bailiffs who is vested with the power to execute judicial decisions and other legal instruments bearing the enforcement formula seal.¹³⁵ It is commonplace that the enforcement formula shall be affixed to copies of judicial decisions and acts to be executed without judgment unnecessary mentions shall be deleted where applicable.¹³⁶ This shall be done in a period not exceeding three (3) months of the date the winning party or one with the court's order so requests or from the date the act affixed with enforcement formula is received.¹³⁷ Therefore, the arbitration tribunal, be it *ad hoc* or institutional, after having settled the concerned commercial dispute; the winning party shall seize the competent court above mentioned and request the enforcement formula seal. This can be challenged by the losing party or any other interested party upon the notification to the other party.¹³⁸

¹³² Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labor and administrative procedure, *O. G.* n° 29 of 16/07/2012, article 195 (hereinafter referred as CCLAP).

¹³³ CCLAP, article 198 paragraph 1.

¹³⁴ CCLAP, article 197.

¹³⁵ CCLAP, article 200.

¹³⁶ CCLAP, article 199 paragraph 1 and 2 *in fine*.

¹³⁷ CCLAP, article 201 paragraph 1.

¹³⁸ The practice directions n° 002/2015 of 18/05/2015 by the chief justice governing civil, commercial, labor and administrative procedure, *O. G.* n° Special of 27/05/2015, article 49 paragraph 1.

Recognition and enforcement of arbitral awards in Rwanda

The fact that an arbitral award binds the parties as a state court rendered judgment does is subjected to fewer disputes, if at all. To this end, an award that has been correctly rendered in the claimant's favour by an international arbitral tribunal does not require enforcement by a national court if it is carried out by the respondent. However, the reality is that often the respondent will evade carrying out the terms of the award.¹³⁹ Thus, the winning party may seek the enforcement of the award before state court which will need to first recognize the award before it be enforced, and in this respect, it would be pointless if the winning party has no possibility to enforce the arbitral award in its desired country.¹⁴⁰

The recognition and enforcement of awards calls for a thorough consideration and thus under this party, the rule as to the recognition and enforcement of an arbitral award will be discussed and the exceptions as per Rwandan law and Convention on Recognition and Enforcement of Foreign Awards, New York, 1958 (Hereinafter referred to as 1958 New York Convention) will be perused, though much emphasis will be put on the exception of public policy, since other exceptions seem to be subjected to less academic and judicial controversies.

Prior to embarking on the rule of recognition and enforcement of arbitral award, one finds it important to distinguish recognition from enforcement, albeit these goes hand in hand, since for an award to be enforced it has to be first recognized by the state court as long as the losing party cannot execute it voluntarily. The distinction between these two concepts seems not to be a rocket science as the recognition is a negative action whereas the enforcement is positive action. In this regard, it is argued that the recognition indicates that the award is accepted by the courts of a country as having been validly made. Whereas, enforcement goes with taking steps to recover whatever the award has ordered.¹⁴¹

¹³⁹ O.OZUMBA, "Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?", University of Dundee, p. 4, online: <<http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf>>, accessed on 4th July, 2016

¹⁴⁰ P.NACIMIENTO and A.BERNASHOV, "Recognition and Enforcement of Arbitral Awards in Russia", Moscow, White and Case, September 2010, p. 1.

¹⁴¹ A.TWEEDDALE and K. TWEEDDALE, *Arbitration of commercial disputes*, New York, Oxford University Press, 2005, p. 408.

Both under the 1958 New York Convention, the Law on Arbitration in Commercial Matters and the UNCITRAL Model Law, the recognition and enforcement of awards is a rule, though a number exceptions exist as will be discussed later. For instance the LAC provides for that an arbitral award irrespective of the country in which it was made shall be recognized as binding, but subject to reciprocity¹⁴² i.e. the country in which the award was rendered must be enforcing awards rendered in Rwanda. The similar provision can be found under the 1958 New York Convention which provides for that “each contracting State shall recognize arbitral awards as binding and enforce them...”¹⁴³.

Under Rwandan law, the party seeking the enforcement of the award rendered by an arbitral tribunal shall supply the duly authenticated original award or its duly certified copy and a copy of original arbitration agreement (translated if they are not in one of official languages used in Rwanda).¹⁴⁴ Although, the law does not provide for to which organ these document are to be submitted, one puts that the recognition of arbitral awards is in the jurisdiction of the High Court or Commercial High Court if the award was rendered in commercial disputes. However, these jurisdictions *ratione materiae* of both the High Court and Commercial High Court are not explicit, but instead they are result of extrapolation made from article 91 of OFCJ and article 13 OFCJ Commercial Courts since as per these articles, these are the courts that have been mandated to hear disputes relating to *exequatur* of judgments rendered by foreign courts and authentic deeds that are to be enforced in Rwanda as well.

After an arbitral award has been duly recognized by the competent court through *exequatur*, the party seeking execution of the arbitral award (domestic or international) can choose between professional bailiffs and non-professional bailiffs, whom he/she wants to execute his/her award that has been recognized by the court¹⁴⁵, since much like state court judgments, once the an award has been recognized can be enforced by court bailiffs

It should however be noted that the rule that arbitral awards are binding and enforceable irrespective of the country in which they were rendered is not absolute, but both the LAC and the

¹⁴² The law on arbitration and conciliation in commercial matters, article 50.

¹⁴³ New York Convention of 1958, article 3.

¹⁴⁴ See *Supra* note 125.

¹⁴⁵ D. KOMEZUSENGE, *Recognition and enforcement of foreign arbitral award under Rwandan law*, National University of Rwanda, Faculty of Law, LLM, Kigali, 2011, p. 16 (Unpublished).

1958 New Convention have provided a number of grounds on which the recognition and enforcement of an award may be refused. For instance, it provided for that an award may not be recognized and enforced in Rwanda when the arbitration agreement is not valid under the laws to which parties subjected it to, the claiming party was not notified of arbitral proceedings i.e. was denied of his/her right to argue their case, the arbitrator has ruled beyond what is conferred to them as per arbitration agreement, the award has not yet become binding or has been set aside, the arbitral tribunal has not been duly constituted, the object matter of an award is not arbitrable and when the enforcement of the award is contrary to public policy.¹⁴⁶

Basically, there are 5 grounds are related to fundamental contractual and due process principle and can only be based in refusing the recognition and enforcement of an award upon the quest of the party against whom the enforcement of an award is invoked, whereas the last 2 can be raised by the competent authority *sua sponte*.¹⁴⁷ In this regard, one puts that the first five grounds and the ground of non-arbitrability of the object matter of the award as provided under the 1958 New York Convention and the law on arbitration in commercial matters are not difficult to ascertain as the ground of contrariety to public policy and it is asserted that of the seven grounds listed under article 5 the claim that an award violates the public policy of the State where enforcement is sought has evoked the most discussion.¹⁴⁸

3.3. THE NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD VIS-A-VIS RWANDAN LAW ON ARBITRATION

This section discusses firstly the grounds for refusal of recognition or enforcement and secondly, the impact of the New York convention on recognition and enforcement of foreign arbitration award are examined.

