MIDLANDS STATE UNIVERSITY

Law Review

THE ARBITRATION ACT (CHAPTER 7:15) ENDURING LEGACY

SPECIAL ISSUE

Table of contents

First published October 2014

Midlands State University Law Review
December 2022 Special Issue
Official citation: (*2022) Midlands State University Law Review Special Issue*

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ISSN
Midlands State University Law Review (Print), 3006-9300
Midlands State University Law Review (Online) 3006-9319

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(ii) The manuscript is submitted on the understanding that it may be sent to an expert, independent referee or more than one such referee for confidential peer review.

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The authors of accepted manuscripts must supply details of their academic and professional qualifications and status, and if required, supply verification of such qualifications and status.

FOREWORD

The 2022 Midlands State University Law Review (MSULR) Special Issue is a culmination of endless possibilities that exist in academia underwritten by cooperation across several stakeholders in the justice delivery system. From its humble beginnings, the MSULR has continued to grow in stature and its reputation as a credible and relevant platform for a scientific interrogation of the current legal developments in Zimbabwe. In this regard, the MSULR remains an important outlet in the Zimbabwean legal system which champions jurisprudential development. This Special Issue on commercial arbitration serves as an illustration of the willingness of the MSULR to lead in the development of jurisprudence in various areas of the law, paricturlarly in commerce and trade.

On the 13th of September 1996, Zimbabwe promulgated the Arbitration Act [Chapter 7:15], which repealed and replaced the Arbitration Act [Chapter 7:02]. The former had for more than 68 years regulated arbitration in Zimbabwe. On the 13th of September 2021, the nation celebrated its Silver Jubilee on the enactment of the Arbitration Act [Chapter 7:15], which gave effect to the United Nations Commission on International Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law). Zimbabwe was the fifth African country to adopt the UNCITRAL Model law. Over the past twenty-five years the Zimbabwean courts have interpreted three quarters of the Articles in the Arbitration Act. Resultantly, Zimbabwe has an unsurpassed body of court decisions based on the UNCITRAL Model Law.

In 2022, the Editorial Committee of the Midlands State University Law Review together with Guest Editors, Davison Kanokanga and Prince Kanokanga edited a Special Issue focusing on Arbitration and invited original, unpublished scholarly submissions on recent developments on arbitration law. The focus in this Issue was on the nature and scope of consumer arbitration, investor-state arbitration, evidentiary jurisdiction of the courts and selected case law on arbitral awards. The five research papers contained herein are the final, peer reviewed papers from 2022.

MSU would like to extend heartfelt gratitude to the contributors and Guest Editors for their support in making the publication of this special issue a reality. This is a proud moment in the history of the MSULR and we wish stakeholders an exciting read!!!

Consumer Arbitration in Zimbabwe: A Road Less Travelled

Prince Kanokanga*

Abstract

On 10 December 2019, the Consumer Protection Act [Chapter 14:14] (the CPA) was enacted. The aim of the CPA is to protect consumers of goods and services by ensuring a fair, efficient, sustainable and transparent marketplace for both consumers and businesses. The CPA also ushered in the consumer bill of rights, which consists of fundamental consumer rights such as the right to consumer education and awareness, the right to fair contractual agreements, the right to health and safety, the right to choose, the right to information and the right to be heard, representations and redress among others. However, one of the noteworthy features of the CPA is its acceptance of alternative dispute resolution mechanisms (ADRMs) in the resolution of consumer disputes. Since 13 September 1996 when the Arbitration Act [Chapter 7:15] (the Act) was enacted, matters concerning consumer contracts could not be resolved by arbitration unless a consumer by a separate agreement agreed thereto. Section 60 of the CPA is a welcome development that allows for the resolution of consumer disputes by conciliation or arbitration. However, it is out of step. For instance, under the CPA an arbitrator has the same power as the court, but the CPA does not specify which court, whether it is the Small Claims Court, the Magistrates Court or the High Court. In terms of section 60 (8) of the CPA any person aggrieved by the proceedings can appeal to the High Court within thirty days from the date on which the party making that application received the award. It is respectfully submitted that this section is contrary to Article 5 of the Model Law which reflects the principle of minimal judicial intervention as well as Article 34 and 36 of the Model Law which provide for the exclusive recourse against arbitral awards in Zimbabwe.

1. Introduction

The Republic of Zimbabwe (Zimbabwe) is a textbook example of a jurisdiction that implements and applies the Model Law on International Commercial Arbitration

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adopted by the United Nations Commission on International Trade on 21 June 1985 in its true spirit and intent.[1]

On the African continent, Zimbabwe has led efforts to meet the specific needs of international commercial arbitration.[2] For instance, among a dozen African countries that have to date adopted the Model Law, Zimbabwe was the fifth country after Nigeria (1990), Tunisia (1993), Egypt (1994) and Kenya (1995).[3]

To date, the country has the best reported decisions on the Model Law on the African continent.[4] This is largely due to the prescription of arbitration as a preferred method of dispute resolution by the legislature in various legislative enactments. These decisions have a strong influence on arbitration jurisprudence in Africa, and perhaps elsewhere.

Some of the provisions in the various enactments provide for arbitration arising from animal health,[5] banking,[6] co-operative societies,[7] direct and indirect foreign investments,[8] employment and labour,[9] insurance,[10] international investment disputes,[11] mines and minerals,[12] the Mozambique – Feruka Pipeline,[13] national

1 See generally D Kanokanga & P Kanokanga 'Zimbabwe' in S Finizio & C Caher (eds) International Arbitration Laws and Regulations 2021 (2021) 376 – 385; D Kanokanga & P Kanokanga 'Zimbabwe' in S Finizio & C Caher (eds) International Arbitration Laws and Regulations 2022 (2022) 379 – 388; D Kanokanga & P Kanokanga, UNCITRAL Model Law on International Commercial Arbitration: A Commentary of the Zimbabwean Arbitration Act [Chapter 7:15] (2022).

2 P Kanokanga 'The Southern African Development Community (SADC) Inaugural Panel of International Commercial Arbitration: The Dawn of a Truly Southern African Culture of Arbitration' (2022) Vol 1 *Young Lawyers Association of Zimbabwe Law Journal* 1, 1 – 2.

3 P Kanokanga 'Matrimonial Arbitration in Zimbabwe: An Analysis of Section 4 (2) (d) of the Arbitration Act [Chapter 7:15]' (2022) *University of Zimbabwe Students Law Review* 43, 45; P Kanokanga '25 Years of UNCITRAL Model Law in Zimbabwe' (2022) *University of Zimbabwe Students Law Review* 147, 148.

4 Q Tannock 'Public Policy as a Ground for Setting Aside an Award: Is Zimbabwe out of step?' (2015) Vol 74 *Arbitration: The International Journal of Arbitration: Mediation and Dispute Management* 72, 74.

5 Section 27 of the Animal Health Act [Chapter 19:01].

6 Section 42 (4) of the People's Own Savings Bank of Zimbabwe Act [Chapter 24:22].

7 Section 115 of the Co-operatives Societies Act [Chapter 24:05].

8 Section 38 of the Zimbabwe Investment and Development Agency Act [Chapter 14:38].

9 Section 98 of the Labour Act [Chapter 28:01].

10 Section 75 of the Insurance Act [Chapter 24:07].

11 The Arbitration (International Investment Disputes) Act [Chapter 7:03].

12 Section 337 of the Mines and Minerals Act [Chapter 21:05].

13 Section 6 of the Mozambique – Feruka Pipeline Act [Chapter 13:07].

payment systems,[14] railways,[15] road motor transportation,[16] road traffic,[17] tourism[18] and troubled financial institutions,[19] to mention a few.[20]

2. Application of the CPA

On 10 December 2019, the legislature enacted the Consumer Protection Act [Chapter 14:14] (the CPA).[21] This enactment is a result of successful lobbying by various consumer organisations which include the Consumer Council of Zimbabwe (CCZ),[22] the Confederation of Zimbabwe Industries (CZI) and the Zimbabwe National Chamber of Commerce (ZNCC). The CCZ has been instrumental in Zimbabwe in the lobbying of other consumer related legislation.[23]

The purpose of the CPA[24] in Zimbabwe is to protect consumers of goods and services by ensuring a fair,[25] efficient, sustainable and transparent marketplace for consumers and businesses.[26] The CPA applies to all transactions which occur within Zimbabwe unless such transactions have been specifically exempted by this Act.[27] Additionally, it extends to matters irrespective of whether a supplier resides or has its principal office

14 Section 19 (5) of the National Payment Systems Act [Chapter 24:23]
15 Section 4 of the Railways Act [Chapter 13:09].
16 Section 30 of the Road Motor Transportation Act [Chapter 13:10].
17 Section 72 (4) (b) (ii) of the Road Traffic Act [Chapter 13:11].
18 Section 12 (1) of the Tourism (Designated Tourist Facilities) (General Regulations) 1996.
19 Section 32 Troubled Financial Institution (Resolution) Act [Chapter 24:28].
20 Section 326 and 329 of the Public Entities Corporate Governance Act [Chapter 10:31] provide for inquisitorial alternative dispute resolution as opposed to the adversarial method of dispute resolution in corporate disputes.
21 The Consumer Protection Act [Chapter 14:14] is similar in many respects to the South African Consumer Protection Act 68 of 2008. Therefore, one can have regard to the South African Protection Act or commentary such as L Hawthorne 'Public Governance: Unpacking the Consumer Protection Act' (2012) Vol 75 Tydskrif vir die Hedendaagse Romeins-Hollandse Reg 345 – 370; E Van Eeden & J Barnard *Consumer Protection Law in South Africa* (2017)' T Naude & S Eiselen *Commentary on the Consumer Protection Act* (2018).
22 https://www.ccz.org.zw/about-us/
23 CCZ lobbied for the enactment of the following, Class Action Act [Chapter 8:17]; Consumer Contracts Act [Chapter 8:03]; Competition Act [Chapter 14:28] and the Small Claims Act [Chapter 7:12].
24 For more information on consumer law in Zimbabwe, see generally C Mucheche *Consumer Law in Zimbabwe* (2018).
25 In terms of section 35 (2) of the Consumer Protection Act [Chapter 14:14]: -
"No supplier, marketer or service provider shall use physical force, coercion, undue influence, pressure, duress, harassment or unfair tactics against a consumer in connection with any— (a) marketing of goods or services; or (b) supply of goods or services; or (c) negotiation, conclusion, execution or enforcement of an agreement to supply goods or services; or (d) demand for or collection of payment of goods or services; or (e) recovery of goods."
26 Preamble to the Consumer Protection Act [Chapter 14:14].
27 Section 3 (1) (a) of the Consumer Protection Act [Chapter 14:14].

within or outside of Zimbabwe, or operates on a profit basis or otherwise.[28] The Act applies to individuals, juristic persons, partnerships, trusts, organs of state, an entity owned or directed by an organ of state,[29] and a person contracted or licensed by an organ of state to offer or supply goods or services.[30] It even applies to public-private partnerships.[31] The CPA however, does not apply to transactions for the sale, lease of immovable property[32] (*locatio conductio rei*) and contracts of employment[33] (*locatio conductio operarum*). In addition, the CPA does not apply to any transaction in which goods or services are promoted or supplied to the State.[34] It also does not apply to juristic persons whose asset value or annual turnover at the time of the transaction, equal(s) or exceeds a threshold value prescribed by the Minister of Industry and Commerce or any other Minister that the President may from to time assign the administration CPA[35] or with respect to a transaction which falls within an exemption granted by the Minister.[36]

2.1. What is consumer protection?

Consumer laws have existed for centuries.[37] However, with the changes in society[38] since the 'second half of the 20th century',[39] consumer law has evolved and continues to evolve. It is for this reason that to date many countries, have and continue to adopt

28 Section 3 (3) (a) of the Consumer Protection Act [Chapter 14:14].

29 An organ of state is one which is created by an enactment, or a comply which is wholly owned by the government, and is distinct from the government. See *Holeni v Land and Agricultural Development Bank of South Africa* 2009 (4) SA 437 (SCA) para 11.

30 Section 3 (3) (a) of the Consumer Protection Act [Chapter 14:14].

31 Section 3 (3) (a) of the Consumer Protection Act [Chapter 14:14].

32 Section 5 (a) of the Consumer Protection Act [Chapter 14:14].

33 Section 5 (b) of the Consumer Protection Act [Chapter 14:14].

34 Section 3 (2) (a) of the Consumer Protection Act [Chapter 14:14]. The term 'State' does not have one settled meaning. It is accepted that the term also refers to the government. See *The Isibaya Fund v Visser & Another* [2015] ZASCA 183 para 10 – 11; *Madibeng Local Authority v Public Investment Corporation Ltd* [2020] ZASCA 157.

35 Section 3 (2) (c) of the Consumer Protection Act [Chapter 14:14].

36 Section 3 (2) (c) of the Consumer Protection Act [Chapter 14:14].

37 P Cartwright *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (2004) 1 notes that: - Laws have been used to protect consumers for centuries. These laws have drawn on a variety of legal forms, including criminal law, tort law and contract law, to achieve their objectives.

38 M Durovic & HW Micklitz *Internationalization of Consumer Law: A Game Changer* (2017) 1S Rachagan 'Development and Consumer Law' in G Howells, I Ramsay & T Wilhelmsson (eds) *Handbook of Resolution of International Consumer Law* (2018) 35 – 63.

39 Durovic & Micklitz (n 38 above) 1.

diverse approaches and experiences in the resolution of consumer disputes[40] and put in place different regulatory frameworks for the protection of consumers.[41]

Consumer protection is concerned 'primarily with the social and economic welfare of consumers in a market–based society.'[42] The promulgation of the CPA by the legislature in Zimbabwe introduced consumer protection buttressed by the creation of the Consumer Protection Commission (Commission) and the regulation of Consumer Advocacy Organisations.[43] The CPA repealed and replaced the Consumer Contracts Act [Chapter 8:03]. However, one of the most significant features of the CPA, is that it provides for alternative dispute resolution mechanisms (ADRMs) in the resolution of consumer disputes in Zimbabwe.[44]

2.2. Who is a consumer?

The term 'consumer' is defined broadly in Zimbabwe.[45] In respect to any particular goods[46] or services,[47] the term consumer refers to a person to whom those goods and services are marketed in the ordinary course of business by a supplier[48] or a service provider.[49] Similarly, a consumer has been defined as a person who has entered into a transaction with a supplier or service provider[50] in the ordinary course of the business of the supplier or the service provider.[51]

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40 AJ Belohlávek *B2C Arbitration Consumer Protection in Arbitration* (2012) 161 – 171.

41 Ibid.

42 *Imperial Group (Pty) Ltd t/a Auto Niche Bloemfontein v Member of the Executive Committee: Economic Development, Environmental Affairs and Tourism Free State Government & Others* [2016] 3 All SA 794 (FB) para 27.

43 Preamble to the Consumer Protection Act [Chapter 14:14].

44 Preamble to the Consumer Protection Act [Chapter 14:14].

45 *Radar Holdings Ltd & Another v Eagle Insurance Co Ltd* 1999 (2) ZLR 246 (S).

46 The word 'goods' refers to any object which may be marketed for human consumption or any tangible object including any medium on which anything is or may be written or encoded. It also refers to any literature, music, photographs, motion picture, games, information, data, software, codes or other intangible products written or encoded on any medium, or a license to use any such intangible. The term 'goods' also refers to gas, water and electricity. Lastly, 'goods' refer to any legal interest in land or any other immovable property other than those specified in section 3 (5) of the Consumer Protection Act [Chapter 14:14].

47 The term 'services' has a broad meaning and refers to the rights or benefits which are provided for in any agreement for the performance of work whether with or without the supply of goods. See *H v Commissioner of Taxes* 1957 R&N 688 (SR) 693A.

48 A supplier refers to any person who is in the business of selling, leasing or trading in goods or services or is otherwise in the business of supplying goods or services, and includes an agent of the supplier.

49 Section 2 (1) (a) of the Consumer Protection Act [Chapter 14:14].

50 A service provider refers to any person who promotes, supplies or offers to supply any service, and includes an agent of the service provider.

51 Section 2 (1) (b) of the Consumer Protection Act [Chapter 14:14].

If the context so requires, a consumer in Zimbabwe also refers to a user, recipient or beneficiary of the goods or services, irrespective of whether that user, recipient or beneficiary was a party to a transaction concerning the supply of those goods or services.[52] Moreover, any person who purchases or offers to purchase goods or services supplied by an enterprise in the ordinary course of business and includes a business person who uses the product or service supplied as an input to its own business, a wholesaler, a retailer and a final consumer, is also regarded as a consumer in terms of the CPA.[53]

Congruently, the term 'consumer' refers to any person who purchases or offers to purchase goods or services for the purpose of using the goods or services in the production and manufacture of any other goods for sale or the provision of another service for remuneration.[54] Therefore, in order to qualify as a consumer contract under the CPA any such contract must meet one of the required criteria in section 2 of the CPA.[55]

2.3. Fundamental consumer rights

One of the essential changes steered by the CPA in Zimbabwe is the Consumer Bill of Rights.[56] Sections 9 to 51 of the CPA contain consumer fundamental rights which broadly include the right to consumer education and awareness,[57] the right to fair contractual agreements,[58] the right to health and safety,[59] the right to choose,[60] the right to information[61] and the right to right to be heard, representations and redress[62] among others.

52 Section 2 (c) of the Consumer Protection Act [Chapter 14:14].
53 Section 2 (d) of the Consumer Protection Act [Chapter 14:14].
54 Section 2 (e) of the Consumer Protection Act [Chapter 14:14].
55 *Radar Holdings Ltd* (n 45 above).
56 W Jacobs, PN Stoop & R van Niekerk 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) Vol 13 *Potchefstroom Electronic Law Journal* 302 – 508.
57 Section 9 of the Consumer Protection Act [Chapter 14:14].
58 Section 35 of the Consumer Protection Act [Chapter 14:14].
59 Section 10 of the Consumer Protection Act [Chapter 14:14].
60 Section 18 of the Consumer Protection Act [Chapter 14:14].
61 Section 26 of the Consumer Protection Act [Chapter 14:14].
62 Section 33 of the Consumer Protection Act [Chapter 14:14].

2.4. Enforcement of consumer rights

One of the fundamental rights envisaged by the CPA is the right to be heard, representations and redress.[63] Under the CPA, a consumer has a right to have his or her complaints heard before the CPO, a court or to seek redress through ADR.[64] Additionally, a consumer has a right to choose and be represented by a person of his or her choice.[65]

In terms of section 33(1) of the CPA, which is based on Article 24(4) of the Model Law,[66] a consumer can be represented by nearly anyone.[67] This provision is clear and does not admit any ambiguity, absurdity or inconsistency.[68] Due to the fact that the word 'person of choice' in section 33(1) of the CPA does not come with any qualification, the person can be a legal practitioner or any other person.[69] Another important right afforded to consumers by the CPA, is the right to have consumer disputes heard and resolved within a reasonable time.[70]

3. Alternative dispute resolution and consumer disputes

Kanokanga notes that the benefits of ADR include but are not limited to choice, expertise, confidence, confidentiality, convenience, neutral forum, privacy, speed and reduced costs.[71] While, Mackie *et al* observe that, '[t]he essential advantage of ADR

63 Section 33 of the Consumer Protection Act [Chapter 14:14]. See also C van Heerden & J Barnard 'Redress for Consumers in term of the Consumer Protection Act 68 of 2008: A Comparative Discussion' (2011) Vol 6 *Journal of International Commercial Law and Technology* 131 – 144.

64 Section 33 (1) of the Consumer Protection Act [Chapter 14:14].

65 Section 33 (1) of the Consumer Protection Act [Chapter 14:14].

66 See generally, CN Kastoris 'Representation of Parties in Arbitration by Non – Attorneys' (1995) Vol 22 Fordham Urban Law Journal 503 – 506; T Cummins 'The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field' (2014) Vol 30 Arbitration International 429 – 456; EJ Castello 'Party Representation: Does Article 21 Mark a Trend?' (2017) Vol 4 Bahrain Chamber for Dispute Resolution International Arbitration Review 357 – 376.

67 For more information of party representation in Zimbabwe, see generally, P Kanokanga & OE Monyei, 'Restricted rights of party representation and assistance in arbitration proceedings in the Federation of the Republic of Nigeria: Lessons from Zimbabwe' (2023) *Nigerian Institute of Chartered Arbitrators Journal* (forthcoming).

68 Zimbabwe Assembies of God Africa (ZAOGA) v Mashonganyika SC 43-18 para 17.

69 Ibid.

70 Section 33 (3) of the Consumer Protection Act [Chapter 14:14].

71 D Kanokanga *Commercial Arbitration in Zimbabwe* (2020) 25 – 28.

is to extend the range of options on offer to businesses or litigants who find themselves in deadlocked negotiations with others.'[72]

A new trend was introduced by the CPA, specifically regulating the resolution of consumer disputes by ADRMs[73] as an appropriate, additional or complementary dispute resolution mechanism to litigation.[74]

3.1. Prescription of consumer disputes

Prescription[75] is a *sine quo non* aspect of consumer law in Zimbabwe.[76] It is a matter of substantive law (*lex causae*) as opposed to procedural law (*lex fori*).[77] Concerning consumer disputes, the prescriptive period is three years.[78] This means that a consumer dispute can be regarded as an ordinary 'debt' which is irrevocably extinguished by prescription, after three years.[79] The word 'debt' in section 2 of the Prescription Act [Chapter 8:11] bears a wide and general meaning,[80] which includes an obligation to do something or refrain from doing something.[81] The term has been equated with the expression cause of action.[82] A cause of action[83] means, the entire set of facts that give rise to an enforceable claim and includes every fact material to plead and prove so as to sustain an action successfully[84] but does not include the

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72 K Mackie, D Miles & W Marsh *Commercial Dispute Resolution* (1995) 1.

73 See generally SA Goodwin 'On Consumer Dissatisfaction – Consumer Arbitration as an Alternative Dispute Resolution Mechanism' (1978) Vol 6 *Advances in Consumer Research* 460 – 465; RJ Adams, 'Consumer Reaction toward Arbitrational as a Remedial Alternative to the Courts' (1983) Vol 17 (1) *The Journal of Consumer of Affairs* 172 – 189.

74 Mackie, Miles & Marsh (n above 72) 7.

75 For more information of prescription, see generally MM Loubser *Extinctive Prescription* (1996); J Saner *Prescription in South African Law* (2013).

76 *Chips Enterprises Solutions (Pvt) Ltd t/a Pastel Software Zimbabwe v Fly Catcher Trading (Pvt) Ltd* HH 332-21.

77 *Laconian Maritime Enterprises Ltd v Agromar Linears Ltd* 1986 (3) SA 509 (D)

78 Section 59 (1) (b) of the Consumer Protection Act [Chapter 14:14].

79 *Manjovha v Delta Beverages (Pvt) Ltd* SC 64-21.

80 *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) 1141F; *Taruona v Zvarevadza & Others* HH 87-12; *Ongopolo Mining Ltd v Uris Safari Lodge (Pty) Ltd* 2014 (1) NR 290 (HC).

81 *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 344F-G

82 *Syfin Holdings Ltd v Pickering* 1982 (1) ZLR 10 (SC) 19; 1982 (2) SA 225 (ZS) 234. In South Africa the courts prefer the expression 'right of action' as to 'cause of action'. See *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) 601F-G; *Strachem Ltd v Prinsloo* 1997 (2) SA 1 (A) 15B-16D; *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* [2003] 2 All SA 597 (SCA) 601C-D.

83 *Read v Brown* (1888) 22 QBD 131; *Abhrahamse & Sons v SA Railways & Harbours* 1933 CPD 626 at 637; *Slomowitx v Vereniging Town Council* 1966 (3) SA 317 (A); *Controller of Customs v Giuffre* 1971 (2) SA 81 (R) 84A; *Patel v Controller of Customs & Excise* 1982 ZLR (2) 82 (H) 85.

84 *Hodgson v Granger & Another* 1991 (2) ZLR 10 (H) 14F-H.

evidence that is necessary to support such a cause of action.[85] Hence, in terms of section 2 of the Prescription Act [Chapter 8:11] a 'debt' entails a right on one side and a corresponding obligation on the other.[86] It is thus not limited to an obligation to pay money, deliver goods or render services.[87]

Therefore, a consumer protection officer (CPO) cannot entertain any disputes which have been prescribed in terms of the law.[88] Prescription does not apply to a dispute or unfair consumer practice that is continuing at the time it is referred to a CPO.[89] The interpretation of the phrase 'continuing at the time it is referred to' with respect of consumer law has not been developed in Zimbabwe. However, the South African courts have had occasion to consider the phrase, albeit in respect of a labour related matter. In the case of *South African Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration & Others* it was held that:

> *"…* The problem however is that the argument presented by the appellant is premised upon the belief that the unfair practice or unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice or unfair discretion may consist of a single act, it may also be continuous, on the basis of race to be awarded a once-off bonus, this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal, the unfair labour practice commences and ends at a given time. But where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or other arbitrary grounds, then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other, he is evincing continued discrimination.[90]"

85 *Chiwawa v Mutzuris & Others* 2009 (1) ZLR 72 (H).
86 *Off-Beat Holiday Club & Another v Sanbonani Holiday Spa Share Block Ltd & Others* 2016 (6) SA 181 (SCA) para 32.
87 cf *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13.
88 Section 59 (3) of the Consumer Protection Act [Chapter 14:14].
89 See *Triangle (Pvt) Ltd v Mutasa (N.O.) & Others* SC 77-21.
90 2010 (3) BLLR 251 (LAC) para 27.

3.2. Conciliation of consumer disputes

A CPO to whom a dispute has been referred, or to whose attention it has come, has an obligation to first attempt to settle the dispute between the parties through conciliation[91] or, if the parties agree, by reference to arbitration.[92] The CPA vests in a CPO, a general jurisdiction to deal with any dispute referred to him/her.[93] The term 'dispute'[94] is a protean word that derives its meaning from its context.[95] It does not have any special or unusual meaning.[96] A dispute can be described as a disagreement or a tiff between parties: there is no limit to the number of persons who must be involved in the dispute in order for it to be arbitrable.[97] Suffice it to say that the dispute must be between two or more persons, whether natural or artificial.

Conciliation is an ADRM in terms of which the parties endeavour to reach an agreement with a view to settling a dispute. The CPA does not define the term 'conciliation'. However, the term conciliation has been defined to refer to mediation.[98] Conciliation/mediation provides a great degree of party control to the parties to the dispute and the outcome of the dispute.[99] The role of the CPO in conciliation is to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.[100]

The CPO can use their interpersonal skills and both oral or written statements from the parties, and paraphrase and summarise the dispute between the parties.[101] Conciliation is a recognized method for the resolution of consumer disputes in terms of the CPA.[102] It is an escalation process toward the resolution of a consumer dispute

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91 For guidance of conciliation, see the UNCITRAL Conciliation Rules 1980 approved by the United Nations General Assembly Resolution 35/52 on the 04 December 1980.
92 Section 58 (1) of the Consumer Protection Act [Chapter 14:14].
93 *Mwenye v Lonrho Zimbabwe* 1999 (2) ZLR 429 (S) 433C – 434B.
94 For a discussion on the meaning of the term dispute see *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) para 12.
95 *Tjong Very Sumito & Others v Antig Investments Pte Ltd* [2009] 4 SLR (R) 73.
96 *Collins (Contractors) Ltd v Baltic Quay Management* (1994) Ltd [2004] ADJLR 12/07.
97 Kanokanga (n above) 31.
98 J Grogan *Labour Litigation and Dispute Resolution* (2014) 118.
99 *Bank of Zambia v Nyambe & Others* 2006 ZR 132.
100 Article 5 of the UNCITRAL Conciliation Rules.
101 *Isoquant Investments (Pvt) Ltd t/a Zimoco v Darikwa* CCZ 6-20.
102 Section 58 (1) of the Consumer Protection Act [Chapter 14:14].

by way of arbitration. Put differently, conciliation is the initial step to resolving a consumer dispute.[103]

The process involves a four – stage approach which consists of (a) an introduction, (b) story – telling, (c) dispute analysis and (d) problem solving.[104] The role of the CPO in the foregoing is chiefly to assist the disputants and to try and obtain any admissions of facts as well as to try and explore any options for settlement.[105] The process of conciliation is reached through voluntary participation in the discussion and consideration of the matters in dispute with the assistance of the CPO. The process allows the parties to be in control of its outcome. It is the function of the CPO to assist the disputants to moderate their positions and expectations in a practical, mutually satisfactory and cost-effective manner. It is not for a CPO to make a finding on the merits of the case, that is to judge. He or her role is merely to assist and offer the disputants advice.[106]

Typically, a properly conducted conciliation can be achieved between a CPO and the parties within thirty days.[107] The parties, can however, extend the timeframe for the conciliation.[108] In essence, what this means is that before disputes can be referred to arbitration, conciliation is a pre-condition to the commencement of arbitration.[109] In order to assist the parties in reaching an amicable settlement, the CPO may at any stage of the conciliation proceedings make proposals for the settlement of the dispute. The proposals need not be in writing, nor accompanied by any statement of the reasons therefore.[110]

A CPO is however precluded from imposing a solution on the parties as conciliating proceedings are flexible in nature.[111] In conciliation/mediation, the parties have an obligation to act in good faith and cooperate with the CPO and, in particular endeavour

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103 *Vundla & Another v Innscor Africa Bread Company of Zimbabwe (Pvt) Ltd & Another* SC 14 – 22 p 17.

104 *National Union of Metalworkers of South Africa & Others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC) para 21.

105 *Dzenga v Grain Marketing Board & Another* SC 84-23 p 9.

106 Ibid.

107 *Vundla & Another* (n above) 17.

108 Ibid.

109 For more information on multi-tier clauses, or pre-condition clauses in contracts, see generally *Waste Management Services (Pvt) Ltd v City of Harare* 2000 (1) ZLR 162 (H; *Shell Zimbabwe (Pvt) Ltd v ZIMSA (Pvt) Ltd* 2007 (2) ZLR 366 (H).

110 Article 7 (4) of the UNCITRAL Conciliation Rules, 1980.

111 C Parker *Labour Law in Namibia* (2012) 176.

to comply with requests by the CPO in respect of any written materials, evidence or the attendance of any meetings.[112] Each party to a consumer dispute, on his or her own initiative or at the invitation of the CPO, may submit to the CPO suggestions for the settlement of the dispute.[113]

To assist the parties, the CPO is guided by the principles of objectivity, fairness and justice in determining the rights and obligations of the parties. The CPO is further guided by the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.[114] The parties, by agreement, can contract out of conciliation of their dispute and have the same referred by the CPO to arbitration which is final and binding on the parties.[115]

Should a consumer dispute be settled by conciliation, the CPO has an obligation to record the 'settlement' of the dispute in writing.[116] Neither the CPA nor the Consumer Protection (General) Regulations, 2023[117] contains any provision at present, on the enforceability of a certificate of settlement in consumer disputes. Due to the fact that interpreting the CPA still presents new challenges, partly because a variety of issues have not yet been determined by the courts,[118] it is respectfully submitted that the certificates of settlements issued by CPOs should be enforced and have the effect of a civil judgment of the appropriate court, for purposes of enforcement.[119]

If a consumer dispute is to be determined by conciliation, a CPO has a statutory obligation to attempt to settle the dispute within thirty days.[120] Where it appears to the CPO that there exist elements of a settlement that would be acceptable to the parties, the CPO can formulate terms of a possible settlement and submit them to the parties for their observations.[121]

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112 Article 11 of the UNCITRAL Conciliation Rules, 1980.
113 Article 12 of the UNCITRAL Conciliation Rules, 1980.
114 Article 7 (2) of the UNCITRAL Conciliation Rules, 1980.
115 Section 58 (1) of the Consumer Protection Act [Chapter 14:14].
116 Section 58 (2) of the Consumer Protection Act [Chapter 14:14].
117 SI 124 of 2023.
118 In practice, courts must always have regard to the origin of dispute resolution, particularly, the international origin of commercial arbitration. See generally, *Montpelier Reinsurance Ltd v Manufacturers Property & Casualty Ltd* [2008] SC (Bda) 27 Com.
119 Section 30 of the Labour Amendment Act, 2023.
120 Section 58 (3) of the Consumer Protection Act [Chapter 14:14].
121 Article 13 (1) of the UNCITRAL Conciliation Rules, 1980.

After receiving the party's observations, the CPO may reformulate the terms and invite the parties to sign the settlement agreement.[122] By signing a settlement agreement, the parties to a consumer dispute put an end to their dispute.[123]

Where a consumer dispute is not settled within thirty days, the consumer protection officer must issue a certificate of no settlement[124] unless the parties to the dispute agree to extend the conciliatory period of the dispute.[125] A decision to extend the period to resolve a consumer dispute by conciliation should be reasonable. Where a CPO has issued a certificate of no settlement, the CPO upon consulting any Senior Consumer Protection Officer (SCPO) to whom he or she is responsible in the area in which he or she attempted to settle the dispute may, with the agreement of the parties refer the dispute or unfair consumer practice to arbitration.[126] In terms of section 58 (5) of the CPA, where a CPO has issued a settlement of no settlement, and consulted with an SCPO, an unfair consumer practice or dispute may be referred for arbitration, in terms of which the provisions of the Act will apply to the reference.[127]

It is the responsibility of the CPO in referring a dispute to arbitration, other than a CPO who is employed by the Commission, to determine the costs of the arbitration[128] which are to be borne by the parties in equal shares.[129] Currently, there is no statutory tariff on arbitrator fees.

3.3. The CPA's panel of arbitrators

Arbitration is said to be as good as its arbitrators.[130] In general, a consumer arbitrator should have the basic knowledge of consumer law, contract, delict, evidence and procedure. Whatever an arbitrator's background or field of expertise, he or she should have 'some knowledge of the rules of procedure' in arbitral/judicial proceedings.[131]

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122 Article 13 (1) of the UNCITRAL Conciliation Rules, 1980.
123 Article 13 (2) of the UNCITRAL Conciliation Rules, 1980.
124 Section 58 (3) of the Consumer Protection Act [Chapter 14:14].
125 Section 58 (4) of the Consumer Protection Act [Chapter 14:14].
126 Section 58 (5) of the Consumer Protection Act [Chapter 14:14].
127 Section 58 (5) of the Consumer Protection Act [Chapter 14:14].
128 See P Kanokanga *The Law of Costs in Zimbabwe: Text, Cases and Materials* (2021) 361 – 401.
129 Section 60 (6) of the Consumer Protection Act [Chapter 14:14].
130 WS Change 'Formation of the Arbitral Tribunal' (2001) Vol 17 (4) *Arbitration International* 401, 401.
131 DW Butler & E Finsen *Arbitration in South Africa, law and practice* (1993) 76.

The CPA is silent on the required qualifications of an arbitrator.[132] The Commission has the discretion to specify any qualifications. Whilst both the Act and the CPA are silent on the qualifications and qualities of an arbitrator, a 'good arbitrator' should possess competence, character,[133] independence,[134] impartiality, firmness, knowledge, objectivity and decent writing skills.[135]

The CPA establishes a panel of arbitrations, which is drawn up by the Commission and designated consumer protection organisations from time to time.[136] Generally, the panel of consumer arbitrators consists of any consumer protection officer, *ex officio* or member of a designated consumer protection organisation experienced or qualified in arbitration.[137] The diverse panel of consumer arbitrators also comprises persons who are experienced or qualified in arbitration.[138]

4. Reference to arbitration under the CPA

Prior to 10 December 2019, a matter concerning a consumer contract[139] could not be referred to arbitration, unless the consumer had by a separate agreement agreed thereto.[140] The rationale for this was founded on the vulnerability of consumers[141] to businesspersons in which the latter could exploit a consumer by providing in a consumer contract that disputes arising in respect of the consumer contract be referred to arbitration.[142] A separate agreement for consumer arbitration was inserted

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132 Section 3(2) (a) of the Labour (Arbitrators) Regulations, 2012 provides that:
"In considering an application to appoint an arbitrator, an Advisory Council shall satisfy itself that:
The applicant has a minimum educational degree of a University degree with at least two years' experience in the human resource or industrial relations field, a diploma in the field of personnel management, conciliation and arbitration, or industrial relationships will be an added advantage."

133 *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] SLR 532.