¹⁴⁶ The 1958 New York Convention respectively and the LAC article 5 and 51.

¹⁴⁷ S.PERLOFF, "The ties that bind: The limits of autonomy and uniformity in international commercial arbitration", *University of Pennsylvania Journal of International Business Law*, Vol. 13, 1992, p.326.

¹⁴⁸ J. T. Mc LAUGHLIN and L. GENEVRO, "Enforcement of Arbitral Awards under the New York Convention – Practice in U.S. Courts", *Berkeley Journal of International Law*, Vol. 3, 1986, pp. 249-272, p. 258.

3.3. 1. Grounds for the refusal of recognition or enforcement

The New York Convention as well as Rwandan law on arbitration sets out some grounds for refusal of recognition or enforcement, these grounds are discussed below.

a) Incapacity, invalid arbitration agreement

Incapacity and invalidity of the arbitration agreement is the first ground for refusal of recognition or enforcement set out by article 51 a) of Rwandan law on arbitration which states: Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: "... a party to the arbitration agreement... was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected to it..." Capacity may relate to the mental or physical capacity of a party to enter into a contract. This provision (article 51) corresponds with article V a) of the New York convention.

3.3.2. No proper notice of the appointment of an arbitrator and lack of due process

This second ground for refusal of recognition and enforcement is under the New York convention in article V (1) b) and under Rwandan law on arbitration under article b). They both state: Recognition and enforcement of the arbitral award may be refused... only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that: ... the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case. This ground concerns the fundamental principle of procedure, that of fair hearing and adversary proceedings, the audi alteram partem rule.

This provision aims to ensure that the parties to arbitration are given a minimum standard of fairness during the arbitral proceedings¹⁴⁹.

The notice of arbitration proceedings is also important because it gives the parties the chance to participate in the process of appointment of arbitrators.

The question that can arise is under which law the standards of due process are to be judged.

¹⁴⁹DI PIETRO DOMENICO and P. MARTIN, *Enforcement of international arbitration awards*, Cameron May, London, 2001, p.144.

Even though it has been argued that article V (1) b) constitutes an international rule, not linked to any national law, many authors are convinced that the judge before whom the enforcement of the award is sought will find his inspiration in the notions of due process under his/her own law.

The defendant in the LKT case also invoked Article V(1)(b) of the Convention which provides a defense to enforcement where “a party was not given proper notice of ... the arbitration proceedings.” In that case, the court found that even though the defendant was misnamed in the letter sent to him from the ICC giving notice of the request for arbitration, on balance the defendant would have understood that the documents that he received related to him and identified him as a party to the arbitration proceedings¹⁵⁰.

The court was no doubt influenced in this view by the fact that the misnomer was very minor: “Albert Chun Ying Llo” instead of the correct “Albert Chun Ying Ho.” A more interesting question would have possibly arisen if the naming error had been more significant such that a reasonable person may not have considered that the correspondence was addressed to him or her¹⁵¹.

3.3.3. Excess of jurisdiction

The jurisdictional issues have to be raised as the first line of defense in a reference to arbitration matters¹⁵²

This rule is confirmed under article 18 paragraph 3 of Rwandan law on commercial arbitration. It provides in its relevant part, “... An objection that the arbitral tribunal does not have jurisdiction shall be raised before the submission of the statement of defense...”

Jurisdiction as a ground for refusal of recognition and enforcement is stated under article 51 c) which corresponds to article V (1) (c) New York convention and state: Recognition and enforcement of the arbitral award may be refused... only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that : the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted,

¹⁵⁰R. GARNETT and M. PRYLES, Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand, in *Journal of International Arbitration*, Volume 25, Issue 6, 2008 <<http://ssrn.com/abstract=1030403>>, accessed on 7th May, 2015

¹⁵¹*Ibid.*

¹⁵²A. REDFERN and M. HUNTER, *Op. Cit.* p. 464

that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

This third ground can be divided into two parts:

The first part is concerned with the award which contains decisions in excess of the arbitrator's authority. The second part is concerned with the situation where it is alleged that the tribunal exceeded its jurisdiction in some respects, but not in others.

3.3.4. Improper arbitral composition or procedure

The composition of a tribunal or procedure in breach of an arbitration agreement or the relevant law is the fourth ground under the New York convention and under Rwandan law on commercial arbitration, under article V (1) (d) and 51 d) respectively and are as follow: "...The composition of the arbitral tribunal (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.

Two different points are being made here:

Firstly, the arbitration must be in accordance with what has been agreed to between the parties, secondly, if there is no agreement between parties the arbitration must be in accordance with the law of the place in which the arbitration was held.

3.3.5. Awards not binding, suspended or set aside

The fifth ground for refusal of recognition and enforcement is when the award is not binding, when it is suspended or set aside. This ground is set out in article 51 e) of the Rwandan law on commercial arbitration and in article V (1) (e) of the New York convention. It states in the relevant part, "...The award has not yet become binding on the parties or has been set aside or suspended by a court in which, or under law of which that award was made. Similarly, article 396 of law n° 18/2004 of 20/6/2004 relating to civil, commercial, labour and administrative procedure, provides that the president of higher court may mark the arbitral award with executory title or stamp only when it is no longer appealable or when the arbitral award has ordered provisional execution notwithstanding appeal.

3.4. ARBITRABILITY

The law ° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters as well as the New York convention make arbitrability one of the grounds for refusal of recognition and enforcement of an arbitral award. This is stated in article 51 (2) (a) of the Rwandan law and under article V (2) (a), the provision states: “The subject-matter of the dispute is not capable of settlement by arbitration under its law (Rwandan law)”. Regarding the question of which law, the arbitrability of the subject matter is to be determined under New York convention, the law of the country where enforcement is sought will be applied.

Arbitrability plays a role when the arbitration agreement is to be enforced because a court will not let an arbitration go ahead on its territory if, according to its laws, the subject matter is not one that can be settled by arbitration. Furthermore, arbitrability comes into play in the enforcement stage, and courts can rely on non-arbitrability of the subject matter to refuse recognition and enforcement of awards.

a. Public Policy

Public policy as a ground for refusal to recognize and enforce an arbitral award is very complex in the sense that it is incapable of being precisely determined and varies from one state to another. This may lead to the fact that the enforcement of an award can be contrary to public order in the country where it is sought to be enforced yet it would have not been the case in the country where it was rendered.¹⁵³

In spite of the fact that the determination of what is meant by public policy seems to be complex, it cannot be easy to discuss this as ground for non-recognition and enforcement of an award without having it defined. In this regard, where attempt has been made the concept of public policy has been defined as it consists of fundamental principles and regulations that pertain to justice or morality or serves the fundamental socio-political and economic interests of a state.¹⁵⁴ However, this definition is not comprehensive and does not remove the difficulties posed by the ground of public policy in recognition and enforcement of arbitral awards, since it does not give a kind of standard according to which the justice, morality and fundamental interests of a state is

¹⁵³ O. OZUMBI, *Op. cit.*, p. 4.