134 MJ Mustill & JC Boyd *The Law and Practice of commercial arbitration in England* (1989) 252.

135 *Bremer Handelsgesellschaft GmbH v West Zucker GmbH (No 2)* [1981] 2 Lloyd's Rep 130.

136 Section 60 (5) of the Consumer Protection Act [Chapter 14:14].

137 Section 60 (5) (a) of the Consumer Protection Act [Chapter 14:14].

138 Section 60 (5) (b) of the Consumer Protection Act [Chapter 14:14].

139 In terms of section 2 (1) of the Consumer Contracts Act a 'consumer contract' was defined as a contract for the sale or supply of goods or services or both, in which the seller of supplier is dealing in the curse of business and the purchaser or user is not, but did not include a contract for the sale, letting or hire or immovable property or a contract of employment.

140 Section 4 (1) of the Arbitration Act [Chapter 7:15].

141 C Reifa & S Saintier *Vulnerable Consumers and the Law: Consumer Protection and Access to Justice* (2021).

142 The Law Development Commission of Zimbabwe: Final Report of Arbitration (Report No. 31) (1994) 25.

for consumers who specifically agreed to arbitration, as arbitration could be costly, and the consumer would be able to arbitration to affect any remedies or afford the costs of arbitration.

The CPA addresses the limitation of section 4(1)(f) of the repealed Act, which provided for limited consumer arbitration, for instance, based on a separate agreement between the parties to a consumer contract.[143] Thus, in terms of section 60 (1) of the CPA, the Act applies to all disputes referred to arbitration. Before referring a dispute to arbitration, a CPO should afford the parties a reasonable opportunity to make representations on the dispute.[144] Additionally, a CPO in referring a dispute to arbitration cannot create a new dispute for the parties,[145] mischaracterise a dispute between the parties[146] or refer a dispute that has been resolved through conciliation or mediation.[147]

In referring a dispute to arbitration, a CPO, after consulting any SCPO to whom he or she is responsible in the area, will then appoint an arbitrator.[148] Moreover, a CPO who would have attempted to conciliate the dispute that is referred to arbitration, cannot be appointed as arbitrator in respect of that particular dispute.[149] Also, for the consumer dispute to be referred to arbitration, there must be a dispute, which should have arisen with regard to a consumer and fall within the powers of the CPO. The referral of the dispute to arbitration should be timeous.[150]

4.1. The Terms of Reference

In referring a dispute to arbitration, a CPO should determine the arbitrator(s) terms of reference[151] after consultation with the parties.[152] The words 'terms of reference'[153]

143 *Zimbabwe Electricity Supply Authority v Bikita Minerals (Pvt) Ltd* 2001 (1) ZLR 438 (H).
144 Section 60 (2) of the Consumer Protection Act [Chapter 14:14].
145 *Sakarombe & Another v Montana Carswell Meats* SC 44-20.
146 *Alliance Insurance v Imperial Plastics (Pvt) Ltd* SC 30-17.
147 *Watyoka v ZUPCO (Northern Division)* 2006 (2) ZLR 170 (S) 173B – E.
148 Section 60 (4) of the Consumer Protection Act [Chapter 14:14].
149 Section 60 (5) of the Consumer Protection Act [Chapter 14:14].
150 *Living Waters Theological Seminary v Chiwanha* SC 59-21.
151 For a discussion the on arbitration and terms of reference in respect of labour matters see *Munchville Investments (Pvt) Ltd t/a Bernstein Clothing v Mugavha* SC 62-19.
152 Section 60 (3) of the Consumer Protection Act [Chapter 14:14].
153 The words 'terms of reference' are derived from Article 23 (1) of the ICC Arbitration Rules. See B Barin, AD Little & RA Pepper *The Osler Guide to Commercial Arbitration in Canada: A Practical Introduction to Domestic and International Commercial Arbitration* (2006) 24.

refers to a 'submission to arbitration'.[154] Put differently, the terms of reference of dispute refer to the terms of submission to arbitration. Terms of reference are common in international commercial arbitration. The terms of reference (TOR) reflect the foundation for the arbitral proceedings.[155] Essentially, the TOR is the 'arbitration agreement' that is specifically drawn by the CPO in consultation with the parties. It may refer a consumer dispute or an unfair consumer dispute that is based on the issues or questions specifically referred to the arbitral tribunal.

It is essential that the TOR should be clear and concise and not drawn up or drafted in a casual or general manner.[156] While it is the responsibility of the CPO to draft the TOR, it cannot be said to be unfair or unjust to penalise a party for the inept drafting of the TOR[157] which is drawn by the CPO in consultation with the parties to the dispute. Each party and their legal representatives owe a duty of care to the other and should not allow errors such as misnomers to go unchecked.[158] Thus, the parties have a duty of good faith to each other on the correctness of the issues, and the identities of the parties, and to notify the CPO of the correct citation of the parties.

It is a principle of substantive law, that no one can maintain a claim arising out of their own wrong.[159] Therefore, the parties to the dispute should have the legal capacity to sue and be sued, there should have a *locus standi*.[160] A carefully and properly drafted TOR will generally include the correct names and contact details of the parties and/or their party representatives to which notifications and communications arising in the course of the arbitration may be made, a brief statement of claim, the relief sought, the mandate of the arbitral tribunal[161] (a list of issues/questions to be determined, the constitution of the arbitral tribunal the name(s), address(es) of the arbitrator(s) and

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154 The term submission to arbitration traces its roots to Article 2 (c) of the 1927 Geneva Convention. The term is also found in Article V (1) (c) of the 1958 New York Convention and is also found in Article 34 (2) (a) (iii) of the Model Law.

155 VK Rajah 'W(h)ither Institutional Terms of Reference?' (2022) Vol 39 (2) *Journal of International Arbitration* 163 – 184.

156 E Gaillard & J Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) 988.

157 *Mapondera & Others v Freda Rebecca Gold Mine Holdings Ltd* SC 81-22.

158 *City of Harare v Cinamon* 1992 (1) ZLR 361 (S) 365E – F.

159 *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (SC).

160 *CT Bolts (Pvt) Ltd v Workers Committee* SC 16-12; *Gweru Water Workers Committee v City of Gweru* SC 25-15; *Marange Resources (Pvt) Ltd v Core Mining & Minerals (Pvt) Ltd (In Liquidation) & Others* SC 37-16.

161 Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd & Another 2002 (4) SA 661 (SCA) 673H – I.

other contact details),[162] the place of arbitration with due regard to the circumstances of the case and the parties to the dispute, the language of the arbitration, the efficiency and conduct of the arbitral proceedings i.e. submission dates for the filing of any Statement of Claim, defence or counter-claim.[163]

The TOR can also provide for oral hearings or a documents-only arbitration. Other issues that may be included in the TOR are: the applicable procedural rules, if any, interim measures, court assistance in taking of evidence, the power of the arbitral tribunal to act as *amiable compositeur* to decide *ex aequo et bono*, the costs of the proceedings, disclosure of documents and a period within which an award should be rendered.[164] An arbitral tribunal should not go beyond the scope of the submission to arbitration (*extra petita* or *ultra petita*). Such tribunal has an obligation to confine itself to the TOR[165] and to simply determine the issues or questions as captured in the TOR.[166]

4.2. The conduct of the arbitrators

It is not the function of the arbitrator to define the disputes for the parties nor to draw up the TOR for such disputes. An arbitrator's function is restricted to resolving disputes between the parties.[167] An arbitrator has an obligation to act professionally and should comply with the TOR. Where the TOR states the tribunal's power, duties and the time frame within which the award should be made, the arbitrator should comply. In tandem with this, an arbitral tribunal should only decide the disputes submitted to it, and observe the principles of natural justice, namely *audi alteram partem*[168] (hear the other side) and *nemo judex in sua causa* (no man can be a judge in this own case).[169] These principles ensure procedural fairness and justice.

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162 Where the arbitrator is named and designated in the TOR, the arbitral proceedings are commenced when the Claimant(s) serve on the Respondent(s) the Statement of Claim. See I Carr & P Stone *International Trade Law* (2014) 373.

163 See generally, J Fry, S Greenberg & F Mazza *The Secretariat's Guide to ICC Arbitration* (2012) 248 – 249.

164 J Goldsmith *How to Draft Terms of Reference* (1987) Vol 3 (4) *Arbitration International* 298 – 308.

165 *Kambuzuma & Others v The Athol Evans Hospital Home Complex* SC 118-04.

166 *Ballantyne Butchery (Pvt) Ltd v Chisvinga & Others* SC 6-15.

167 *CFI Holdings Ltd & Others v Commercial Arbitration Centre & Others* HH 365-15.

168 *Taylor v Minister of Education & Another* 1996 (2) ZLR 772 (S) 780A-C.

169 G Feltoe *A Guide to Administrative and Local Government Law in Zimbabwe* (2009) 50.

Arbitrators should not only be impartial but must be seen to be impartial. They must not receive information from one party which was not disclosed to the other.[170] Furthermore, an arbitrator cannot delegate his or her duties to another person. An arbitrator is under a continuous obligation during the pendency of the arbitral proceedings to disclose to the parties and/or party representatives any circumstances that are likely to give rise to any justifiable doubts as to his/her impartiality or independence.[171]

An arbitrator to whom a matter has been referred to in terms of section 58(5) of the CPA has a statutory obligation to convene a hearing and determine the dispute in terms of the Arbitration Act [Chapter 7:15].[172] In terms of Article 19 of the Model Law which is the First Schedule to the Arbitration Act [Chapter 7:15], the parties are free to agree on the procedure to be followed by an arbitral tribunal in conducting the proceedings.[173] This authority includes on whether the parties desire to hold an oral hearing or conduct the proceedings based on a documents only basis.[174] That is a document-only arbitration.[175]

Ortolani, in discussing Article 24(1) of the Model Law, observes that:

> "[Regulates] the parties' rights to an oral hearing by distinguishing three main situations. First, if the parties have agreed to exclude hearings, the arbitration should in principle be conducted on the basis of documents and other materials. Second, if the parties have concluded no agreements, but none of them has requested a hearing either, the tribunal is free to decide whether to hold one. Third, if the parties have not excluded hearings and one of them requests that a hearing be held, the tribunal is under a general obligation to comply with such a request, in accordance with the criterion of appropriateness."[176]

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170 Article 18 of the Model Law.
171 Article 12 (1) of the Model Law.
172 Section 14(1) of the Consumer Protection (General) Regulations, 2023.
173 Article 19(1) of the Model Law.
174 *City of Harare v Univern Enterprises (Pvt) Ltd t/a Southern Region Trading Co & Another* HH 346-23.
175 Article 24(1) of the Model Law.
176 P Ortolani 'Article 24: Hearings and Written Proceedings' in I Bantekas et al (eds) *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) 659.

The autonomy to decide on whether or not to hold an oral hearing vests with the parties and not the arbitral tribunal, unless the parties fail to agree.[177]

One of the salient features of consumer arbitration in Zimbabwe is that the proceedings should be conducted within a period of thirty days following the date of submission of the matter to arbitration.[178] An arbitrator should make reasonable efforts to prevent delaying and other guerrilla tactics, the harassment or abuse of parties or other participants or disruptions to the arbitral proceedings.[179] Thus, an arbitrator should ensure that the arbitral procedure is fair, efficient and expeditious, and act with diligence and render the award within the agreed time. If there is no stipulated time, the arbitrator should make a decision within a reasonable time – justice delayed is justice denied.

5. The powers of an arbitral tribunal under the CPA

In hearing and determining any dispute, an arbitrator under the CPA has the same powers as the court.[180] The power of the court[181] in consumer disputes can be exercised by the court *mero muto* or on an application by an affected party.[182] In terms of section 2 of the CPA, the term 'court' refers to the Small Claims Court,[183] the Magistrates Court[184] or the High Court.[185] It begs the question, power in respect of which court i.e. the Small Claims Court, the Magistrates Court or the High Court? The aforesaid courts are all enacted courts in Zimbabwe whose jurisdiction is specifically spelt out. With respect, the position of the legislature that the powers of an arbitrator are akin to a court of law[186] is flawed, problematic and seriously out of step. In matters governed by the Act, which adopted the Model Law in Zimbabwe, the 'courts' are limited by Article 5 of the Model Law in their intervention, supervision or assistance to

177 *Giya v Ribi Trading* 2014 (1) ZLR 103 (H) 109C – D; *Makonye v Ramodimoosi & Others* 2014 (1) ZLR 111 (H) 116.
178 Section 14(1) of the Consumer Protection (General) Regulations, 2023.
179 Section 7 (2) (f) of the Labour (Arbitrators) Regulations, 2012.
180 Section 60 (7) of the Consumer Protection Act [Chapter 14:14]. This provision is similar to section 98 (9) of the Labour Act [Chapter 28:01].
181 See also J Barnard & E Mišćenić 'The role of the courts in the application of consumer protection law: a comparative perspective' (2019) 44 (1) *Journal for Juridical Science* 111 – 138.
182 *Musindire v OK Zimbabwe Ltd* 2012 (1) ZLR 292 (H).
183 Small Claims Court Act [Chapter 7:12].
184 Magistrates Court Act [Chapter 7:10].
185 High Court Act [Chapter 7:06].
186 *Zesa Holdings (Pvt) Ltd v Utah* SC 32-18.

matters which are provided for in the Model Law.[187] This is known as the principle of minimal judicial interference.[188]

The power of the court to intervene in arbitral proceedings is limited to assistance in terms of section 4 (d) of the Act (leave of the court in a matrimonial cause or matter relating to status) and section 4 (e) (leave of the court in a matter affecting the interest of a minor or an individual under a legal disability). It is also limited to the provisions of the Model Law in terms of article 8 (arbitration agreement and substantive claim before court), article 9 (interim measures, article 11 (appointment of arbitrators, article 13 (challenge procedure, article (failure of impossibility to act), article 16 (competence of arbitral tribunal to rule on its jurisdiction), article 17 (power of the arbitral tribunal to order interim measures, article 27 (court assistance in taking evidence), article 34 (setting aside an award), and articles 35 and 36 (recognition and enforcement of awards).[189]

If it is to be accepted that an arbitrator in consumer arbitration has the same powers as the court, then naturally it would mean that in consumer arbitration an arbitrator need not determine all the issues raised by the parties[190] and similarly to the powers of a 'court' can venture outside of the TOR.[191] This would be inconsistent with the guidelines of the Model Law[192].

6. The relief that an arbitral tribunal can order under the CPA

In terms of the CPA an arbitral tribunal has the discretion to grant relief in terms of the Act.[193] Hence, a CPO, a court, or an arbitral tribunal may, if it is satisfied that any consumer contract is unfair grant relief.[194] An arbitral tribunal may also grant relief where any actual or reasonably anticipated exercise or non-exercise of power, right or

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187 See generally GB Born 'The Principle of Judicial Non-Interference in International Arbitral Proceedings' (2009) Vol 30 (4) *University of Pennsylvania Journal of International Law* 999 – 1033.

187 GB Born *International Commercial Arbitration* (2014) 2189.

188 GB Born *International Commercial Arbitration* (2014) 2189.

189 HM Holtzmann & JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 216.

190 *Longman Zimbabwe (Pvt) Ltd v Midzi & Others* 2008 (1) ZLR 198 (S) 203D.

191 *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & Others* 2008 (2) SA 608 (SCA) para 30.

192 *Inter-Agric (Pvt) Ltd v Mudavanhu & Others* SC 09-15.

193 *Mazibuko v The Board of Governors, Christian Brothers College & Others* SC 54-17.

194 Section 46 (1) (a) of the Consumer Protection Act [Chapter 14:14].

discretion under a consumer contract is or would be unfair,[195]. In addition, an arbitral tribunal has the discretion to cancel the whole or any part of the consumer contract,[196] vary the consumer contract,[197] or partially enforce the consumer contract.[198]

In terms of the CPA, if an employee or an agent of a supplier of goods or services is held liable in terms of the CPA for anything done or omitted in the course of that person's employment or activities on behalf of their principal, the employer or principal may be held jointly and severally liable with the employee or agent.[199] An arbitrator can order a supplier to alter or discontinue any conduct that is inconsistent with the CPA.[200] However, an order to alter any product may be contrary to public policy. It should be borne in mind that arbitration is based on contract, and all contracts are subject to the duty of good faith. It is a principle of public policy to regard the sanctity of contracts.[201] The courts do not retain the authority to rewrite a contract for the parties, even where the terms are onerous or oppressive.[202] An order to alter a product is distinct from an alteration or correction of a contract. Therefore, it is questionable that an arbitral tribunal/court order the alternation of a conduct.

An arbitral tribunal can also declare a consumer contract to be enforceable for a particular purpose only[203] and make an order for restitution[204] or award compensation to a party or reduce any amount payable under the consumer contract.[205] It may also annul the exercise or any power, right or discretion under the consumer contract. In addition, the arbitral tribunal may direct that any such power, right or discretion be exercised in a particular way.[206]

An arbitrator/arbitral tribunal/court in considering a matter in terms of the CPA may also make any such order as specifically referred to in the Act.[207] For instance, an

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195 Section 46 (1) (b) of the Consumer Protection Act [Chapter 14:14].
196 Section 46 (1) (c) (i) of the Consumer Protection Act [Chapter 14:14].
197 Section 46 (1) (c) (ii) of the Consumer Protection Act [Chapter 14:14].
198 Section 46 (1) (c) (iii) of the Consumer Protection Act [Chapter 14:14].
199 Section 81 of the Consumer Protection Act [Chapter 14:14].
200 Section 67 (1) (a) of the Consumer Protection Act [Chapter 14:14].
201 *Book v Davidson* 1988 (1) ZLR 365 (S).
202 *Courtney-Clarke v Bassingthwaighte* 1991 (1) SA 684 (NM) 698; *Magodora & Others v Care International Zimbabwe* 2014 (1) ZLR 397 (S) 403C – D.
203 Section 46 (1) (c) (iv) of the Consumer Protection Act [Chapter 14:14].
204 *PTC Pension Fund v Standard Chartered Bank Zimbabwe Ltd & Another* 1993 (1) 55 (H).
205 Section 46 (1) (c) (v) of the Consumer Protection Act [Chapter 14:14].
206 Section 46 (1) (c) (vi) of the Consumer Protection Act [Chapter 14:14].
207 Section 67 (1) (b) of the Consumer Protection Act [Chapter 14:14].

arbitrator/court may award damages against a supplier for collective injury to all or a class of consumers, which are to be paid on any terms or conditions that the arbitrator or arbitral tribunal considers just and equitable, to achieve the purposes of the Act.[208]

Turning to an award of damages, it is a principle of substantive law that an arbitrator/court cannot make a universal assessment of damages[209] or 'pluck figures from the air' and award damages.[210] A party seeking an award of damages should in its documents request an award of damages.[211] More so, the party should be successful in respect of its claim on damages. The assessment on the quantum of damages should advance justice between the parties.[212] It must be mentioned that the CPA does not limit any right of a consumer or a supplier to recover interest[213] or special damages (punitive damages) in any case in which interest or special damages may be recoverable,[214] or money paid if the consideration for the payment of it has failed.[215]

7. The form of the award

For an arbitral award to be valid, it must meet the requirements set out in Article 31 of the Model Law. The award must be in writing,[216] and be signed by the arbitrator or arbitrators.[217] Where the tribunal consists of more than one arbitrator, the award must be signed by the majority of all the members.[218]

An award must identify and state precisely who the parties are. This is normally done in the recitals, which should state the date the award was made and the place of arbitration as agreed by the parties or as determined by the tribunal.[219] Again, an award should state the reasons upon which it is based unless the parties have agreed

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208 Section 67 (1) (c) of the Consumer Protection Act [Chapter 14:14].
209 *Nyaguse v Mkwasine Estate (Pvt) Ltd* 2000 (1) ZLR 571 (S) 575D.
210 *Redstar Wholesalers v Mabika* SC 52-05. Where the TOR does not refer to interest and costs, regard can be had to *lex arbitri* provided in Article 31 (5) and Article 31 (6) of the Model Law in terms of which an arbitral tribunal can make a determination on the issue of costs and interests. see MA de Dilveira & L Levy 'Transgression of the Arbitrator's Authority: Article V (1) (c) of the New York Convention' in E Gaillard & D Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention 1958 in Practice* (2007) 656 – 657.
211 *Chiviya v Chiviya 1995* (1) ZLR 210 (H) 213.
212 *Munhuwa v Mukahuru Bus Services (Pvt) Ltd* (2) ZLR 382 (H).
213 See *ZB Bank Ltd v Eric Rosen (Pvt) Ltd & Others* HH 183-15.
214 Section 67 (2) (a) of the Consumer Protection Act [Chapter 14:14].
215 Section 67 (2) (b) of the Consumer Protection Act [Chapter 14:14].
216 Article 31 (1) of the Model Law.
217 Article 31 (1) of the Model Law.
218 Article 31 (1) of the Model Law.
219 Article 31 (3) of the Model Law.

that no reasons should be given or that the award is an award on agreed terms in terms of Article 30 of the Model Law.[220]

The 'scope of an arbitrator's obligation to give reasons is logically the same as that of a judge.'[221] A well-reasoned award helps the parties to appreciate and be satisfied that their disputes were heard and considered. Unless otherwise agreed by the parties, the award may fix and allocate the costs and expenses of the arbitration[222] and award interest.[223]

The Act does not provide for the certification of arbitral awards. However, the CPA[224] and the Labour Act [Chapter 28:01] provide that at the conclusion of arbitral proceedings, an arbitrator has an obligation to furnish the parties with 'sufficient certified copies' of the arbitral award.[225]

8. Appeals to the High Court

Article 34 of the Model Law took away the High Court's inherent jurisdiction to review the conduct of arbitral tribunals under the common law. It is for this reason that it is not prudent for a litigant to invoke section 26 of the High Court Act [Chapter 7:06] in respect to setting aside proceedings.[226] In terms of section 60 (8) of the CPA, any person aggrieved by the decision of an arbitrator may appeal to the High Court within thirty days from the date on which the party making that application received the award.[227]

Prior to the adoption of the Model Law, the courts had always been reluctant to interfere with arbitral awards.[228] To date, the courts are reluctant to interfere with arbitral awards since arbitral awards are final and binding on the parties. This is consistent with the Model Law which provides no right to appeal.[229] As such, section

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220 Section 31 (2) of the Model Law.
221 *Oil Basins Ltd v BHP Billiton Ltd & Others* [2007] VSCA 255 para 56.
222 Article 31 (5) of the Model Law.
223 Article 31 (6) of the Model Law.
224 Section 60 (9) of the Consumer Protection Act [Chapter 14:14].
225 This provision is similar to section 98 (13) of the Labour Act [Chapter 28:01].
226 L Madhuku *Labour Law in Zimbabwe* (2015) 380.
227 Section 60 (8) of the Consumer Protection Act [Chapter 14:14].
228 *Cone Textiles (Pvt) Ltd v Redgment & Others* 1983 (1) ZLR 88 (S); *McKelvey v Abrahams & Another* 1989 (2) ZLR 251 (S).
229 *Pamire & Others v Dumbutshena N.O. & Another* 2001 (1) ZLR (H); *Catering Employers Association of Zimbabwe v Zimbabwe Hotel and Catering Workers Union & Another* 2001 (2) ZLR 388 (S); *Ropa v Reosmart Investments (Pvt) Ltd & Another* 2006 (2) ZLR 283 (S).

60 (8) of the CPA is inconsistent with the object of finality in arbitration. An arbitral award is final and binding on the parties and stands even if it may be erroneous in law and in fact.[230] 'It is an implied term of an arbitration agreement that the parties agree to perform the award.'[231] Redfern and Hunter state that if parties want a compromise solution to be proposed, they should opt for mediation.[232] If they are prepared to fight the cause to the highest court in the land, they should opt for litigation.[233] By choosing arbitration, the parties choose a system of dispute resolution that is, in principle, final and binding.[234] Therefore, it is not enough for an aggrieved party to an arbitration to simply disagree with the award. For an award to be set aside in Zimbabwe, there must be more than a mere difference of opinion.[235] Consequently, the courts have interpreted Article 34 of the Model Law 'restrictively'[236] so that the objective of finality to arbitration is achieved.[237]

The fundamental issue on why section 60(8) of the CPA is out of step is that this provision is likely to dilute the jurisprudence on arbitration in Zimbabwe. It is likely to create the impression that 'all' arbitral awards can be appealed against. Kanokanga[238] posed a question as to what the Supreme Court was doing in a matter brought in terms of Article 16 (3) of the Model Law. This is a matter in terms of which there is no appeal to a decision to the High Court. Accordingly, if the Supreme Court can entertain 'appeals' or turn a blind eye to specific provisions of an enactment, what more when the time comes to deal with 'appeals' from consumer disputes?

In any case, it is now settled law in Zimbabwe[239] that the noting of an appeal of an arbitral tribunal does not suspend the arbitral award, since arbitral awards are not

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230 *Augur Investments OU v Fairclot Investments (Pvt) Ltd t/a T & C Construction & Another* S-08-19.

231 *Associated Electrical & Gas Insurance Services Ltd v European Reinsurance Company of Zurich (Bermuda)* [2003] UKPC 11.

232 A Redfern & M Hunter *Law and Practice of International Commercial Arbitration* (1999) 417 – 418.

233 A Redfern & M Hunter *Law and Practice of International Commercial Arbitration* (1999) 417 – 418.

234 A Redfern & M Hunter *Law and Practice of International Commercial Arbitration* (1999) 417 – 418.

235 *Karonga v Zimbabwe Leaf Tobacco Co & Another* HH 64-16.

236 *Chanakira v Mapfumo* 2010 (1) ZLR 178 (H).

237 *Husaihwevhu & Others v UZ-USF Collaborative Research Programme* 2010 (2) ZLR 488 (H).

238 see https://afaa.ngo/page-18097/12822807 [20 June 2022]. indicate date of access

239 *Dhlodho v Deputy Sheriff of Marondera & Others* 2011 (1) ZLR 416 (H); *Mvududu v Agricultural and Development Authority (ARDA)* 2011 (2) ZLR 44 (H).

judgments.[240] There is no provision in the CPA regarding the suspension of an arbitral award pending appeal.[241] Thus, an appeal from a tribunal without inherent jurisdiction does not suspend the award.[242]

Resultantly, the noting of an appeal against an award of an arbitrator in terms of section 60 (8) of the CPA serves no practical purpose. Resultantly, any party to whom an arbitral award relates may submit the copy of the award for registration to the Magistrates Court or High Court, respectively.[243] Where an arbitral award has been registered, it will have the effect, for purposes of enforcement, of a civil judgment of the appropriate court.[244]

Assuming that the High Court can entertain an appeal from an aggrieved party in respect of consumer disputes, it is submitted that section 60 (8) of the CPA is still out of step with the provisions of the Model Law. In terms of Article 34 (4) of the Model Law, the High Court may, where appropriate and so requested by a party, suspend the setting aside of proceedings for a period of time, and remit a matter to an arbitral tribunal.[245] Should the appeal procedure be the correct procedure in terms of section 60 (8) of the CPA, then remission of matters to arbitral tribunals would not be competent as the CPA does not expressly provide for such remission.[246]

9. Conclusion

The promulgation of the CPA in Zimbabwe is a welcome development. This Act seeks to protect consumers of goods and services by ensuring a fair, efficient, sustainable and transparent marketplace for both consumers and businesses. The CPA is also significant as it also provides for consumer disputes to be settled through conciliation in terms of which a CPO is charged with a responsibility of attempting to settle the dispute between the parties through conciliation, or, if the parties agree, by reference to arbitration.

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240 *Vengesai & Others v Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) 596E – 599E.

241 *Baudi v Kenmark Builders (Pvt) Ltd* HH 4-12; *Kingdom Bank Workers' Committee v Kingdom Bank Financial Holdings* 2012 (1) ZLR 93 (H); *CFI Retail (Pvt) Ltd v Manyika* SC 8-16; *Zimrock Investments (Pvt) Ltd v Kabubi* SC 5-17.

242 *Founders Building Society v Mazuka* 2000 (1) ZLR 529 (H); *Lowveld Rhino Trust v Dhlomo-Bhala* SC 34-20.

243 Section 60 (10) of the Consumer Protection Act [Chapter 14:14].

244 Section 60 (11) of the Consumer Protection Act [Chapter 14:14].

245 Article 34 (4) of the Model Law.

246 See *Eastern Highland Plantations v Mapeto & 136 Others* SC 43-16.

Whereas the CPA is working well, it needs to be revised to bring it into conformity with the Arbitration Act [Chapter 7:15]. This is because the latter incorporates the Model Law.

The Model Law is the First Schedule to the Arbitration Act [Chapter 7:15]. It therefore has the status of law in Zimbabwe. One commentator noted that:

> *"*A schedule is as much as part of the statute and in as much as an enactment as any other part, but if any enactment in a schedule contract an earlier clause prevails against the schedule*."*[247]

Section 60(8) of the CPA provides that 'any person aggrieved by the decision of the arbitrator may appeal to the High Court within thirty days.' This is contrary to Article 34 and 36 of the Model Law. This is due to the fact that an arbitral award may be set aside only on the limited circumstances which are set out in Article 34 and 36 of the Model Law.[248] Even the timeframe to bring an application to set aside an arbitral award is regulated by Article 34(3) of the Model Law and where a party fails to bring an application within three months after it has received a copy of the arbitral award, the High Court does not have discretion to extend the time nor the jurisdiction to grant condonation in the circumstances.[249]

In a plethora of cases,[250] the superior courts have held that in exercising its powers in terms of Article 34 and 36 of the Model Law, the High Court does not sit as a review or an appellate court.[251] Subsequently, the High Court of Zimbabwe does not have unlimited jurisdiction in matters concerning arbitration. Its jurisdiction is limited as set out in the Arbitration Act [Chapter 7:15].[252]

It is also important to note that in all matters whether domestic or international, commercial or non-commercial (inclusive of consumer disputes), which are governed by the Arbitration Act [Chapter 7:15] the High Court may only intervene where so

247 SS Edgar *Craises on State Law* (1971) 225.
248 *Mtetwa & Another v Mupamhadzi* 2007 (1) ZLR 253 (S).
249 *Courtesy Connection (Pvt) Ltd & Another v Mupamhadzi* 2006 (1) ZLR 479 (H).
250 *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S); *Pioneer Transport (Pvt) Ltd v Delta Corporation Ltd* 2012 (1) ZLR 58 (H).
251 *Star Africa Corporation Ltd v Sivnet Investments (Pvt) Ltd & Another* 2011 (2) ZLR 123 (H); *Husaihwevhu & Others v UZ-USF Collaborative Research Programme* 2012 (2) ZLR 111 (H).
252 *Zimbabwe Educational, Scientific, Social & Cultural Workers' Union v Welfare Educational Institutions Employers' Association* 2013 (1) ZLR 187 (S) 187.

provided for in the Arbitration Act [Chapter 7:15].[253] Resultantly the setting aside of arbitral awards in Zimbabwe may only be effected by the High Court in the limited circumstances provided for in Article 34 and Article 36 of the Model Law.[254] In interpreting the Model law, regard should not be lost to its international origin and to the desirability of achieving international uniformity in its interpretation and application.[255]

Furthermore, the CPA requires alignment with the High Court Act [Chapter 27:06]. It is a general principle of law, that the grounds as set out in section 27 of the High Court [Chapter 27:06] with regards to reviews do not apply to the setting aside of arbitral awards in Zimbabwe.[256] The late Justice Sandura had this to say on the subject:

> *"*The suggestion by the learned judge is that in addition to the grounds set out in Article 34(2) of the Model Law, an arbitral award may be set aside by the High Court on review on the grounds as set out in section 27 of the High Court Act [Chapter 7:06]. I respectfully disagree. In my view, Article 34(2) of the Model law sets out the grounds on which an arbitration award may be set aside by the High Court*."*[257]

At the heart of the arbitration law in Zimbabwe is the need for a delicate balance upholding the consensual nature of the arbitral process and maintaining a degree of judicial oversight to ensure that fundamental standards of procedural fairness are abided by, and public policy is now contravened.[258]

There is therefore an urgent need for the policymakers in Zimbabwe to align the CPA and the Arbitration Act [Chapter 7:15]. By way of illustration, section 60(7) of the CPA provides that, in the hearing and determination of disputes by arbitrators, the arbitrators 'shall have the same power as the court'. It is common cause that arbitrators do not have the same powers as a court.

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253 Article 5 of the Model Law.
254 Kanokanga (n 71 above) 181.
255 Section 2(3) of the Arbitration Act [Chapter 7:15].
256 *National Social Security Authority v Chairman, National Social Security Authority Workers Committee & Others* 2002 (1) ZLR 306 (H).
257 *Catering Employers Association of Zimbabwe Hotel v Zimbabwe Catering Workers Union & Another* 2001 (2) ZLR 388 (S) 392E.
258 Kanokanga (n 71 above) 134.

Achieving Reform of Investor-state Arbitration Through a Dispute Systems Design Analysis

Kathleen Mpofu*

Abstract

In response to the concerns that have been raised with the use of investor state-arbitration to resolve disputes that arise in the context of international investment law, this article seeks to make recommendations on how the system can be reformed. A dispute systems design analysis is used to assess and evaluate the current system of investor- state arbitration and make recommendations on how it can be improved. The analysis finds that some steps have been taken by arbitral institutions and states to reform the system of international investment arbitration such as the introduction of rules on transparency, amendment of institutional rules to reduce time and costs of proceedings and introduce non-disputing treaty party submissions. Despite this, the analysis also shows that there are still some areas that require attention to address the concerns that have been raised against the system and to meet the needs of the various stakeholders. Recommendations are then made to address the concerns regarding lack of independence and impartiality of arbitrators, measures to ensure the correctness of arbitral decisions and improve consistency and coherence within the system and measures to allow host states to be able to hold investors accountable for their conduct. This article adopts an incrementalist approach to the reform of investor state arbitration and finds that making changes to the system of investment arbitration will be sufficiently able to address the concerns of the system without having to resort to the creation of an entirely new system for the settlement of investor state disputes.

1. Introduction

International arbitration has been the most used method for the resolution of international investment disputes.[1] International investment agreements (IIAs) contain dispute settlement provisions which provide for the use of investment arbitration to solve disputes arising out of violations of the IIA- a system known as investor state

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1 UNCTAD Series on International Investment Policies for Development 'Investor-State Disputes: Prevention and Alternatives to Arbitration' (year) 1

dispute settlement (ISDS).[2] ISDS has become one of the most contested elements of the international trade and investment regime to date.[3] Changes in the global investment landscape have over the past years triggered a wide range of criticisms against the international investment regime and its dispute settlement system.[4]

Criticisms of the dispute resolution procedures include concerns pertaining to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by tribunals;[5] concerns pertaining to arbitrators and decision makers[6] and concerns pertaining to the cost and duration of ISDS cases.[7] Consequently, governments, intergovernmental organisations, and commercial actors have come together to investigate the existence of these challenges and come up with reforms of the system. There seems to be consensus on what is wrong with the regime and that there is indeed a need for reform. However, there has been little progress made as to what the reform options should be.[8]

This study seeks to evaluate the current system of investor-state arbitration by undertaking a dispute systems design (DSD) analysis and provide relevant recommendations. The article proceeds by first introducing the concept of DSD analysis. It sets out the principles used in DSD and how it can be applied to evaluate the system of investor-state arbitration. It undertakes an assessment of the types of conflicts in investor-state arbitration, with a focus on the dispute resolution procedures. The discussion turns to the process of redesigning the system in order to make recommendations for the reform of the system.

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2 Ibid.

3 C.Brown, 'Multilateral mechanism for the settlement of disputes: some preliminary sketches' (2017) 32 *ICSID Review* 673.

4 UNCTAD Reform Package for the International Investment Regime 2018 10. see also M. Waibel et al (eds) The Backlash against Investment Arbitration: Perceptions and Reality (2010); Chester Brown and Kate Miles (eds) Evolution in Investment Treaty Law and Arbitration (2011).

5 UNCITRAL Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session A/CN.9/964 available at https://uncitral.un.org/en/working_groups/3/investor-state.

6 *Ibid*.

7 *Ibid*.