¹⁵⁴ A. RYABININ, *Procedural Public Policy in Regard to the Enforcement and Recognition of Foreign Arbitral Award*, Central European University, 2009, p.5.

assessed and more importantly, it is quite understandable that such justice and morality are relative to each State.

In any case, the ground of public policy is assessed by the court or any competent authority as far as the recognition and enforcement of award are concerned depending on the facts of each case and courts before which recognition and enforcement are sought adopt a kind of “a pro-enforcement bias”¹⁵⁵ and therefore interpret this restrictively. In this respect, a good number of case laws exist and courts have repeatedly interpreted it restrictively and shown a pro-enforcement bias.

For instance the *Cour de Cassation Française* has recently held that what the court has to find whether it is contrary to public order or not, is the recognition and enforcement of award not an award itself.¹⁵⁶ This pace taken by the French court has a significant legal implication, since it would allow an enforcement of an award even if its substance may be contrary to public order as long as the recognition and enforcement is not contrary to public order.

Likewise, the US Court of Appeal in *Parsons v Whittemore* has taken a restrictive interpretation of public policy where it recognized and enforced an award rendered in Egypt irrespective of strained relationship between USA and Egypt due to 1967 Arab-Israel war and put forward that national interests in the form of economic sanctions or diplomatic policies are not included in the public policy exception.¹⁵⁷

However, in some jurisdictions like Russia, the enforcement of international arbitral award is strongly hampered by the exception of public policy and Russian courts have been reluctant to adopt a pro-enforcement bias. For instance in *United World v. Krasny Yakor*, the Russian *Cour de Cassation* held that enforcement of the arbitral award against Krasny Yakor (a state-owned company) would lead to its bankruptcy, which would consequently have a negative influence on the social and economic stability of the city of Nizhi Novgorod, and consequently on the Russian Federation as a whole, as Krasny Yakor manufactured products of strategic value for the security

¹⁵⁵ The pro-enforcement bias goes with the application of the public policy exception in most jurisdictions is usually on the side of enforcement. See O.OZOMBI, *Op. cit.*, p. 9.

¹⁵⁶ *Cass. 1^{re} civ.*, 12 févr. 2014.

¹⁵⁷ *Parsons v Whittemore* (1974) 508 F.2D 2nd Cir 969.

and national safety of the state.¹⁵⁸ This case clearly indicates how Russian Courts are reluctant to “pro-enforcement bias” doctrine and one puts that such an interpretation of public policy exception can defeat the purpose of international arbitration itself.

3.4. IMPACT OF THE NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD IN RWANDA

As mentioned above, Rwanda ratified the New York convention on Recognition and enforcement of foreign arbitral award in 2008 and became the 143rd State party to the convention. The New York convention provides for a simpler and effective method of enforcement of obtaining recognition and enforcement of foreign award.

It is mainly due to the provisions of the New York convention that arbitration has become a very attractive alternative to traditional litigation. It is one of the widest accepted international conventions. It has significantly simplified the enforcement of foreign awards and harmonized the national rules for the enforcement of foreign awards.

The New York convention has had a positive impact on recognition and enforcement of foreign arbitral awards in Rwanda. For instance, the mandatory obligation stated in its article III, which is the obligation to recognize and enforce foreign awards, even though article V lists some exceptions known as grounds for refusal of recognition and enforcement .

The second positive impact of the New York convention is that it clearly allocates the burden of overcoming the presumptive enforceability of an award to the party resisting recognition and enforcement. The third positive impact of the convention is that the exceptions enumerated in article V of the New York convention are the exclusive grounds for denying recognition of a foreign award under the convention.

Fourthly, there is no double exequatur requirement under the New York Convention. This is one of the central objectives of the Convention because double exequatur required confirmation of an

¹⁵⁸ United World v. Krasny Yakor, cited by Elliot Glusker, ‘Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications’ [2010], Vol. 10, *PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL*, p. 13, online: < <http://law.pepperdine.edu/dispute-resolution-law-journal/issues/volume-ten/glusker-article.pdf>>, accessed on 4th July, 2016.

award in the arbitral seat before it could be recognized abroad, and this process made the recognition and enforcement of international arbitral awards difficult, uncertain and slow. As far as Rwanda is concerned, foreign awards had to go through the double exequatur process in order to be executed.

Happily, with the ratification of the New York Convention, the double exequatur process is no longer required and both the State and the Rwandan users of arbitration benefit from the ratification.

A part from the positive impact of the New York Convention, it also provides for reservations in article I (3), which can narrow the scope of application of the convention.

Those reservations are known as the commercial reservation and the reciprocity reservation. According to article I (3) of the convention, the State party may only recognize and enforce awards which are made in the territory of another contracting State. This reservation could have negative consequences, but due to the growing number of signatories (143 States parties); it will probably become insignificant in the near future. Rwanda did not make the reciprocity reservation. Concerning the Commercial reservation, it is also provided for in article I (3) which means that the State party may declare that it will only apply the convention to differences arising out of a legal relationship, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

This reservation was adopted in order to facilitate the signing of the convention by some countries whose national legal systems only allowed referral to arbitration commercial disputes. Rwanda did not make the commercial reservation.

In brief, Rwanda has simplified the procedure of recognition and enforcement of arbitral awards by adopting the New York Convention, and by not making the commercial and reciprocity reservations. Furthermore, the implementation or execution of arbitral awards is also simple due to the multiplicity of authorities who are entitled to implement or execute judgments, judicial orders and writs with executor stamp parties can choose from.

GENERAL CONCLUSION

Thus although court assistance to arbitral tribunals in taking evidence is possible today in many jurisdictions, courts tend to have a great deal of discretion, which contributes to a lack of clarity with respect to how much help a court will actually provide. There is clearly resistance on the part of some courts to providing the same level of assistance in arbitration as they provide in litigation. No doubt this resistance stems in part from a sense that one advantage of arbitration is that the disclosure obligations are not as arduous as in litigation.

Nonetheless, as arbitration proceedings have expanded to cover mere complex issues, including, for example, statutory rights in areas such as antitrust and employment contracts, there may be a justifiable need for more extensive discovery. When a tribunal has determined that certain disclosure is needed, court assistance in obtaining it becomes increasingly important to a fair process and reasonable result.