8 UNCTAD'S Reform Package for the International Investment Regime 2018.

2. Dispute Systems Design

A conflict between parties exists within the context of a system that provides rules, processes, steps and forums through which the dispute should be resolved.[9] At international law, no state can be compelled to engage any dispute settlement mechanism without its consent.[10] The increase in consent based dispute resolution measures has signified a move away from traditional dispute settlement systems towards the creation of dispute settlement systems through the conclusion of agreements that set out dispute settlement procedures as is the case in investment law.[11] Dispute systems design (DSD) plays a role in the creation of dispute settlement mechanisms. DSD refers to the purposeful creation of a system for managing and resolving disputes with the expectation that the system will be used more than once.[12] It also provides a lens through which the effectiveness of domestic and global justice systems can be evaluated.[13] While it was developed in the context of organisational disputes arising from labour matters, it has been developed over time by scholars to apply in a wide range of areas including during the creation of new entities and treaty regimes.[14]

Although different methodologies have been developed over time by various scholars in various contexts, the following five phases are common throughout a wide range of methodologies and are applicable for the assessment of investor state arbitration: [15]

- Conflict assessment, which involves the analysis of the context within which the dispute occurs, the identification of stakeholders and their needs and interests and investigations into the nature and types of disputes.

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9 Lisa Blomgren Bingham 'Designing Justice: Legal Institutions and Other Systems for Managing Conflict' (2009) 24 *Ohio State Journal of Dispute Resolution* 1–50 at 2.

10 Dispute settlement: State-State, United Nations, K3834. D577 2003, 2003, UNCTAD/ITE/IIT/2003/1 1–101 at 8.

11 Bingham, supra n 18 at 2.

12 Gill et al, supra n 3 at 446; Lisa Blomgren Amsler & Jessica Sherrod 'Accountability Forums and Dispute System Design' (2017) 40 *Public Performance & Management Review* 529–50 at 530.

13 Stephanie Smith & Janet Martinez 'An Analytic Framework for Dispute Systems Design' (2009) 14 *Harvard Negotiation Law Review* 123–69; Bingham, supra n 18.

14 Lisa Blomgren Amsler, Janet K Martinez & Stephanie E Smith 'Christina Merchant and the State of Dispute System Design' (2015) 33 *Conflict Resolution Quarterly* S7–26 at 14.

15 Juan Pablo Labbé Arocca 'Rethinking the Structure of Construction Arbitration: A Dispute Systems Design Approach to the Position of Experts' (2021) 27 *Harvard Negotiation Law Review* 43–92 at 54.

- Assessment of the conflict resolution procedures that are in place by setting out the available procedures and the effects of the available procedures.
- Designing a scheme for improving the dispute resolution system by providing the mechanisms for improving the shortcomings of the available procedure.
- Implementing the designed scheme by putting the proposed changes into place.
- Evaluating and monitoring the new system by receiving feedback from stakeholders and analysing the system to determine if further recalibration is needed

For the purposes of this study, it will be sufficient to focus on the first three phases of the methodology to assess the effectiveness of arbitration as a mechanism to settle investor-state disputes as well as make recommendations for any changes that need to be made and what those changes might be.

2.1. Conflict assessment

a. What type of conflict exists?

ISDS arose as a means to provide an effective and neutral forum for the resolution of disputes between an investor and a host state, where the conduct of governments would deprive investors of their investments, once the investment had been made.[16] Disputes were traditionally thought to be of a commercial nature, arising from a contractual or treaty relationship which gave investors rights in respect of the foreign investments made in a host state, and imposed obligations on the host state to ensure the protection of the foreign investment. However, with the increase in the number of disputes, it has become apparent that the disputes between the host state and the investor are more complex than previously imagined and implicate a wide range of issues within and outside of the host state.

Some of the cases that are brought before arbitral tribunals are of significant public interest to parties other than the host state or the investor.[17] The investor-state disputes that have brought this issue to the fore are the cases which involve state

16 Julie Maupin, A, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 Virginia Journal of International Law 367, 375.

17 See for a general discussion on the public-private aspects of international investment law Gus Van Harten 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 *The International and Comparative Law Quarterly* 371–93.

regulatory conduct which has affected investment in areas such as health, safety and the environment or matters that impact on the provision of public services such as the provision of water, electricity or sanitation or matters that relate to the extraction and use of natural resources.[18] Further, the general public has an interest where the host state has to expend significant amounts of public funding in defending cases and the payment of damages, which may have a trickling effect on service delivery.[19] This creates a difficulty in the balancing of the needs and interest of the public on the one hand and the legitimate commercial interests of investors on the other hand.[20]

The type of disputes that are resolved within the ISDS system have a dual private and public nature and the dispute resolution mechanism must cater for both these aspects.

b. What are the needs of stakeholders?

Investors

ISDS was created in response to the need for a neutral forum for the settlement of disputes as investors were generally distrusting of the national courts of host states.[21] ISDS has been advanced as a neutral forum through which investment disputes can be addressed and remove the benefit of 'home ground advantage' for the host state.[22] The resort to arbitration de-politicises the dispute settlement process[23] and provides an opportunity for investors to participate in the decision-making process through arbitrator appointments, selection of acceptable neutral procedural rules and the possibility of protection of their confidential information. The ease of recognition of awards that is provided for because of the New York Convention and the ICISD provisions on recognition and enforcement of awards, make for easy enforcement of awards granted by tribunals. As such, the needs of investors can be set out to include neutrality, the ability for increased investor participation through the selection of

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18 Barstow Daniel Magraw & Manel Niranjali Amerasinghe 'Transparency and Public Participation in Investor-State Arbitration' (2009) 15 *ILSA Journal of International & Comparative Law* 337–60 at 339.

19 Virginia A Greiman 'The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships' (2010) 32 *Whittier Law Review* 395 at 406.

20 Ibid at 407. See also *Continental Casualty v Argentina* at par 276.

21 Christian Tietje & Freya Baetens the Impact of Investor-State Dispute Settlement in the Transatlantic Trade and Investment Partnership, 2014, Study 1–153 at 22 available at: https://www.eumonitor.eu/9353000/1/j4nvgs5kjg27kof_j9vvik7m1c3gyxp/vjn8exgvufya/f=/blg378683.pdf [last accessed 19 October 2022].

22 Ibid.

23 Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2012) 3 Select Proc ESIL 271, 271–72.

arbitrators and procedural rules, the possibility of the protection of confidential information and enforceability of decisions.

Host states

Within the present regime, host states are generally unable to bring claims and counterclaims against investors.[24] This promotes the one-sided nature of the international investment regime and leaves host states without an equally effective remedy to address their concerns with investor conduct within the international investment law framework.

Home states

Home states are generally not a party to investment disputes, but they do have a significant interest in the way treaty commitments are interpreted and applied as they too may be held to the same standards with respect to foreign investors in their territory. Home states would want to be able to have a say in directing the tribunal as to what the intention of the parties was at the time of conclusion of the treaties. This limits any broad or unintended interpretations that may be determined by the tribunal.

Local communities

While local communities are generally not a party to ISDS proceedings, they are prone to the negative impacts of the activities of investors.[25] Despite the fact that they may have a significant interest in the dispute and its outcome, local communities rarely have access to information regarding the dispute and submissions made by either the host state or the investors. In addition to this, local communities are generally not able to provide their input and participate in the dispute settlement process despite being directly affected by the same. Local communities would therefore require greater transparency in the dispute settlement process as well as an opportunity to participate, make submissions and contribute to the settlement of the dispute.

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24 Yaraslau Kryvoi 'Counterclaims in Investor-State Arbitration' (2012) 21 *Minnesota Journal of International Law* 216–52 at 218.

25 Lorenzo Cotula & Mika Schröder Community Perspectives in Investor-State Arbitration, International Institute for Environment and Development, 2017 1–43 at 6.

2.2. Assessment of the conflict resolution procedures

a. What procedures are in place to address the conflict?

Disputes between the host state and investor are currently resolved through investor-state arbitration, which makes use of arbitration as a means of achieving a binding resolution between the parties. The model of dispute resolution is largely based on international commercial arbitration.[26] The arbitration agreement is concluded in the applicable IIA, where states give advance consent for the settlement of disputes by arbitration often without having to exhaust local remedies first. ISDS provisions give investors the right to initiate arbitral proceedings against the host state arising from the conduct of the host state, which has resulted in the investor suffering some form of harm or loss.[27] Investment arbitrations are often administered under the ICSID Rules or the UNCITRAL Rules although parties are free to make use of the rules of other private institutions. ISDS cases are usually decided by a three-member panel, with each party appointing one arbitrator. A third arbitrator, who would be the chair of the panel, is appointed by either of the two arbitrators or an independent appointing authority appointing. The members of the tribunal are paid by the parties. The tribunal is not bound by the doctrine of legal precedent and is not subject to qualification requirements save those determined by the parties themselves. The awards rendered by the tribunals are enforced using the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and using the recognition and enforcement provisions in the ICSID Convention for ICSID arbitrations.

b. What are the advantages and disadvantages of the system that is in place?

There has been significant discourse regarding the advantages and disadvantages of the investor-state arbitration system. The advantages of investor-state arbitration include:

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26 José E Alvarez 'Is Investor-State Arbitration "Public"?', *Institute for International Law and Justice*, available at: https://www.iilj.org/working-papers/is-investor-state-arbitration-public/ [last accessed 26 October 2022].

27 Stephen E Blythe 'The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties' (2013) 47 *The International Lawyer* 273–90 at 276.

- the assurance of neutrality,[28] in that the arbitration provides a neutral forum for the resolution of the dispute that is neither affiliated with the host state or with the investor;
- the ability of both parties to exercise control over the procedure by selecting the applicable arbitral rules and procedures as well as the seat of the arbitration;[29]
- the ability to choose from a pool of decision makers who have skills and expertise in the subject matter of the dispute;[30]
- easy enforcement of awards; and
- the depoliticization of the dispute and dispute resolution procedures.[31]

The disadvantages of the system include:

- lack of consistency, coherence, predictability and correctness of arbitral decisions by tribunals;
- lack of transparency;
- lack of independence and impartiality of arbitrator;
- increased time and costs associated with arbitral proceedings; and
- failure to consider the needs of stakeholders.

The advantages that are associated with the use of investor-state arbitration have undoubtedly contributed to its widespread use for the settlement of disputes. Furthermore, save for the EU that has already begun negotiating IIAs that make use of an investment court system, and a few countries that have withdrawn from the use of ISDS in general, many states have, for the time being maintained the status quo with respect to the use of ISDS. This indicates that, at least for the time being and despite the concerns that have been raised with the use of ISDS, states are willing to maintain the status quo.

c. What steps have been taken to address the concerns that have been raised?

In response to the concerns that have been raised regarding the use of arbitration as a mechanism for the settlement of disputes, various administering institutions and

28 Investor-state dispute settlement: A sequel, United Nations Conference on Trade and Development, 2014 1–230 at 24.
29 Investor-state dispute settlement: A sequel, supra n 43.
30 Ibid at 24.
31 United Nations Conference on Trade and Development (ed) *Investor-State Disputes: Prevention and Alternatives to Arbitration* (2010) at 13.

inter-governmental organisations have taken an active role in reforming the investment arbitration landscape to address the concerns that have been raised. These efforts at reform are discussed below.

i. *Transparency*

Transparency refers to the public availability of information regarding the existence of the arbitration, the production of documents and awards that are generated as a result of the arbitral proceedings and the possibilities of participation in the arbitration by non-disputing parties and the possibility of the public to attend hearings.[32] Transparency is importance in the context of investor-state arbitration as it has the potential to act as a means by which tribunals are kept accountable. Transparency also ensures the consistency and predictability of awards, contributes to the improvement of the quality of awards and enhances the legitimacy of international investment arbitration.[33]

While transparency was generally not provided for in institutional rules and in IIAs, the growing concerns that have been raised regarding transparency has led to a shift in the way parties, tribunals and institutions have viewed issues related to the transparency of international investment arbitration.[34] To this end, both UNCITRAL and ICSID have implemented measures that are aimed at advancing transparency in international arbitration proceedings.

UNCITRAL adopted the Rules on Transparency in Treaty-based Investor- State Arbitration (Transparency Rules) which provide for extensive rules on transparency in investor-state arbitration. The Transparency Rules recognise the public nature of investor-state arbitration and create a disclosure regime that allows for public access to documents,[35] open hearings[36] and civil society participation.[37] The Transparency Rules apply automatically to treaties concluded after 1 April 2014 that refer to the use

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32 Joanna Lam & Güneş Ünüvar 'Transparency and participatory aspects of investor-state dispute settlement in the EU "new wave" trade agreements' (2019) 32 *Leiden Journal of International Law* 781–800 at 783.

33 Ibid at 16.

34 Sebastian Puerta & Tim Samples 'Investment Law's Transparency Gap' (2022) Forthcoming *Cornell International Law Journal*.

35 Article 2 and 3 of the UNICTRAL Rules on Transparency in Treaty-based Investor State Arbitration.

36 Article 6 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

37 Article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor -State Arbitration.

of the UNCITRAL Arbitration Rules unless the parties expressly exclude them from applying.[38] To supplement the Transparency Rules and ensure that they can be easily applied to treaties concluded prior to April 2014 without requiring an amendment to every single IIA, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Transparency Convention) allows states to accede to and ratify the Convention. By doing so, the Transparency Rules will be deemed to be applicable to disputes arising out of treaties concluded prior to 1 April 2014.[39]

ICSID has also had a positive approach to transparency with its good history of availing its case load and some decisions to the public.[40] Many of the cases that appear on investment arbitration databases were heard under the ICSID Rules.[41] In terms of Rule 63 of the ICSID Arbitration Rules makes provision for the publication of the awards to these cases.

From the above we see that the reforms made to the institutional rules of UNCITRAL and ICSID reflect greater provisions for transparency that ensure availability of information and documentation, and greater participation by third parties and the public in the form of opening oral hearings to the public. These institutional trends have also been adopted by states who have also begun to ensure greater transparency in their IIAs. This trend can be seen in NAFTA wherein the parties have made provision for the public release of documentation and awards and the opening of hearings to the public.[42] Canadian,[43] United States[44] and Indian[45] model agreements make provision for greater transparency by providing for the publication of documents, awards and allowing amicus curiae submissions.[46] This practice has also been adopted by other

38 Article 1(1) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.
39 Article 2 of the United Nations Convention-on Transparency in Treaty-based Investor-State Arbitration.
40 Magraw & Amerasinghe, supra n 28 at 341.
41 See for example UNCTAD Investment Policy Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement and ITA law database https://www.italaw.com/
42 Article 1127 and 1137 of NAFTA and the NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' para-A(2)(b). These provisions also appear in the United States-Mexico-Canada Agreement Chapter 14 Article 14.D.8 which makes provision for the applicable transparency rules.
43 Canada Model Investment Treaty (2004) 2004 arts 38(1) (open hearings), 38(3) (publication of documents), 38(4) (publication of award), art 39 (amicus submissions).
44 United States Model Investment Treaty (2004) art 29(1).
45 Model Text for the Indian Bilateral Investment Treaty (2015), art. 14.8(i)–(iii).
46 Shirlow & Caron, supra n 51 at 9.

states and there is a growing trend among states to make provisions that allow for greater transparency. Examples of these are the United Mexican States- Panama BIT,[47] USA-Uruguay BIT,[48] Czech Iran-BIT[49], Australia- Uruguay BIT,[50] and Canada-Serbia BIT,[51] which all make reference to increased standards of transparency.[52] The COMESA Investment Agreement also makes provision for open hearings and publication of case documents.[53]

Although these examples may seem insignificant in comparison to the number of IIAs that do not make provision for transparency in the proceedings, it does indicate a growing trend of states acceptance of the importance of transparency. Scholars are optimistic about the future of transparency in investor state arbitration. Puerta and Samples note that, '[t]he landscape for transparency is improving. The next two decades should be more transparent than the first two decades.' This is largely due to the reform efforts that have been implemented by states, arbitral institutions and inter-governmental organisations as discussed above.

ii. *Concerns related to time and costs of proceedings*

Complaints regarding time and costs of proceedings are related because the longer the proceedings take, the more costly they are likely to be.[54] The costs incurred by parties in investor-state arbitration and length of proceedings have risen quite significantly. There are several factors that may affect the cost and length of proceedings including the complexity of the factual and legal issues that are in dispute,

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47 Agreement between the United Mexican States and the Republic of Panama for the Promotion and Reciprocal Protection of Investments (2005), art 20(4) which makes provision for the public release of documents.

48 Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment (2005), art 29(2) ('The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements...').

49 Agreement on Reciprocal Promotion and Protection of Investments, Czech- Iran, art 11.7 which makes provision for the application of the UNCITRAL Transparency Rules.

50 Agreement on the Promotion and Protection of Investments, between Australia and Uruguay, art. 14.19, Apr. 5, 2019, which refers to the application of the UNCITRAL Transparency Rules

51 Article 12 and 31 which provide for publication of materials and publicity of the hearing and publication of the award.

52 This is not an exhaustive list of all IIAs that contain transparency provisions but has been used to illustrate a trend in the growing uptake of IIAs to include transparency provisions.

53 Article 4 of the Investment Agreement for the COMESA Common Investment Area.

54 Jean Kalicki 'Controlling Time and Costs in Arbitration: A Progress Report (Part 1 of 2)', *Kluwer Arbitration Blog*, 21 November 2011, at 1 available at: http://arbitrationblog.kluwerarbitration.com/2011/11/21/controlling-time-and-costs-in-arbitration-a-progress-report-part-1-of-2/ [last accessed 17 June 2022].

the disputing parties conduct and the conduct of the arbitrators.[55] According to the 2011 Chartered Institute of Arbitrators Costs of International Arbitration Survey, [56] three quarters of the costs of arbitration were spent on outside counsel. Further, the conduct of the parties themselves in selecting arbitrators and in carrying out the dispute resolution procedures contributes significantly to the increased delays that are experienced in arbitral proceedings.[57] It would appear that the parties themselves are largely responsible for increasing the costs and delays experienced in international arbitration. It is necessary to have a more proactive role to play in the reduction of costs and duration of the proceedings.[58] Despite this, there is still a key role that can be played by arbitral institutions in reducing the time and costs of arbitration proceedings. ICSID has recently undertaken an amendment to its rules, which amendments came into effect on the 1st of July 2022. The amendments undertaken by ICSID seek to address the concerns that have been raised with regard to the issue of time and costs in international arbitration.[59] The amendments made include electronic filing of documents,[60] case management conferences,[61]objections for claims that are manifestly without legal merit,[62] preliminary objections on jurisdiction and competence of the tribunal,[63] and provisions for expedited arbitration.[64] The methods are also presently under discussion by UNCITRAL Working Group III as measures that can be implemented for the reduction of time and costs of proceedings.[65]

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55 José Manuel Álvarez Zárate et al 'Duration of Investor-State Dispute Settlement Proceedings' (2020) 21 *The Journal of World Investment & Trade* 300–35 at 305.