Besides, provisions relating to enforceability of international commercial arbitral award in Rwandan are briefly discussed, by going through the procedure of recognition and enforcement under Rwandan legal framework. It is known that a foreign arbitral award to be enforced in any other country and in Rwanda in particular; it must be recognized and enforced by an authorized judicial body of the country in which the enforcement is sought. This is done in accordance with certain formalities and legal provisions of that particular country. This is a matter of principle representing sovereignty¹⁵⁹. Accordingly, the recognition and enforcement of foreign arbitral awards in Rwanda must be in accordance with the principle.

Additionally, the dissertation dealt in detail with discuss about the grounds for refusal of recognition or enforcement. Lastly, the impact of the New York Convention on recognition and enforcement of foreign arbitration award were examined. There can be no doubt that the Convention has been, and still is, a great success. By and large the enforcement of awards is considerably easier than the enforcement of judgments rendered by national courts¹⁶⁰.

¹⁵⁹TRAN THI HUYEN NGA, *The Issue Of Recognition And Enforcement Of Foreign Arbitral Awards In Vietnam*, 10-01-2007, online: < www.kslaw.com/library/pdf/00000621.pdf >, accessed on 4th July 2016.

¹⁶⁰ R. BRINER, 'Philosophy and objectives of the Convention', online: < www.newyorkconvention.org/publications/bibliography >, accessed on May 7th May, 2015.

Generally, this paper has concentrated primarily on the enforcement of foreign arbitral awards under Rwandan law. Some reference has been made

As noted at the outset, however, successful claimants must be certain that an award can be adequately enforced. The clear pro-enforcement policy underlying the New York convention and Rwandan law on conciliation and arbitration in commercial matters referred to in this paper should provide comfort to commercial contracting parties and ensure that arbitration continues to gain in popularity as a method of dispute resolution.

In a nutshell therefore, the Rwandan law on arbitration and the New York Convention on recognition and enforcement of foreign arbitral awards make Rwanda a well-equipped country, as far as commercial arbitration is concerned. Thus it is the foreign and national investors favored way of resolving commercial disputes, and increase the chances of seeing Rwanda becoming a suitable host venue for both domestic and international arbitration.

BIBLIOGRAPHY

Legislations

1. The constitution of the Republic of Rwanda of 2003 revised in 2015, *O. G. n° Special of 24/12/2015*.
2. Organic law N° 03/2012 of the 13/ 06/2012, determining the Organisation, functioning and jurisdiction of the Supreme Court, *O. G. n° 28 of 09 July 2012*.
3. Organic law N° 06/2012 of 14/09/2012 determining the organisation, functioning and jurisdiction of commercial courts, *O. G. n°45 of 05/11/2012*.
4. Organic law n°06/2012/OL of 14/09/2012 determining the organization, functioning and jurisdiction of commercial courts, *O. G. n°45 of 05/11/2012*.
5. The law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, *O. G. special n° of 06. 03. 2008*.
6. Law n°45/2011 of 25/11/2011 governing contracts, *O.G. n° 04 bis of 23/01/2012*.
7. Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, *O. G. n° 29 of 16/07/2012*.
8. Modified and completed by law n° 09/2006 of 02/03/2006, in *O. G. n° of 5 April 2006* and the law n° 45/2007 of 11/09/2007 in *O. G. n° 5 of 1st March 2008. 82*.
9. Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, *O.G special n° of 06. 03. 2008*.
10. The law n° 45/2011 of 25/11/2011 governing contracts, *O. G. n° 04bis of 23/01/2012*.
11. The practice directions n° 002/2015 of 18/05/2015 by the chief justice governing civil, commercial, labor and administrative procedure, *O. G. n° Special of 27/05/2015*.
12. Presidential order n° 60/01 of 31/12/2007 on the ratification of the United Nations Convention on recognition and enforcement of foreign arbitral awards adopted in New York on June 10th, 1958, *Official Gazette n° 08 of 15 April 2008*.
13. Ministerial Order N°479/08.11 of 19/03/2015 appointing Professional Court Bailiffs, *O. G. n° 14 of 06/04/2015*.

Jurisprudence

- ❖ Supreme Court, Kigali, 06/02/2015, HYDROBATEL Ltd Vs Karekezi François Xavier, RCOMA 0007/13/CS (unpublished).
- ❖ Supreme Court, Kigali, 20/06/2012, RUKERIBAYE Raphael Vs Golf Course Estate, RCOMA0041/11/CS, online: <
www.judiciary.gov.rw/fileadmin/Publications/Case_Law.../Icyegeranyo_n_15.pdf>, accessed on 5th July 2016.
- ❖ Commercial tribunal, Kigali, 10/07/2012, BEN BENZINGE Vs NATURAL RESOURCES DEVELOPMENT RWANDA (NRD), R.COM 0349/12/TC/Nyge, unpublished.
- ❖ The commercial tribunal, 12/10/2012, Victor HASSON and Judith HASSON Vs KONSTANTINOS FRAGAKIS and BENALCO Ltd, R.COM 0332/12/TC/Nyge, unpublished.

Books

1. REDFERN A. and HUNTER M., *Law and practice of international commercial arbitration*, Sweet & Maxwell, London, 2003.
2. MOSES M.L., *The principles and practice of International Commercial arbitration*, Cambridge, University Press, New York, USA 2008.
3. TWEEDDALE A., and TWEEDDALE K., *Arbitration of commercial disputes*, Oxford University Press, New York., 2005.
4. BINDER P., *International arbitration and conciliation in UNCTRAL model law jurisdiction*, 2nd ed., Sweet&Maxwel, London. 2005.
5. VAN DER BERG A. J., *The New York convention of 1958*, Kluwer law international, The Hague, 1981.
6. Butler, David and Finsen Eyvind, *Arbitration in South Africa*, 1993.
7. Charles N. Brower and Abby Cohen Smutny, *Arbitration Agreements versus Forum Selection clauses: Legal and Practical Considerations*, in Jack L. Goldsmith (ed., 1997) *International Dispute Resolution: The Regulation of forum Selection*.
8. LEW D.M., JULIAN et al. *Comparative international commercial arbitration*, Kluwer Law international, The Hague, 2003.
9. DAVID ST JOHN SUTTON et al, *Russel on Arbitration*, 23rd ed., 2007. .
10. David W. Plant, 'ADR and Arbitration' in Lawrence W. Newman, Richard D. Hill (eds) 'The Leading Arbitrators' Guide to international Arbitration'.
11. PIETRO DOMENICO D. and MARTIN P., *Enforcement of international arbitration awards*, Cameron May, London, 2001.
12. KNOEPFLER F. and SCHWEIZER P., *Making of awards and termination of proceedings*, in *Essays on international commercial arbitration*, edited by PETAR SARCEVIC, London, 1989.
13. FRIEDLAND P. D., *Arbitration clauses for international contracts*, 2nd ed., Juris publication, New York, 2007.
14. GARY B BORN, 'International commercial arbitration' [2007], vol. 2, 2nded Jean François Poudret and Sebastian Besson, *Comparative law of international arbitration*.
15. Lynch K., *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*.