56 https://www.international-arbitration-attorney.com/wp-content/uploads/2017/01/CIArb-Cost-of-International-Arbitration-Survey.pdf accessed 21 June 2022.

57 Kalicki, supra n 74.

58 Jean Kalicki 'Controlling Time and Costs in Arbitration: A Progress Report (Part 2 of 2)', *Kluwer Arbitration Blog*, 22 November 2011, available at: http://arbitrationblog.kluwerarbitration.com/2011/11/22/controlling-time-and-costs-in-arbitration-a-progress-report-part-2-of-2/ [last accessed 17 June 2022].

59 Maria José Alarcon 'Interview with Meg Kinnear Secretary General of ICSID', available at: http://arbitrationblog.kluwerarbitration.com/2022/03/22/interview-with-meg-kinnear-secretary-general-of-icsid/.

60 Rule 4 of ICSID Arbitration Rules 2022.

61 Rule 31 of ICSID Arbitration Rules 2022.

62 Rule 41 of ICSID Arbitration Rules 2022.

63 Rule 43 of ICSID Arbitration Rules 2022.

64 Chapter XII of ICSID Arbitration Rules 2022. UNCITRAL Arbitration Rules also provide for expedited arbitration.

65 UNCITRAL Working Group III Investor State Dispute Settlement Reform forty-third session Possible reform of Investor-State dispute settlement (ISDS) Draft provisions on procedural reform Note by the Secretariat A/CN.9/WG.III/WP.219.

These changes have not yet been used in practice as they came into force recently. However, from a theoretical perspective, these amendments may have the impact of reducing the length of proceedings and by extension, the costs associated with proceedings. As ICSID is a self -contained mechanism, only arbitrations that are carried out in accordance with the ICSID Arbitration Rules would benefit from these changes. As such there needs to be further rules of amendment of the UNCITRAL Arbitration Rules, to make provision for measures that are aimed at reducing time and costs of arbitrations.

iii. *Non- disputing treaty party submissions*

Rule 68 of the ICSID Rules 2022, makes provision for non-disputing treaty parties (NDTP) to make submissions on the interpretation of the treaty during the dispute. This amounts to a codification of the CIL rule that recognises that states can unilaterally express their views on a question of the interpretation of the treaty. Such expression can amount to evidence of a common intention between the treaty parties regarding the meaning of a particular provision.[66] While the rule was already provided for in CIL, there was very little uptake of the use of NDTP submissions in practice, save for NAFTA disputes and Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) disputes. A study by Mehranvar and Johnson shows that NAFTA cases and CAFTA-DR cases show the highest instances of NDTP submissions than cases brought under any other IIA.[67] One of the reasons that has been advanced for this occurrence is the express provision for NDTP submissions that are utilised in both NAFTA and CAFTA-DR. [68] This allows for home states, who would not ordinarily be a party to the dispute to make submissions on the way treaty provisions should be interpreted. It also ensures that the NDTP have knowledge of the dispute and the issues of interpretation that may arise and with this knowledge they are able to invoke their rights to file submissions on issues of interpretation of treaty provisions. It is argued that the inclusion of an express rule on NDTP submissions in the ICSID Rules may have a similar effect. Numerous scholars and commentators have recognised the use of NDTP submissions as a viable means of ensuring that

66 Mehranvar & Johnson, supra n 34 at 274.
67 Ibid at 277–8. While there are a limited number of known cases brought under CAFTA-DR, in seven out of the seven known cases, home states have made use of the NDTP submissions.
68 Ibid at 278.

treaty parties are able to clarify their understanding of treaty provisions.[69] This is beneficial to the interpretation process as it would allow the home state, which has a substantial interest in the interpretation of treaty provisions,[70] an opportunity to have a say regarding how a particular treaty provision should be interpreted in line with what the parties intended. The role of the home state in this regard is already contemplated in light of the fact that treaty parties are viewed as 'masters of their treaties.'

d. ***What gaps still exist in the system?***

Despite the changes that have been incorporated in the system, there are still some outstanding issues that have not been dealt with that would still be of concern and would need to be addressed.

i. Independence and impartiality of arbitrators

Having an independent and impartial adjudicator for the resolution of disputes is an essential element of any dispute resolution system.[71] Unlike court judges who have a specific governing body, are bound by strict ethical rules and subject to a system of checks and balances through the process of appeal and review, no such mechanisms exist within the field of arbitration. Consequently, arbitrators are viewed as being largely unregulated and unmonitored (save for institutional oversight). This has fostered growing concerns regarding arbitrator independence and impartiality.[72] The non-exclusive nature of arbitration, is of particular concern as individuals can act as arbitrators and counsel at the same time.

ii. Coherence and predictability

The concerns with the coherence and predictability of international arbitration have arisen because of similar cases being decided differently. This goes against one of the

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69 Geoffrey Gertz and Taylor St. John, 'State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries' (June 2015) GEG & BSG Policy Brief, 2; Lise Johnson and Merim Razbaeva, 'State Control Over Interpretation of Investment Treaties' (April 2014) CCSI Policy Paper; Lauge N Skovgaard Poulsen and Geoffrey Gertz, 'Reforming the Investment Treaty Regime: A 'Backward-Looking' Approach' (March 2021) Briefing Paper, Global Econ & Finance Prog.

70 As they too would be bound by the same interpretation should the home state find itself in the position of a host state.

71 Olga K Byrne 'A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party-Appointed Arbitrators on a Tripartite Panel' (2003) 30 *Fordham Urban Law Journal* 1815–47 at 1815.

72 Henry Gabriel & Anjanette H Raymond 'Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards' (2005) 5 *Wyoming Law Review* 453–70 at 456.

fundamental principles of fairness which requires that like cases be treated the same.[73] As a result of this, there is a need to address the occurrence of inconsistent decision making in international investment arbitration.

iii. Host state's access to dispute settlement procedure

Host states are not able to bring claims against the investor for their conduct which may have negatively impacted their citizens.[74] This is because the agreement to arbitrate is made *perfecta* by the investor initiating arbitral proceedings. However, where the investor has not expressly consented to the arbitration, the host state would not be able to initiate arbitral proceedings. To address these concerns, some arbitration rules allow host states to bring counterclaims against investors.[75] Despite the rules of most arbitral institutions making provision for the use of counterclaims, there have been two key obstacles that have been identified by arbitral tribunals in accepting counterclaims made by host states.[76] These two obstacles are whether or not the agreement to arbitrate provides the tribunal with jurisdiction over the determination of counterclaims and the question as to what obligations are owed by the investor to the host state.[77]

In the case of *AMTO v Ukraine*[78], Ukraine sought to bring a counterclaim in accordance with the arbitral rules of the Stockholm Chamber of Commerce. The applicable IIA was the Energy Charter Treaty whose dispute resolution clause provides for the resolution of disputes relating to an alleged breach of an obligation of the host state. The tribunal held that its jurisdiction to hear a counterclaim was dependent on the contents of the dispute resolution clause in the applicable treaty. In this instance, the dispute resolution clause only extended jurisdiction to the tribunal to determine matters arising from an alleged breach of an obligation of the host state.

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73 Irene M Ten Cate 'International Arbitration and the Ends of Appellate Review' (2011) 44 *New York University Journal of International Law and Politics* 1109–204 at 1184.

74 Tomoko Ishikawa 'Counterclaims and the Rule of Law in Investment Arbitration' (2019) 113 *American Journal of International Law* 33–7 at 35.

75 See for example Rule 48 of ICSID Arbitration Rules 2022.

76 Kryvoi, supra n 35 at 216.

77 Ibid.

78 *Limited Liability Company AMTO v Ukraine* SCC Case No. 080/2005 Final Award March 26, 2008.

The tribunal found that it was limited by the terms defined in the dispute resolution clause and could not determine the counterclaim raised by the host state.[79]

2.3. Redesigning the system

As a widely used dispute settlement mechanism already exists in the form of investor-state arbitration, the reform process should make use of existing mechanisms and strategies. This does not suggest the creation of an entirely new system, but to make the one that already exists better and more adaptable to changing circumstances by recalibrating and re-aligning it as needed.

The sections that follow will match concerns with solutions that can be incorporated into the international investment regime to address the gaps identified above.

a. Independence and impartiality of arbitrators

UNCITRAL Working Group III, together with ICSID have circulated a Draft Code of Conduct (Draft Code) for arbitrators.[80]The Draft Code addresses issues of, independence and impartiality,[81] limitation on multiple roles,[82]duty of due diligence, [83] integrity and competence,[84] *ex parte* communications,[85] confidentiality,[86] fees and expenses,[87] and disclosure requirements.[88] The Draft Code has been designed to be applicable to investment arbitration disputes and also in the instance that a different dispute resolution mechanism would be implemented.[89] As the Draft Code is still under debate before UNCITRAL Working Group III, this paper seeks to make contributions on some of the issues that have arisen in the discussions before Working Group III.

From the report of the recent Working Group III session, one of the most contentious aspects contained under discussion has been Article 4 of the Draft Code relating to

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79 *AMTO v Ukraine* 118. See also *Spyridon Roussaliss v Romani*a, ICSID Case No Arb/06/1 Award Dec 7, 2011

80 UNCITRAL Working Group III Possible reform of investor-State dispute settlement (ISDS) Draft Code of Conduct A/CN.9/ WGIII/ WP.216.

81 Article 3 of the Draft Code of Conduct.

82 Article 4 of the Draft of Conduct.

83 Article 5 of the Draft Code of Conduct.

84 Article 6 of the Draft Code of Conduct.

85 Article 7 of the Draft Code of Conduct.

86 Article 8 of the Draft Code of Conduct.

87 Article 9 of the Draft Code of Conduct.

88 Article 10 of the Draft Code of Conduct.

89 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022) A/CN.9/1124 page 40.

limitations of multiple roles. The contentious issues arising from this article are whether there should be a cooling off period, and if so, how long should it be,[90] and whether parties should be able to derogate or exclude the applicability of the Draft Code.[91] The cooling off period provides that for a period after the conclusion of the dispute, a former arbitrator cannot act as counsel in another dispute involving the same parties, or same measures or same treaty provisions. Some states parties are for the cooling off period, and others are against it.[92] It is common cause, that within the investor-state regime, arbitrators are also practicing legal practitioners. The purpose of the rule limiting multiple roles is to prevent the occurrence, where an arbitrator, concurrently acts as a legal practitioner in another dispute involving the same parties, measure or treaty provisions. The possibility of a lack of independence and impartiality is quite clear in the instance of concurrent roles. Once the arbitration is concluded and a decision has been rendered, a 'precedent'[93] has been set that can be used by any legal practitioner in arguing the merits of their case or by any tribunal substantiating their findings.

The purpose of the rule on the limitation of multiple roles is to ensure that the arbitrator remains independent and impartial during the proceedings and is not influenced by external factors in rendering a decision. After the decision is rendered, the arbitrator has become *functus officio*. In the author's view, the question of independence and impartiality would therefore not arise after the proceedings have been concluded. The former arbitrator, should be free to accept instructions in any future matters, involving similar parties, and similar treaty provisions provided that the mater wherein the arbitrator accepts instructions has arisen after the conclusion of the investment dispute in which he acted as arbitrator. Thus, while acting as counsel, one cannot accept an appointment as an arbitrator. If the roles of arbitrator and counsel are not concurrently held in similar cases, there would be no infringement after the conclusion of the dispute, rendering the requirement of a cooling off period unnecessary. To cater for instances of any future conflict, Article 3(2)(c) which creates the obligation not to allow any past or present conduct to influence conduct or judgement can be extended. The

90 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-third session (Vienna, 5–16 September 2022) A/CN.9/1124 34 para 233-236.
91 Supra 35 para 240.
92 Supra 34 para 234-235.
93 The term precedent is used loosely as there is doctrine of precedent in arbitration.

extension includes any future financial, business, professional or personal relationships to cater for the concerns that the cooling off period seeks to address without the over limitation that a cooling off period provides.

The language used in Article 4 of the Draft Code of Conduct allows for parties to derogate from its provisions by agreement. In the author's view, this would undermine the effectiveness of the provision on the limitation on multiple roles and of the code in general. This is because the purpose of the rule is to ensure the independence and impartiality of the arbitrator as well as to protect the integrity of the arbitral proceedings. Article 3(2)(f) of the Draft Code of Conduct provides that the obligation to maintain independence and impartiality includes not taking any action 'that creates the appearance of a lack of independence or impartiality.' The very fact that the issue of double hatting has caused such significant controversy even in the absence of empirical evidence of bias, is sufficient to show that the practice of double hatting creates the appearance of lack of independence and impartiality. While the parties would have agreed to waive the rule on limitation of multiple roles, this agreement does little to improve public perceptions on the integrity of the arbitral process. Despite the fact that the arbitral process is essentially consensus based and allows parties to agree to the manner in which the process will be run, the question of ensuring the independence and impartiality of arbitrators is vital to the legitimacy of the individual decision-maker. It is also vital for the legitimacy of the administering institution as a whole and as such should not be subject to party autonomy. [94] This is to ensure that investment arbitration remains a fair forum for the resolution of disputes and to maintain trust in the process.[95]

To be effective, the code of conduct would have to be binding on arbitrators, arbitral institutions and tribunals as opposed to being a soft law guide. This will create a binding obligation on arbitrators in the manner they conduct themselves during arbitral

94 Maria Nicole Cleis 'Analysis of Existing Reform Proposals' *The Independence and Impartiality of ICSID Arbitrators* (2017) 188–223 at 192 available at: https://www.jstor.org/stable/10.1163/j.ctt1w8h3hc.10.

95 Lawrence W Newman & Michael J Radine (eds) 'Ethics in International Arbitration: Soft Law Guidance for Arbitrators and Party Representatives' *Soft law in international Arbitration* (2014) 239–56 at 239.

proceedings, thereby providing greater assurance to the public on the independence and impartiality of arbitrators. It would also provide a set standard against which the independence and impartiality of arbitrators can be measured and ensure uniformity in the way in which challenges to arbitrators will be handled.

b. Correctness of arbitral decisions

In addition to allowing home states, the right to make submissions which has been incorporated into the rules of ICSID, the treaty state parties, could make use of binding interpretative agreements to direct the way tribunals interpret treaty provisions. Most treaties are silent on the powers of state parties to issue interpretative texts on the treaty save for NAFTA, which provides that the FTC can issue binding interpretive notes on NAFTA treaty provisions.[96] By making use of binding interpretive notes, states, who are the masters of the agreement[97] are able to provide greater clarity on the scope and content of treaty provisions such that investors will be in a position to exercise their rights. Binding interpretive notes will also ensure that tribunals exercise their adjudicatory power subject to the interpretations that would have been adopted by the treaty parties. The court in *ADF Group Inc. v United States,*[98] held that the use of the interpretive note was an "authentic and authoritative" source of instruction as to what the parties had intended in the conclusion of NAFTA.[99] The use of interpretive notes by the treaty parties would also be in line with Article 31(3) of the VCLT, which provides that when undertaking treaty interpretation, the tribunal shall take into account subsequent agreements between the parties regarding the interpretation of the treaty or the application of its provisions.[100] In order to ensure that the appropriate weight is placed on treaty parties interpretive notes, provisions providing for the rights of the state parties to the treaty to issue interpretive notes should be incorporated into

96 Article 1131(2) of NAFTA.

97 Tarcisio Gazzini 'Beyond Protection: The Role of the Home State in Modern Foreign Investment Law' in Catharine Titi (ed) *Public Actors in International Investment Law* (2021) 19–36 at 22 available at: https://doi.org/10.1007/978-3-030-58916-5_2.

98 ICSID Arb (AF)/001/1 par 177.

99 This approach was also adopted by the tribunal in Methanex v United States, where the tribunal endorsed the use of interpretive notes as providing clarity on the proper intention of the parties in concluding the treaty.

100 For a discussion on the use of Article 31(3) of the VCLT see generally Anthea Roberts 'Power and Persuasion In Investment Treaty Interpretation: The Dual Role of States' (2010) 104 *The American Journal of International Law* 179–225.

IIAs. These provisions would also set out the binding effect of any interpretive notes issued by the parties.

In addition to the above, state parties could form ad hoc commissions that would be tasked with reviewing the interpretations reached by tribunals in respect of any of the substantive provisions provided for in the IIAs. These commissions would then make recommendations to the state parties on the potential impact of any interpretations adopted by tribunals. By so doing, state parties would be able to either expressly adopt the interpretations produced by tribunals as defining the meaning of any substantive provisions or reject the same as having a far-reaching effect not intended by the parties. This would also assist in countering the instances of arbitral tribunals discounting interpretations provided by the home state and respondent state in their submissions in a dispute. In *Infinito Gold v Costa Rica*, the tribunal rejected the interpretation offered by the respondent and home state, which was evidence of the parties' subsequent agreement on the meaning of the FET standard. The tribunal opined that submissions made in the context of disputes should be discounted if they are adverse to the claimant's interests.[101] In *Eco Oro v Colombia*, the respondent and home state provided detailed submissions, including on their (shared) interpretation of the general exceptions clause. The tribunal, however, disagreed with their interpretation, on the basis that if the parties had intended a particular interpretation, they would have incorporated it into their treaties, even though the state parties made their intentions abundantly clear in their respective submissions.[102] The ad hoc commissions would be in a position to assess the submissions made by both the home and respondent state in a dispute. In instances of significant points of convergence, these ad hoc commission would be able to propose the incorporation of the of the submission of the home and respondent states into the text of the treaty. This would ensure that interpretation of the treaty by the state parties is given effect in future disputes relating to an interpretation of the same text. This would also be the case,

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101 *Infinito Gold v Costa Rica*, ICSID Case No ARB/14/5, Award (3 June 2021), para 339 wherein the tribunal held that '[t]he submissions made by Costa Rica and Canada in this arbitration reflect legal arguments put forward in the context of this dispute to advance their respective interests. Although they happen to coincide, they do not reflect an agreement as just described over the interpretation of the BIT.'

102 *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum (9 September 2021), paras 826–37. See also *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016), para 476.

where the corresponding interpretations were raised in different matters. The ad hoc commissions would identify instances where treaty parties' advance interpretations on similar provisions albeit in different cases. These would serve as the basis for negotiating a binding joint interpretation between two treaty parties regarding a particular provision. The use of interpretations by treaty parties in this manner would lead to greater clarity in treaties and limit the discretion of the tribunal in providing unintended interpretations.

c. Host state's access to the dispute settlement mechanism

It is important for the host state to be able to bring counterclaims. The relevant dispute resolution clause in the applicable IIA is determinative as to the question of whether the tribunal will have the jurisdiction to determine a counterclaim by the host state. For the tribunal to have jurisdiction to hear counterclaims by the host state, the dispute resolution provisions in the IIA will have to specifically provide for this. As opposed to granting the tribunal jurisdiction to decide disputes arising from the host state's breach of its obligations,[103] the dispute resolution provision will have to grant the tribunal the general jurisdiction to hear disputes arising out of a violation of any of the obligations that are contained in the treaty. As such, the parties will have provided consent for the tribunal to adjudicate disputes arising out of the violation of obligations by the host states and the investors respectively. This will give effect to the provisions on counterclaims that are already provided for in the institutional rules.

2.4. Conclusion

The above DSD analysis has been undertaken to assist in ascertaining the reform required for the investment arbitration framework. The DSD analysis assisted in identifying the strengths and weaknesses in the system as well as in making recommendations for a redesign of the system. This DSD analysis showed that international investment arbitration is capable of reforming and adapting to accommodate the needs of its users. There is sufficient room for investment arbitration to continue to grow and adapt to changing circumstances while at the same time providing an effective mechanism for the settlement of disputes.

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103 As is the case with most dispute resolution clauses.

The High Court's Jurisdiction in Taking Evidence in Arbitral Proceedings

Prince Kanokanga*

Abstract

On 13 September 1996, the Arbitration Act [Chapter 7:15] (the Act) was enacted in Zimbabwe. The purpose of the Act is to encourage the use of arbitration as an agreed method of resolving commercial, non-commercial disputes, domestic and international disputes. The Act adopted with minor modifications, mainly of a procedural nature, the Model Law on International Commercial Arbitration (Model Law) as adopted by the United Nations Commission on International Trade Law on 21 June 1985. The Act facilitates the recognition and enforcement of arbitration agreements and arbitral awards in Zimbabwe as it gave effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on 10 June 1958 (the New York Convention). The adoption of the Model Law in Zimbabwe traces its roots to the recommendations of the Law Development Commission of Zimbabwe (LDCZ) on Arbitration which recommended that the Arbitration Act [Chapter 7:02] (the old Act) be repealed and replaced as it had become outdated and further in response to the upsurge in international arbitrations that had become a common feature of international commercial transactions. One of the modified provisions of the Model Law as it applies to Zimbabwe is Article 27 which deals with court assistance in taking evidence. An arbitral tribunal ex officio or a party with the approval of an arbitral tribunal may seek assistance from the High Court in taking evidence. In enacting the Act, the legislature enumerated the specific type of court assistance which a party with the approval of an arbitral tribunal or an arbitral tribunal ex officio may seek from the High Court. As a result, in Zimbabwe, the powers of the High Court to assist in the taking of evidence in arbitral proceedings, when requested are clearly spelt out.

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1. Introduction

Article 27 of the Model Law on International Commercial Arbitration (Model Law) concerns court assistance in taking evidence.[1] It is important in the beginning to highlight that Article 27 of the Model Law as it applies to Zimbabwe was adopted by the legislature on the recommendations of the Law Development Commission of Zimbabwe (LDCZ).[2] Article 27 of the Model Law was adopted with some procedural modifications similar to those made in other countries[3] which reflect the comprehensive manner in which assistance may be sought from the courts.[4]

In terms of this provision of the Model Law, where the place of arbitration is in Zimbabwe,[5] an arbitral tribunal or a party with the approval of the arbitral tribunal may specifically request assistance from the High Court of Zimbabwe[6] in taking evidence.[7] Pursuant to the fact that an arbitral tribunal's authority is founded on an agreement between the parties,[8] an arbitral tribunal lacks the power to compel the attendance of witnesses before an arbitral tribunal to give evidence or produce documents.[9] Consistent with this realism, Article 27 of the Model Law is an important provision of

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1 The background and *travaux préparatoires* of Article 27 of the Model Law as adopted in 1985 are contained in the following documents:
Report of the United Nations Commission on International Trade Law on the work of its 18th session (Official Records of the General Assembly, 40th Session, Supplement No 17 (A/40/17)), paras 11 – 333; Reports of the Working Group: A/CN9/216; A/CN9/233; A/CN9/245; A/CN9/246, annex: A/CN9263 and Add 1 -2; A/CN9/264. The relevant working papers are referred to in the reports. Summary records of the 325th, 33rd and 332nd UNCITRAL meetings.

2 The Law Development Commission of Zimbabwe (LDCZ) on Arbitration comprised of Chief Justice AR Gubbay (Chairman), Mr AR McMillan (Deputy Chairman), Mr PA Chinamasa (Attorney General), Mr Y Omerjee (Secretary for Justice, Legal and Parliamentary Affairs), Mr BC Brown (Law Reviser), Mrs B Chanetsa (Ombudsman), Messers W. Ncube and G. Feltoe (University Representatives), Mr H Kantor (Senior Legal Practitioner), Justice Robison (Judiciary Representative) and Mr T Uchena (Magistracy Representative).

3 Article 27 of the Model Law as it has been modified in Zimbabwe is similar to the Article 27 applicable in jurisdictions which include, Australia, India, Hong Kong, Malaysia, New Zealand, Nigeria, Singapore, Tunisia and Zambia.

4 M Roth 'UNCITRAL Model Law on International Commercial Arbitration' in FB Weigand (ed) *Practitioner's Handbook on International Commercial Arbitration* (2009) 1073.

5 Section 3 of the Arbitration Act [Chapter 7:15].

6 Section 27 of the Model Law as it applies to Zimbabwe specifically mentions the High Court as the competent court. See also, UNCITRAL, Report on the Working Group on International Contract Practices on the Work of its Third Session, UN Doc. A/Cn.9/216 (23 March 1982) para 61.

7 Article 27(1) of the Model Law.

8 D Kanokanga & P Kanokanga *UNCITRAL Model Law on International Commercial Arbitration: A Commentary on the Zimbabwean Arbitration Act [Chapter 7:15]* (2022) 292.

9 Article 27(2)(a) of the Model Law.

the law in Zimbabwe which 'deals with the interaction between arbitration and court procedures, and the intervention of the courts in the arbitral process.'[10]

This article discusses the High Court's jurisdiction in taking evidence in arbitral proceedings seated in Zimbabwe.[11] Some national laws are silent on the procedure or remedy which are available to arbitral tribunals or the parties in evidentiary matters.[12] Evidence plays an important role in arbitration.[13] Further, this article discusses the High Court's authority in terms of Article 27 of the Model Law to issue a subpoena to compel the attendance of witnesses before an arbitral tribunal to give evidence or to procedure documents.[14] Without limiting the generality of instances in which the High Court in terms of Article 27 of the Model Law in Zimbabwe may grant a request to an arbitral tribunal or to a party which has obtained tribunal, this article will in-depth detail the High Court's powers and competences and the rules on which they are to be based.

2. Court intervention in arbitral proceedings

The courts in Zimbabwe observe Article 5 of the Model Law,[15] which deals with judicial intervention in arbitration proceedings. Arbitration is a specialised field of practice that cannot function without the assistance of the courts. The courts involvement in arbitration is a 'fact of life as prevalent as the weather'.[16] Resultantly, intervention or supervision by the courts is a *sine qua non* of arbitration,[17] without which the latter would be wholly ineffective. Courts in general have coercive power that arbitral tribunals do not possess. The importance of court intervention in arbitration can also

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10 S Ali & OG Repousis 'Article 27: Court Assistance in Taking Evidence' in I Bantekas et al (eds) *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) 718.

11 For more generally on evidence in arbitration see, ND O'Malley *Rules of Evidence in International Commercial Arbitration: An Annotated Guide* (2013).

12 *Sh Satinder Narayan Singh v Indian Labour Cooperative Society Ltd & Others* 2008 (1) ARBLR 355 (Del) 3 – 4.

13 CT Salon & S Friedrich, 'Obtaining and Submitting Evidence in International Arbitration in the United States' (2013) Vol 24 *The American Review of International Arbitration* 549, 549.

14 Article 27(2)(a) of the Model Law.

15 For a historical analysis of Article 5 see *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush & Another* [2004] SGHC 26.

16 JDM Lew 'Does national court involvement undermine the international arbitration process?' (2009) Vol 24 *American University International Law Review* 489, 490.

17 M Bislimi 'Extent of court intervention on arbitration under Kosovo arbitration law and UNCITRAL Model Law' (2016) Vol 3 *Journal of Dispute Resolution in Kosovo* 41, 42.

be considered when one considers the different schools of thought.[18] These schools of thought include the contractual theory, the jurisdiction theory, the mixed or hybrid theory and the delocalisation theory.[19]

In passing, the contractual theory is based on the belief that an arbitral tribunal's authority stems from an agreement between the parties. The jurisdictional theory, conversely, is based on the idea that the power of an arbitral tribunal is delegated by the state, and it is not founded on an agreement of the parties.[20] The mixed or hybrid theory, in principle, combines both the contractual and jurisdictional theory.[21] Finally, there is the delocalization theory,[22] which is based on the premise that an arbitral tribunal should be free from the intervention of the local laws and the courts of the seat of arbitration.[23]

Following the obiter discussion on the different legal theories of law, what is important to highlight is that, that whether the seat of arbitration is inside or outside of Zimbabwe,[24] the provisions of Article 5 of the Model Law still apply to the arbitration.

Holtzmann and Neuhaus have stated the following regarding Article 5 of the Mode Law:

> "Article 5 states a simple, but very important, principle. Its purpose is to oblige the draftsmen of the Law to state any instances in which court control is envisioned, in order to increase certainty for parties and arbitrators and further the cause of uniformity. As noted by the Secretariat the effect of the provision is to 'exclude any

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18 For a comprehensive discussion of the theoretical models of international commercial arbitration, see generally, E Gaillard *Legal Theory of International Arbitration* (2010); WL Kidane *The Theories and Theoreticians of International Arbitration* (2017) 63 – 90.

19 M Ahmed 'The Influence of the Delocalisation and Seat Theories upon Judicial Attitudes Towards International Commercial Arbitration' (2011) Vol 77 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 406 – 422.

20 See generally, E Gaillard 'Theories of International Arbitration' in S Kroll, AK Bjorklund & F Ferrari (eds) *Cambridge Compendium on International Commercial and Investment Arbitration* (2023) 27 – 46.

21 WH Ross & DE Conlon 'Hybrid Forms of Third – Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration' (2000) Vol 25 *The Academy of Management Review* 416 – 427.

22 R Brazil-David 'Harmonization and Delocalization of International Commercial Arbitration' (2011) Vol 28 *Journal of International Arbitration* 445 – 466.

23 G Yanez 'Legitimacy and Legality within the Seat and Delocalisation Theory of International Commercial Arbitration' (2022) Vol 5 *De Lege Ferenda* 66 – 83.

24 For a discussion on the difference between the seat and venue of arbitration proceedings, see generally D Kanokanga *Commercial Arbitration in Zimbabwe* (2020) 49 – 53.

> general or residual powers' given to the court of the enacting State in statutes other than the Model Law. The Commission made it clear that the term 'intervene' in Article 5 included court action that might be categorized as 'assistance' to the arbitration rather than intervention in it. Article 5 should not be taken to express hostility to court intervention or assistance in appropriate circumstances, but only to satisfy the need for certainty as to when court action is permissible. The Model Law provides for or envisages court involvement in the following Articles: 8 (arbitration agreement and substantive claim before court), 9 (interim measures), 11 (appointment of arbitrators), 13 (challenge procedure), 14 (failure or impossibility to act), 16 (competence of arbitral tribunal to rule on its jurisdiction), 27 (court assistance in taking evidence), 34 (setting aside an award) and 35 and 36 (recognition and enforcement of awards)."[25]

In Zimbabwe, there are four courts that tend to be involved in arbitration, namely the Magistrates Court, the Labour Court, the High Court and the Supreme Court.

Article 5 of the Model Law has excluded the inherent jurisdiction of the High Court in arbitral proceedings.[26] Resultantly, the High Court is the body or organ of the judicial system of Zimbabwe that has been reposed with minimum judicial intervention in arbitral proceedings in Zimbabwe. For instance, in terms of section 4 of the Act, the High Court may grant leave for arbitration of a matrimonial case, or a cause relating to status.[27] The High Court may also grant leave for arbitration for a matter involving a minor or an individual under a legal disability.[28]

In general, the High Court has limited authority to intervene and assist in arbitral proceedings in four instances, that is, prior to the commencement of the arbitration, at the commencement of the arbitration, during the pendency of the arbitration and at the post-award stage.[29] The justification of the principle of minimum judicial interference

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25 HM Holtzmann & JE Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) 216.

26 Ibid 216.

27 Section 4 (2) (d) of the Arbitration Act [Chapter 7:15].

28 Section 4 (2) (e) of the Arbitration Act [Chapter 7:15].

29 The specific involvement of the High Court in terms of the Model Law is in respect of the following (a) Article 8 (arbitration agreement and substantive claim before court), (b) Article 9 (interim measures, (c) Article 11 (appointment of arbitrators), (d) Article 13 (challenge procedures), (e) Article 14 (failure or impossibility to act), (f) Article 16 (competence of arbitral tribunal to rule on its jurisdiction, (g) Article 17 (power of arbitral tribunal to order interim measures), (h) Article 27 (court assistance in taking evidence), (i) Article 34 (setting aside an award), (j) Article 35 and (k) Article 36 (refusal of recognition or enforcement).

ensures the efficiency of the arbitral process.[30] This ensures that an arbitral proceedings can continue, pursuant to the agreement of the parties or under the direction of an arbitral tribunal, without delays.[31]

3. The importance of evidence

There does not appear to be a universally accepted definition of the term 'evidence'.[32] Be that as it may, the term 'evidence' is derived from the Latin word '*evidentia*' which means that which is obvious.[33] In both arbitration and litigation, evidence is important as it 'plays an important role in the administration of justice.'[34] Whether the arbitral proceedings are *ad hoc* or under the auspices of an arbitral institution, evidence is important. It matters not whether it is domestic or international arbitration or commercial or non-commercial arbitration, evidence plays an important part in the proceedings.[35]

Evidence is important as it assists an arbitral tribunal in determining the truth with regard to the disputed issues before an arbitral tribunal.[36] Thus, the taking of evidence whether through documents, witness testimony or other means is an integral component in international commercial arbitration.[37] In terms of Article 27 of the Model Law, the courts may aid in the taking of evidence.[38]

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30 G Banerji 'Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts' (2009) Vol 21 *National Law School of India Review* 39 – 53.

31 GB Born 'The Principle of Judicial Non - Interference in International Arbitral Proceedings' (2009) Vol 34 *University of Pennsylvania Journal of International Law* 999- 1033.

32 In general, evidence can be divided into five main classes, that is (a) documentary evidence, (b) expert evidence, (c) on-site inspection of subject matter i.e. inspection in loco, (d) oral evidence, and (f) witness evidence.

33 JAT Lancaster & R Raiswell *Evidence in the age of the new sciences* (2018) 4.

34 P Huni & P Dewah 'Admissibility of digital records as evidence in Bulawayo High Court in Zimbabwe' (2019) Vol 52 *Journal of the South African Society of Archivists* 133,133.

35 M. Malacka 'Evidence in international commercial arbitration" (2013) Vol 13 *International and Comparative Law Review* 97 – 104.

36 R Pietrowski 'Evidence in international arbitration' (2006) Vol 22 *Arbitration International* 373 – 410.

37 See generally J Waincymer *Procedure and evidence in international arbitration* (2012); F Ferrari & F Rosenfeld (eds) *Handbook of evidence in international arbitration: key issues and concepts* (2022).

38 The *travaux préparatoires* on Article 27 of the Model Law as adopted in 1985 are contained in the following documents: (a) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)), paras 11 – 333 (b) Reports of the Working Group: A/CN.9/16; A/CN.9/233; A/CN.9/25; A/CN.9/246, annex; A/CN.9/263 and Add 1 – 2; A/CN.9/264. Relevant working papers are referred to in the reports (c) Summary records of the 325th, 330th and 332nd UNCITRAL meetings.

In terms of Article 27 of the Model Law, the High Court may come to the aid of an arbitral tribunal or a party with the approval of the arbitral tribunal in the taking of evidence.[39] In terms of Article 27(1) of the Model Law, the High Court has the competence to grant a request for assistance in taking evidence in arbitral proceedings according to its rules on taking evidence.[40]

Section 4(2)(c) of the Arbitration Act [Chapter 7:15] is instructive, in that criminal cases are not capable of arbitration in Zimbabwe.[41] Resultantly, the High Court's rules of evidence in terms of Article 27 of the Model Law are the civil rules of evidence pursuant to Civil Evidence Act [Chapter 28:01]. In terms of section 2 of the Civil Evidence Act [Chapter 28:01], civil proceedings refer to any proceedings which are not criminal in nature, and which are before any court to which the strict rules of evidence apply. The same Act, also provides for the competence of witnesses generally.[42] It also provides for the incompetence of certain persons from giving evidence, such as persons suffering from any mental disorder or defect;[43] or any person under the influence of intoxicating liquor or drugs.[44] Even the spouse of a party to proceedings is regarded as competent and compellable as a witness in those proceedings.[45] There is a plethora of cases in Zimbabwe which deals with issues regarding hearsay evidence,[46] evidence in previous legal proceedings,[47] the parole evidence rule[48] and in general on all issues concerning the admissibility of evidence.[49] It is trite law that in civil proceedings, that

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39 The *travaux préparatoires* on Article 27 of the Model Law as adopted in 1985 are contained in the following documents: (a) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)), paras 11 – 333 (b) Reports of the Working Group: A/CN.9/16; A/CN.9/233; A/CN.9/25; A/CN.9/246, annex; A/CN.9/263 and Add 1 – 2; A/CN.9/264. Relevant working papers are referred to in the reports (c) Summary records of the 325th, 330th and 332nd UNCITRAL meetings.