16. Kizito S., *The Law of arbitration in Rwanda: institutionalization and efficiency*, University of Cup Town, School for advanced legal studies, Thesis, 2010, unpublished.
17. MERKIN R., *Arbitration law*, Informal Professional, London, 2004.
18. MUSTILL, MICHAEL J and STEWARD C BOYD QC, *Commercial Arbitration*, 2nd ed., Butterwoths, London, 1989.
19. MWINE G.B., *Commercial alternative dispute resolutions (ADR): The Rwandan perspective*, Thesis, NUR, LLM Program in Business Law, 2009, unpublished.
20. GARNETT R. and PRYLES M., ‘Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand’ [2008], Volume 25, Issue 6, *Journal of International Arbitration*.
21. SARCEVIC P., *Essays on international commercial arbitration*, Kluwer Academic Publishers Group, London, 1989.
22. TURNER R., *Arbitration awards*, Blackwell publishing, Oxford, 2005.
23. TWEEDDALE A., and TWEEDDALE K., *Arbitration of commercial disputes*, Oxford University Press, New York., 2005.
24. VAN DER BERG A. J., ‘The New York convention of 1958’ [1981], *Kluwer law international*, The Hague, 1981.
25. Samantha L. and Rupert B. ‘A Comparison of the UNCITRAL Model Law and the Arbitration Rules of the Stockholm Chamber of Commerce’ [2008], *Vindobona Journal of International Commercial Law & Arbitration*.
26. TWEEDDALE A. and TWEEDDALE K., *Arbitration of commercial disputes*, New York, Oxford University Press, 2005.
27. KOMEZUSENGE D., *Recognition and enforcement of foreign arbitral award under Rwandan law*, National University of Rwanda, Faculty of Law, LLM, Kigali, 2011 (Unpublished).

Journal articles and electronic sources

1. Quang Chuc Tran, 'Recognition and Enforcement of Foreign Arbitral Awards in Vietnam' [2005] *Journal of International Arbitration*, Issue 6, online: < <http://www.kluwerlawonline.com/abstract.php?id=JOIA2005032>>, accessed on 2nd July 2016.
2. PERLOFF S., "The ties that bind: The limits of autonomy and uniformity in international commercial arbitration", *University of Pennsylvania Journal of International Business Law*, Vol. 13, 1992.
3. NACIMIENTO P. and BERNASHOV A., *Recognition and Enforcement of Arbitral Awards in Russia*, Moscow, White and Case, September 2010.
4. OZUMBA O., "Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?", University of Dundee, online: < <http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf>>, accessed on 4th July, 2016
5. Mc LAUGHLIN J. T. and GENEVRO L., "Enforcement of Arbitral Awards under the New York Convention – Practice in U.S. Courts", *Berkeley Journal of International Law*, Vol. 3, 1986.
6. L. Sebucensha, 'National and International Arbitration', Vol. 18, *Africa Law Study Library*, p. 20, online: <www.kas.de/wf/doc/kas_37293-1522-2-30.pdf?140401110439>, accessed on 5th July, 2016.
7. BRINER R., Philosophy and objectives of the Convention, online: < <http://ssrn.com/abstract=1030403>>, accessed on May 7th, 2015.
8. American Bar Association Center for Continuing Legal Education, Enforcement of Arbitration Awards in Russia and Ukraine: Dream or Reality?, online: <<http://meetings.abanet.org/webupload/commupload/IC855000/relatedresources/EnforcingArbitrationAwardsinRussiaandUkraineCLEMaterials.pdf>>, accessed on 2nd July 2016.
9. American Bar Association Center for Continuing Legal Education, Enforcement of Arbitration Awards in Russia and Ukraine: Dream or Reality?, online: < http://www.americanbar.org/content/dam/aba/multimedia/international_law/docs/committees/russia_eurasia/enforcingarbitrationawardsinrussiaandukraineclematerials.authcheckdam.pdf>, accessed on 2nd July 2016.

10. BARCELÓ J. J. , ‘Anti-foreign-suit injunctions to enforce arbitration agreements’, *Journal of International Arbitration*, Vol. 24, No. 3, 2007 , online: <<http://ssrn.com/abstract=1030403>>, accessed on 2nd July 2016.
11. Cuniberti G., The Law Governing the Performance of Arbitral Awards, University of Luxembourg, 2009, online: <<http://ssrn.com/abstract=1030403>>, accessed on 7th May, 2015.
12. BRINER R, Philosophy and objectives of the Convention, available at <<http://ssrn.com/abstract=1030403>>, accessed on 10th May, 2015.
13. GARNETT R. and PRYLES M., ‘Recognition and Enforcement of Foreign Awards under the New York Convention in Australia and New Zealand’ [2008], Volume 25, Issue 6, *Journal of International Arbitration*, online: <<http://ssrn.com/abstract=1030403>>, accessed on 7th May 2015
14. Babu R., ‘International Commercial Arbitration and the Developing Countries’, online: <<http://ssrn.com/abstract=981123>>, accessed on 2nd July, 2016.
15. UNCITRAL model law on international commercial arbitration with amendments adopted in 2006, online: <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html>, accessed 1st May 2015.
16. The International Journal of Public and Private Arbitration, online: <<http://www.globalarbitrationreview.com>>, accessed on 21st May 2015.
17. An arbitration rules of the east African court of justice, online: <http://www.eac.int>>, accessed on 27th May 2015.

APPENDICES

URUKIKO RW'IKIRENGA RURI I KIGALI, RUHABURANISHIRIZA IMANZA Z'UBUCURUZI, RUHAKIRIJE MU RUHAME URUBANZA RCOMA 0007/13/CS KUWA 06/02/2015, MU BURYO BUKURIKIRA:

HABURANA

UWAJURIYE

HYDROBATEL Ltd yahoze yitwa HYDROBATEL Sarl, mu izina ry'Umuyobozi wayo, iburanirwa na Me Rusanganwa Jean Bosco.

UREGWA

Karekezi François Xavier, mwene Bufirifiri François na Mukandoli Adèle, utuye mu Mudugudu wa Gatoki, Akagali ka Gatenga, Akarere ka Kicukiro, Umujyi wa Kigali, yunganiwe na Me Mucyo Donatien.

IKIBURANWA:

Gukuraho icyemezo cyafashwe n'Inteko y'Abakemurampaka tariki ya 10/04/2013 hagati ya Karekezi François Xavier na HYDROBATEL Sarl.

IKIREGERWA:

Kujuririra urubanza RCOMA 0152/13/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi kuwa 26/06/2013.

I. IMITERERE Y'URUBANZA

[1] Karekezi François Xavier afatanyije na Katarwa André, Katarwa Aimé na Kalisa Evariste bashinze Sosiyete yitwa HYDROBATEL Sarl yahindutse HYDROBATEL Ltd ifite imari-shingiro ingana na 5.000.000 Frw ahwanye n'imigabane 100, ni ukuvuga ko buri wese yatanze 50.000 Frw y'umugabane we. Mu ngingo ya 51 ya Sitati y'iyo Sosiyete hateganyijwe ko mu gihe havutse ikibazo muri Sosiyete kizakemurwa n'Umukemurampaka umwe cyangwa benshi bumvikanyweho n'impande zose, bitashoboka, kigakemurwa n'Inkiko z'u Rwanda zibifitiye ububasha.

- [2] Karekezi François Xavier avuga ko yeguye muri iyo Sosiyete kubera ko imicungire yayo itari myiza, maze hakurikijwe ibiteganywa n'ingingo ya 51 ya Sitati ya HYDROBATEL Ltd yavuzwe haruguru, aregera Inteko Nkemurampaka igizwe n'Abacamanza batatu (3) asaba ko yahabwa inyungu zikomoka ku migabane ye yatanze muri iyo Sosiyete hamwe n'indishyi zinyuranye.
- [3] Kuwa 29/01/2013, ababuranyi b'impane zombi bagiranye inyandiko itanga ubutumwa (Acte de mission), aho bahaye Abakemurampaka igihe cy'iminsi 60 kugira ngo bazabe barangije gufata umwanzuro wabo ku kibazo bashyikirijwe.
- [4] Kuwa 10/04/2013, Inteko y'Abakemurampaka yafashe umwanzuro wayo, itegeka HYDROBATEL Ltd ihagarariwe na Katarwa André guha Karekezi François Xavier 60.000.000 Frw y'inyungu (dividendes) zikomoka ku migabane ye yashoye muri iyo sosiyete, 20.000.000 Frw y'indishyi z'akababaro, 3.700.000 Frw y'ubukemurampaka yatanze mbere, 1.850.000 Frw y'ubukemurampaka yasigaye na 3.925.000 Frw y'igihembo cya Avoka.
- [5] HYDROBATEL Ltd yajuririye uwo mwanzuro mu Rukiko Rukuru rw'Ubucuruzi isaba ko wawanwaho kubera ko wafashwe n'Inteko Nkemurampaka itakibifitiye ububasha kuko igihe cy'iminsi 60 yari yarahawe cyo kuwufata cyari cyararenze.
- [6] Iburanisha ry'urubanza ritangiye, Karekezi François Xavier yatanze inzitizi y'iburabubasha bw'Urukiko Rukuru rw'Ubucuruzi bwo kuburanisha urwo rubanza kubera ko bufitwe n'Urukiko rw'Ubucuruzi kuko arirwo rwagombaga kuruburanisha iyo ababuranyi batiyambaza Ubukemurampaka. Karekezi François Xavier yatanze kandi inzitizi igamije kutakira ikirego cya HYDROBATEL Ltd kubera ko yagitanze impitagihe bitewe n'uko yagitanze muri urwo Rukiko, nyamara itarigeze igaragariza Inteko Nkemurampaka igihe cy'iburanisha ko yafashe umwanzuro wayo igihe cy'iminsi 60 yari yarahawe cyo kuwufata cyari cyararenze.
- [7] Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza, rwemeza ko inzitizi y'iburabubasha bw'Urukiko Rukuru rw'Ubucuruzi yatanzwe na Karekezi François Xavier nta shingiro ifite kubera ko urwo Rukiko arirwo rufite ububasha bwo kuburanisha urwo rubanza hashingiwe ku ngingo ya 13, igika cya 4 y'Itegeko Ngenga n° 06/2012/OL ryo kuwa

14/09/2012 rigena imiterere, imikorere n'ububasha by'Inkiko z'Ubucuruzi, iteganya ko *“Urukiko Rukururw'Ubucuruzi rufite ububasha bwo kuburanisha mu rwego rw'ubujurire ibyemezo byafashwe n'Abakemurampaka”*.

[8] Urukiko Rukuru rw'Ubucuruzi rwemeje kandi ko ikirego cya HYDROBATEL Ltd kitakiriwe kubera ko cyatanzwe impitagihe kubera ko igihe yaburanaga, itigize igaragariza Inteko Nkemurampaka ko yasomye umwanzuro wayo kuwa 10/04/2013, igihe cy'iminsi 60 yari yarahawe cyo kuwufata mu nyandiko itanga ubutumwa cyari cyararenze.

[9] HYDROBATEL Ltd yajuririye urwo rubanza mu Rukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rwagombaga kwakira ikirego cyayo kuko kitatanzwe impitagihe.

[10] Iburanisha ry'urubanza ritangiye, Karekezi François Xavier yatanze inzitizi igamije kutakira ubujurire bwa HYDROBATEL Ltd kubera ko Urukiko Rukuru rw'Ubucuruzi rutari rufite ububasha bwo kuburanisha ubujurire bwayo busaba ivanwaho ry'umwanzuro wafashwe n'Inteko Nkemurampaka, ko ahubwo ubwo bubasha bufitwe n'Urukiko rw'Ubucuruzi kuko arirwo rwagombaga kuburanisha urwo rubanza iyo ababuranyi batiyambaza Ubukemurampaka.

[11] Nyuma y'iburanisha ry'urubanza kuri iyo nzitizi, Urukiko rw'Ikirenga rwafashe icyemezo kuwa 24/10/2014, rwemeza ko inzitizi y'iburabubasha bw'Urukiko Rukuru rw'Ubucuruzi yatanzwe na Karekezi François Xavier nta shingiro ifite kubera ko urwo Rukiko arirwo rwari rufite ububasha bwo kuburanisha ubujurire bwatanzwe na HYDROBATEL Ltd busaba ivanwaho ry'umwanzuro wo kuwa 10/04/2013 wafashwe n'Inteko Nkemurampaka, rutegeka ko iburanisha ry'urubanza mu mizi rizaba kuwa 16/12/2014.

[12] Kuri iyo tariki, urubanza rwaburanishijwe mu mizi, HYDROBATEL Ltd ihagarariwe na Me Rusanganwa Jean Bosco, naho Karekezi François Xavier yunganiwe na Me Mucyo Donatien.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO:

1. Kumenya niba Umwanzuro w'Abakemurampaka wateshwa agaciro kubera ko wafashwe igihe cy'ubutumwa cyararangiyeye

[13] Me Rusanganwa Jean Bosco uburanira HYDROBATEL Ltd avuga ko Urukiko rwemeje ko ikirego cyayo kitakiriwe kubera ko cyatanzwe impitagihe ngo kuko itagaragariye Abakemurampaka ko amasezerano (Acte de mission) yo kuwa 29/01/2013 yabahaga ububasha yari yararangiyeye kuwa 25/03/2013, rwirengagije ko itashoboraga kubigaragariza Abakemurampaka igihe cy'iburanisha bitewe n'uko icyo gihe ayo masezerano yari agifite agaciro, ariko ko igihe bafataga umwanzuro wabo kuwa 10/04/2013, ayo masezerano yari yarataye agaciro kubera ko yarangiyeye kuwa 25/03/2013.

[14] Asobanura ko urubanza rwaburanishijwe bwa nyuma kuwa 13/03/2013, Urukiko Nkemurampaka rumenyeshya ababuranyi ko urubanza ruzasomwa kuwa 03/04/2013, uwo munsu ugeze, HYDROBATEL Ltd iritaba, ariko ntirwasomwa kubera ko umwe mu Bakemurampaka atari yitabye, maze hakorwa inyandiko-mvugo yimurira isomwa ryarwo kuwa 08/04/2013, irayisinye, uyu munsu ugeze, nabwo ntirwasomwa kandi ntihakorwa inyandiko-mvugo yimurira isomwa ryarwo kuwa 10/04/2013, ahubwo yamenyeshweje iyi tariki kuri telefoni gusa, iyi tariki igeze urubanza ruzasomwa. Asaba ko umwanzuro wafashwe n'Abakemurampaka kuwa 10/04/2013 wavanwaho kuko wafashwe n'Abakemurampaka batagifite ububasha bitewe n'uko amasezerano (Acte de mission) yo kuwa 29/01/2013 yabubahaga yari yararangiyeye kuwa 25/03/2013, ko kandi ayo masezerano atigeze yongerwa kuko itariki y'isomwa ry'urubanza yo kuwa 10/04/2013 itigeze yumvikanywaho n'ababuranyi b'impande zombi.

[15] Urukiko rwabajije Me Rusanganwa Jean Bosco impamvu yatumye HYDROBATEL Ltd itamenyeshya Abakemurampaka igihe cy'iburanisha cyangwa icy'isubikwa ry'urubanza ko amasezerano y'ubutumwa (Acte de mission) yarangiyeye kuwa 25/03/2013, asubiza ko byatewe n'uko itari yaratahuye ivuguruzanya (contradiction) riri muri ayo masezerano ku byerekeranye n'igihe cy'iminsi 60, ubutumwa bwagombaga kumara n'igihe cy'iminsi 30 yari igenewe isomwa ry'urubanza, ariko ko HYDROBATEL Ltd yajurijwe n'uko Abakemurampaka bafashe umwanzuro

impande zombi zitaha ziyisinyiye, iyi tariki igeze, isomwa ry'urubanza ryimurirwa kuwa 08/04/2013, uyu munsu ugeze nabwo ntirwasomwa bitewe n'uko wahuriranye n'ikiruhuko gitunguranye kijyanye n'icyunamo cyo kwibuka abazize Jenocide yakorewe Abatutsi bituma isomwa ryarwo ryimurirwa kuwa 10/04/2013 ariko ababuranyi b'impande zombi babimenyeshwa kuri telefoni, uyu munsu ugeze, urubanza rusomwa ababuranyi bose bahari, ko rero asanga umwanzuro wafashwe n'Inteko y'Abakemurampaka kuwa 10/04/2013 utateshwa agaciro kubera ko amasezerano y'ubutumwa yari agifite agaciro.

UKO URUKIKO RUBIBONA

[20] Ingingo ya 6 y'Itegeko n° 005/2008 ryo kuwa 14/02/2008 ryerekeye ubukemurampaka n'ubwunzi mu bibazo by'ubucuruzi, iteganya ko *“Umwe mu biyambaje ubukemurampaka uzi neza ko hari ingingo muri iri tegeko abiyambaje ubukemurampaka bashobora kwirengagiza, cyangwa se ko hari ibisabwa n'amasezerano y'ubukemurampaka byirengagijwe, ariko we agakomeza ubukemurampaka atagaragaje ibyo anenga hatabayeho gukererwa cyangwa niba hari igihe ntarengwa cyateganyijwe akabigaragaza muri icyo gihe, ubwo afatwa nk'uwaretse uburenganzira bwe bwo kugaragaza ibyo atemera mu bukemurampaka”*.

[21] Ku birebana n'uru rubanza, Urukiko rurasanga ubujurire bwa HYDROBATEL Ltd bugamije gusaba kuvanaho umwanzuro wafashwe n'Inteko y'Abakemurampaka tariki ya 10/04/2013 kubera ko wafashwe mu buryo bunyuranyije n'amategeko bitewe n'uko wafashwe amasezerano y'Ubutumwa (Acte de mission) yo kuwa 29/01/2013 atagifite agaciro kubera ko yarangiye kuwa 25/03/2013.

[22] Ingingo ya 6 y'amasezerano y'ubutumwa (Acte de mission) Karekezi François Xavier yagiranye HYDROBATEL Ltd iteganya ko Urukiko Nkemurampaka ruhawe iminsi mirongo itandatu (60) itangira kubarwa guhera kuwa 24/01/2013 kugira ngo ruzabe rwarangije imirimo yarwo, ko kandi umwanzuro wabo uzafatwa mu gihe cy'iminsi 30 itangira kubarwa guhera igihe ayo masezeramo azatangira gukurikizwa kuwa 29/01/2013, ariko ko icyo gihe gishobora kongerwa ariko ntikirenze igihe giteganywa n'Itegeko ryerekeye Ubukemurampaka.

[23] Inyandiko mvugo ziri muri dosiye zigaragaza ko iburanisha ry'urubanza rishojwe kuwa 13/3/2013, Urukiko Nkemurampaka rwamenyesheje ababuranyi b'impande zombi ko urubanza ruzasomwa kuwa 03/04/2013, bataha basinyiye iyo tariki, iyi tariki igeze, ababuranyi bose baritabye, ariko Urukiko rubamenyesha ko isomwa ry'urubanza ryimuriwe kuwa 08/04/2013 kubera ko hari Umukemurampaka utabonetse, ababuranyi b'impande zombi barayisinyira, iyi tariki igeze nta nyandiko-mvugo y'iyimurwa ry'isomwa ry'urubanza iri muri dosiye, ariko ababuranyi b'impande zombi bavuze igihe cy'iburanisha ko bamenyeshejwe kuri telefoni ko urubanza rutari busomwe, ko ahubwo ruzasomwa kuwa 10/04/2013, iyi tariki igeze, urubanza rwasomwe hari ababuranyi b'impande zombi, HYDROBATEL Ltd ihagarariwe na Katarwa André hari kandi na Karekezi François Xavier, ndetse ababuranyi bombi batashye basinyiye ko basomewe umwanzuro warwo, nyamara ntacyo HYDROBATEL Ltd yigeze yandika ku nyandiko-mvugo y'isomwa ry'urubanza igira icyo inenga uwo mwanzuro nk'uko bigaragazwa n'inyandiko-mvugo y'isomwa ryarwo iri muri dosiye.

[24] Hakurikijwe ibimaze kuvugwa haruguru, Urukiko rurasanga kuba HYDROBATEL Ltd yarakomeje kwitabira imihango y'Ubukemurampaka harimo n'iy'isomwa ry'urubanza ryagiye ryimurirwa ku matariki atandukanye ikanasinya ku nyandiko-mvugo, kandi ivuga ko igihe cy'ubutumwa cyari cyarangiyeye, ntigire icyo ibivugaho, uko guceceka kwayo kugaragaraza ko yari yemeye mu buryo buteruye (tacite) ko igihe cy'ubutumwa cyongerewe (prorogation tacite), bityo ingingo y'ubujurire ya HYDROBATEL Ltd isaba ko umwanzuro wafashwe n'Inteko y'Abakemurampaka tariki ya 10/04/2013 wateshwa agaciro ikaba nta shingiro ifite.

[25] Ibyo bihuje kandi n'ibisobanuro by'abahanga mu mategeko arebana n'Ubukemurampaka barimo Philippe DE Bournoville mu gitabo cye yise "Droit Judiciaire-L'arbitrage"¹⁶¹, aho yasobanuye ko igihe cyateganyijwe mu masezerano y'Ubutumwa (Acte de mission) gishobora kongerwa n'ababuranyi mu buryo bweruye (exprès) cyangwa buteruye (tacite), ko kandi umucamanza uburanisha urubanza mu mizi ariwe ufite ububasha bwo ku byemeza mu bushishozi bwe bitewe n'imiterere ya buri dosiye yashyikirijwe. Akomeza asobanura ko imanza zaciwe n'Inkiko (Jurisprudence)

¹⁶¹ Philippe DE Bournoville, "Droit Judiciaire-L'Arbitrage", Larcier, 2000, p.183, yasobanuye ko « Les parties peuvent proroger, soit expressément, soit tacitement, le délai fixé dans la convention d'arbitrage, leur accord dit être exempt de toute ambiguïté et bannir toute imprécision quant au nouveau délai. Il appartient au juge de fond, sur base des faits qu'il constate, d'apprécier souverainement s'il y a prorogation tacite du délai. La jurisprudence induit généralement une prorogation du délai de la participation de toutes les parties à l'instance, se traduisant par des actes positifs et sans équivoques, sans protestation ni réserve. Il en est ainsi si les parties assistent librement à une phase de l'arbitrage après expiration de délai initialement convenu ».

zigaragaza ko igihe cyari giteganyijwe mu masezerano y'Ubutumwa (Acte de mission) cyongerewe n'abaturanyi bese, iyo icyo gihe cyarangiye, ariko bagakomeza kwitabira imihango y'Ubukemurampaka bakanakora nyuma y'aho ibikorwa bigaragara mu buryo budashidikanywaho.

[26] Hashingiwe ku mategeko n'ibisobanuro by'abahanga byavuzwe haruguru, Urukiko rurasanga ubujurire bwa HYDROBATEL Ltd nta shingiro bufite.

2.Kumenya niba ubujurire bwuririye ku bundi bwatanzwe na Karekezi François Xavier bufite ishingiro

[27] Me Mucyo Donatien avuga ko Karekezi François Xavier yunganira atanze ubujurire bwuririye ku bundi asaba ko HYDROBATEL Ltd yamuha 10.000.000 Frw y'indishyi z'akababaro z'uko yamushoye mu manza ku maherere na 500.000 Frw y'igihembo cya avoka, yose hamwe akaba 10.500.000 Frw.

[28] Me Rusanganwa Jean Bosco uburanira HYDROBATEL Ltd avuga ko itaha Karekezi François Xavier indishyi asaba kubera ko yazigenewe mu rubanza rwaciwe mu mizi, ariko ko mu gihe Urukiko rwasanga Avoka wamuburaniye akwiye guhabwa amafaranga y'igihembo cya avoka, rwayamugenera ruherereye ku byo amategeko agenga ba Avoka abateganyiriza.

UKO URUKIKO RUBIBONA

[29] Ingingo ya 162 y'Itegeko n° 21/2012 ryo kuwa 14/06/2012 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko *“Umuntu wese wabaye umuburanyi mu rubanza ku rwego rwa mbere ashobora kurujuririra iyo abifitemo inyungu, keretse iyo amategeko abigena ukundi”*.

[30] Hakurikijwe ibiteganywa n'iyi ngingo, Urukiko rurasanga HYDROBATEL Ltd itaha Karekezi François Xavier indishyi z'akababaro asaba kuko itamushoye mu rubanza

ku maherere nk'uko abivuga kuko ari uburenganzira bwayo bwo kujuririra imikirize y'urubanza itishimiye.

[31] Urukiko rurasanga rero HYDROBATEL Ltd igomba Karekezi François Xavier 500.000 Frw Frw y'igihembo cya avoka kuko byabaye ngombwa ko ashaka umwunganira kuri uru rwego hashingiwe ku ngingo ya 258 y'Igitabo cya gatatu cy'amategeko y'imbonezamubano, iteganya ko *“Igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse”*.

III. ICYEMEZO CY'URUKIKO

[32] **Rwemeje** ko ubujurire bwa HYDROBATEL Ltd nta shingiro bufite;

[33] **Rutegetse** HYDROBATEL Ltd guha Karekezi François Xavier 500.000 Frw y'igihembo cya avoka;

[34] **Rwemeje** kandi rutegetse ko umwanzuro wafashwe n'Inteko y'Abakemurampaka tariki ya 10/04/2013 ugumyeho;

[35] **Rutegetse** HYDROBATEL Ltd gutanga amagarama y'uru rubanza angana na 100.000 Frw.

RUKIJIJWE RUTYO KANDI RUSOMEWE MU RUHAME NONE KUWA 06/02/2015.

RUGABIRWA Ruben

Umucamanza

MUKANYUNDO Patricie

Perezida

GAKWAYA Justin

Umucamanza

MUNYANDAMUTSA Jean Pierre

Umwanditsi w'Urukiko