40 Article 27(1) of the Model Law.

41 Section 4(2)(c) of the Arbitration Act [Chapter 7:15].

42 Section 4 of the Evidence Act [Chapter 28:01].

43 Section 5(a) of the Civil Evidence Act [Chapter 28:01].

44 Section 5(b) of the Civil Evidence Act [Chapter 28:01].

45 Section 6(2) of the Civil Evidence Act [Chapter 28:01].

46 Section 27 of the Civil Evidence Act [Chapter 28:01]. See also *Hiltunen v Hiltunen* 2008 (2) ZLR 296 (H).

47 Section 28 of the Civil Evidence Act [Chapter 28:01].

48 *Nhundu v Chiota & Another* 2007 (2) ZLR 163 (S).

49 Part VII of the Civil Evidence Act [Chapter 28:01]. For more information of illegally obtained evidence, see generally, *Paradza v Chirwa NO & Others* 2005 (2) ZLR 94 (S).

is proceedings which are not criminal in nature, the burden of proof is based upon a preponderance of probability.[50]

4. Court assistance in taking evidence

Article 27 of the Model Law provides a 'solution to the "toothlessness" which until recently played in international commercial arbitration.'[51] The words 'court assistance in taking evidence' are apt as a matter of language to cover all evidence relevant[52] and necessary in arbitral proceedings.[53] The adoption of the Model Law in Zimbabwe endorsed the recommendations of the LDCZ in its Final Report on Arbitration to include a modified Article 27 of the Model Law with regards to the court's assistance in taking evidence.[54] The modifications[55] to Article 27 of the Model Law in Zimbabwe are mainly procedural and reflect the comprehensive manner in which assistance can be sought from the High Court.[56] Resultantly, the modifications clarify the issue of court assistance in taking evidence and also create the authority in law for the High Court to render such assistance.

In terms of Article 27 of the Model Law, the High Court may assist an arbitral tribunal or a party to the arbitral proceedings with the approval of the arbitral tribunal, to request from the High Court assistance in taking evidence. For the purposes of the arbitral proceedings, the High Court has the same power as it has for the purpose of proceedings before it to make an order for the discovery of documents and interrogatories.[57] The relates to the issue of a commission of request for the taking of evidence outside the jurisdiction.[58]

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50 *Zimbabwe Financial Holdings v Mafunga* 2005 (2) ZLR 289 (S).

51 II Dore *Arbitration and conciliation under the UNCITRAL rules: a textual analysis* (1986) 122.

52 *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] SGHC 67 at 82.

53 *A and B v C, D and E* [2020] EWCA Civ 409.

54 Law Development Commission of Zimbabwe Final Report on Arbitration Law in Zimbabwe, Report No. 31, January 1994 at 54.

55 Similar modifications to Article 27 of the Model Law have also been adopted in other Model Law jurisdictions, such as Australia, Hong Kong, India, Malaysia, New Zealand, Singapore, Tunisia and Zambia.

56 In terms of section 15 of the Arbitration Act [Chapter 7:02] (the Old Act) any party to a submission could take out process in the High Court for the attendance of a witness, but no person was compelled to produce any document which he or she could not be compelled to produce on the trial of any action. Section 15 of the Old Act also contained a comprehensive list of orders.

57 Article 27 (2) (c) (i) of the Model Law.

58 Article 27 (2) (c) (ii) of the Model Law.

The High Court may assist an arbitral tribunal or a party to the arbitral proceedings with the approval of the arbitral tribunal to request for the detention, preservation or inspection of any property or thing which is in issue or relevant to the arbitral proceedings. This Court may also authorise, for any of those purposes, the entering by any person into any land or building in the possession of a party. It may also grant authority for any sample to be taken or any observation (through photography or video recording or any other means of observation) to be made or experiments to be carried out which may be necessary or expedient for the purpose of obtaining full information or evidence.[59]

The High Court has the authority to issue a *subpoena* to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents.[60] It also has authority to order any witness to submit to examination on oath before the arbitral tribunal, or before an officer of the court or any other person for the use of the arbitral tribunal.[61]

5. An arbitral tribunal's discretion regarding a request for assistance in taking evidence

In terms of Article 27 (1) of the Model Law, the High Court may only assist in the taking of evidence for use in arbitral proceedings where a party to the arbitral proceedings has been granted leave by an arbitral tribunal to make such a request to the High Court, or where the arbitral tribunal *ex offico* is desirous of the court's coercive[62] authority in taking of evidence.[63]

Where a party to the arbitral proceedings makes a request to an arbitral tribunal for assistance in taking evidence, the request should not be aimed at delaying the arbitral proceedings,[64] since such requests tend to be lengthy and cost consuming. Arbitral tribunals have a moral obligation to ensure that arbitral proceedings are conducted

59 Article 27 (2) (c) (iii) of the Model Law.
60 Article 27 (2) (a) of the Model Law.
61 Article 27 (2) (b) of the Model Law.
62 R Moloo 'Evidentiary issues arising in an investment arbitration' in C Giorgetti (ed) *Litigating international investment disputes: a practitioner's guide* (2014) 305.
63 TH Webster 'Obtaining evidence from third parties in international arbitration' (2001) Vol 17 *Arbitration International* 143 – 162.
64 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration A/C/39/246, Art 27, para 5.

expeditiously[65] and in the most economical manner possible to bring finality and a determination in the form of an arbitral award upon conclusion of the dispute.[66]

As one commentator has noted, the evidentiary 'tools in arbitration should balance sensitivity towards cost and delay against the parties' interest in due and correct decisions.[67] Resultantly arbitral tribunals should weigh in each instance, the risks of dilatory tactics against the danger of wasting money and time.

The High Court's assistance in taking evidence is generally available. However, an arbitral tribunal nor a party with the approval of the arbitral tribunal do 'not enjoy immediate access to the enforcement apparatus of the State.'[68] Consequently, requests must 'therefore be considered at a very early stage of the arbitration.'[69] The request to an arbitral tribunal for court assistance in taking evidence must be relevant[70] and necessary.[71] In order for evidence to be regarded as relevant, the evidence must constitute a fact in issue (*facta probanda*) as evidence from which the existence (or non-existence) of a fact in issue may properly be drawn.[72]

In arbitral proceedings, it is generally the arbitral tribunal that is itself vested with the authority in the taking of evidence.[73] As soon as practicable after the construction of the arbitral tribunal, it is common practice for the arbitral tribunal to convene a preliminary meeting in order to map out the arbitral process. During such preliminary meeting, a provisional timetable for steps to deal with any matters efficiently and

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65 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at 103.

66 *ADG and another v ADI and another matter* [2014] 3 SLR 481.

67 WW Park 'Arbitrators and accuracy' (2010) Vol 1 *Journal of International Dispute Settlement* 25, 25.

68 A Sayed *Corruption in international trade and commercial arbitration* (2004) 99.

69 G Lett 'Arbitration in Denmark: features' in G Cordero-Moss (ed) *International commercial arbitration: different forms and their features* (2013) 136.

70 In *R v Katz* 1946 AD 71 at 78 the court adopted the following definition:
"The word relevant means that any two facts to which it is applied are so related to each other that according to the common course of events one, either taken by itself, or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other."

71 The word 'necessary' has been interpreted as meaning 'necessary for the purposes of justice'. See *Banda v Zambia Newspaper Ltd* (1968) ZR 1 (H).

72 DT Zeffertt 'Evidence' in WA Joubert (ed) *The law of South Africa* (1976) para 399.

73 The rules of evidence in Zimbabwe are that of an adversarial procedure, as opposed to an inquisitorial procedure. The difference between the two procedures, relates to the extent of participation in the proceedings. The 'adversarial system is based on idea that parties arrive at the truth by leading evidence and each then testing the evidence led by the other through cross-examination.' See L Shore & JDM Lew 'International commercial arbitration: harmonizing cultural differences' (1999) Vol 54 *Dispute Resolution Journal* 32 at 35.

expeditiously will be set, as well as considering the issue of evidence and procedure it deems necessary (or the parties deem necessary) for the just and expeditious resolution of the dispute.[74] This includes issues to do with the discovery of documents, the exchange of expert reports and the exchange of witness statements. It is also at the preliminary meeting that the dates of any hearing(s) and the likely length thereof are generally discussed.[75]

In general, an arbitral tribunal can limit the evidence that the parties to the proceedings wish to call.[76] In determining whether a request for court assistance in taking evidence is relevant and necessary, an arbitral tribunal whether in institutional arbitration, *ad hoc* arbitration, or in arbitration based on rules chosen by the parties, should be mindful of any party agreement on the taking of evidence.[77]

It is not usual in international commercial arbitration, for the arbitration to be conducted under the auspices of an arbitration institute or for the parties to agree on the conduct of the arbitration based on the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration[78] or the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration.[79] 'Where investment arbitration is concerned, evidentiary norms in public international law may also apply.'[80] The '[t]aking of evidence is important but should not curtail the efficiency of arbitration.'[81]

Party autonomy is the backbone of arbitration.[82] This principle of arbitration recognizes the parties' freedom to lay down the rules or procedures for the conduct of the proceedings.[83] Where the parties have not agreed on any rules of procedure in

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74 Kanokanga (n 71 above) 99.

75 Ibid 100.

76 *Carlisle Place Investments Ltd v Wimpey Construction (UK) Ltd* (1980) 15 BLR 109.

77 P Landolt 'Arbitrator's initiatives to obtain factual and legal evidence' (2012) Vol 28 *Arbitration International* 549 – 571; E Omeroglu 'Taking evidence in international arbitration (2015) Vol 20 *Coventry Law Journal* 1 – 16.

78 P Ashford *The IBA Rules on the taking of evidence in international arbitration* (2013).

79 PJ Pettibone 'The Prague Rules on the efficient conduct of proceedings in international arbitration: are they an alternative to the IBA Rules on the taking of evidence in international arbitration?' (2019) Vol 21 *Asian Dispute Review* 13 – 17; JW Jun 'A critical look at the Prague Rules: rules on the efficient conduct of proceedings in international arbitration' (2019) Vol 29 *Journal of Arbitration Studies* 53 – 74.

80 C Croft, C Lee & J Waincymer *A Guide to the UNCITRAL Arbitration Rules* (2013) 301.

81 Ali & Repousis (n 10 above) 718.

82 *Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* (2007) 2 SCC 228.

83 *Giya v Ribi Trading* 2014 (1) ZLR 103 (H) 09C – D.

arbitration, an arbitral tribunal has wide discretion as to how to conduct the arbitration.[84] This discretion includes the power to determine the admissibility, relevance, materiality and weight of any evidence.[85] Consequently, seeking a procedural order from an arbitral tribunal to take evidence is in general a last resort. Accordingly, an arbitral tribunal will generally dismiss a request for assistance in taking evidence in a documents-only arbitration. The 'main problem with documents-only arbitration is that there are not enough of them.'[86] A documents-only arbitration (an arbitration without an oral hearing) is generally cheaper and less time consuming and often is used in non-complex[87] or non-technical arbitral disputes,[88] in terms of which there are little or no disputes of facts and the parties agree to conduct the arbitral proceedings based on the documents placed before an arbitral tribunal.[89]

Put differently, a documents-only arbitration is an agreed upon procedure whereby the parties to the arbitration agreement agree to waive an oral hearing[90] and to conduct the proceedings based on the documents (pleadings) filed with the arbitral tribunal.[91] In terms of this procedure, the parties do not appear before the arbitral tribunal in order to lead evidence or to make submissions. However, the tribunal receives evidence from the parties not by listening to them (an oral hearing),[92] but by reading the arbitral pleadings that the parties would have filed with the tribunal.[93]

6. Court assistance in taking evidence as a last resort?

When parties to the arbitral proceedings, or their party representatives file on behalf of their respective clients their Statement of Claim, Statement of Defence or Counterclaim(s), there is a general practice that they submit and annex to their

84 Holtzmann & Neuhaus (n 72 above) 582 – 583.
85 Article 19 (2) of the Model Law.
86 B Harris 'Documents-only arbitrations' (1983) Vol 49 *International Journal of Arbitration, Mediation and Dispute Management* 221 at 221.
87 A documents-only arbitration is less common in construction and engineering disputes. See D Butler & E Finsen *Arbitration in South Africa law and practice* (1993) 197.
88 M Rutherford & L Slade 'Documents only arbitrations and the Chartered Institute's low-cost scheme for consumer disputes' (1987) Vol 53 *Arbitration* 87 – 98.
89 *Makonye v Ramodimoosi & Others* (2014) 1 ZLR 111 (H).
90 Butler & Finsen (n 134 above) 192 note that a documents-only hearing may subject to agreement be 'supplemented by an inspection and perhaps a restricted hearing with clearly defined objectives; particularly if the amounts in dispute are relatively modest.'
91 Harris (n 133 above) 222.
92 The general structure of an oral hearing is, an opening address, presentation of evidence of facts and a closing argument.
93 Kanokanga (n 71above) 119 – 120.

respective statements all documents, which include any communications, diagrams, drawings, exhibits, expert reports, maps, photographs, programs, writings, data of any kind or other evidence they consider to be relevant to the arbitral proceedings which support the factual and legal arguments contained therein.[94]

One commentator noted that arbitral pleadings such as the party's written submissions 'constitute the most significant component of the proceedings in terms of probative evidentiary value.'[95] Where the evidence is voluminous, the parties may add a reference to the documents or other evidence that they will submit.[96]

It is common cause that arbitral pleadings are generally prepared and drafted by the parties 'or the party representatives with sufficient evidence which clarifies the issues in dispute between the parties and supports either party's factual allegations and legal arguments so as to persuade an arbitral tribunal to decide in their favour.[97] Moses argues that , '[f]rom a practical standpoint, the first step a party should take in trying to obtain documents would be to simply ask the other party for the information.'[98] If the evidence is relevant and necessary and the other party has refused to share any relevant documents or evidence or refuses to cooperate, it is at this stage, that a party can or should try and 'persuade a tribunal to order the opposing party to produce documents or to produce witnesses under its control.'[99]

There is no general rule of the threshold that one has to meet as cases are different. However, it can be presumed that a party requesting court assistance in the taking of evidence has to show a justified need in a particular case and that the evidence is necessary and relevant in order for that party to 'achieve the purpose of the request.'[100] An application for the request of the High Court's assistance in taking evidence in terms of Article 27 (1) of the Model Law can only be made with the approval of an arbitral tribunal to a party to the arbitral proceedings[101] or by the arbitral tribunal. Where

94 Article 23 (1) of the Model Law.
95 I Bantekas *An introduction to international arbitration* (2015) 170.
96 Article 23 (1) of the Model Law.
97 *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holding (Pvt) Ltd* 2018 (1) ZLR 449 (S) 455G.
98 ML Moses *The Principals and Practice of International Commercial Arbitration* (2012) 113.
99 Moses (n 145 above) 113.
100 L Neuman & S Jarvin 'The Swedish Arbitration Act of 1999, five years on: a critical review of strengths and weakness' (2006) 220.
101 *Singh v Indian Labour Cooperative Society Ltd & Others* 2008 (1) ARBLR 355 (Del).

an arbitral tribunal has denied a party's request[102] to seek the court's assistance in taking evidence, that party cannot afterward file an application to the High Court for court assistance as it would in effect 'second guess'[103] the arbitral tribunal's procedural decision, and be tantamount to be an abuse of the court's power to provide such assistance to such a party contrary to the principle of minimal judicial interference set out in Article 5 of the Model Law.[104]

6.1. The application for request for executory assistance

Where a party with the approval of the arbitral tribunal or where the arbitral tribunal *ex officio* requests from the High Court assistance in taking evidence, the High Court may execute the request within its competence and according to its rules of the taking of evidence.[105] The 'right to request judicial assistance is controlled by the arbitral tribunal.'[106] The High Court does not have the discretion to make any 'additional determination'[107] concerning any request for assistance in the taking of evidence. Neither does the High Court have a right to assist with such a result. The 'granting of assistance is an independent exercise by which the court examines the reasonableness of the request in accordance with the laws of the relevant jurisdiction and the practices of the court.'[108]

The approval by an arbitral tribunal for the approval of a party to request from the High Court executory assistance is a procedural order. It is a decision or interim order by an arbitral tribunal addressing procedural issues before the tribunal.[109] As such, such a decision or order is not an Interim Award.[110] It is neither reviewable nor appealable. There is a presumption that a procedural order granting leave to request assistance in taking evidence from the High Court will provide reasons. However, it suffices that if the tribunal does not furnish reasons, an interested party should ask for the reasons.[111]

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102 *Soh Ben Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SGCA 28.
103 *ASADA v 34 Players and One Support Person* [2014] VSC 635.
104 *Squishy Drinks Ltd v Kevian Kenya Ltd* [2021] eKLR.
105 Article 27 (1) of the Model Law.
106 FT Schwarz & CW Konrad *The Vienna Rules: a commentary on international arbitration in Austria* (2009) 513.
107 Heuman & Jarvin (n 147 above) 221.
108 Ali & Repousis (n 10 above) 723.
109 D Sutton, J Kendall & J Gill *Russell on arbitration* (2015) para 6.001
110 *Bajaja v Sharedeal Financial Consultants* 2003 (2) ARBLR 359 Bom.
111 *Ncube v Hamadziripi* 1996 (2) ZLR 404 (H) 404A.

It is important to highlight that Article 27 of the Model Law is silent on the information or the contents of a request for executory assistance from the High Court.[112] Guidance may however be sought from the *travaux préparatoires* on Article 27 of the Model Law.[113] In the absence of any agreement, the evidence of witnesses at a trial is examined *viva voce* and in open court.[114] However, if the particular facts or the facts can be proved by affidavit or be examined by interrogatories or otherwise before a commissioner or examiner, same can be by chamber application.[115]

Applications for the appointment of a commissioner in terms of Article 27(2)(c)(ii) of the Model Law can be made to the court or a judge in chambers.[116] The appointment of a commission is to be issued under a seal of the High Court.[117] An application for assistance in taking evidence pursuant to Article 27 of the Model Law is made as an ordinary court application, that is to say, it is an application on notice to all interested parties having a legal interest in the matter.[118] The application should be in the relevant form and supported by one or more affidavits setting out the facts upon which the application is based.[119] The reason for an Article 27 application being made as an ordinary application as opposed to a chamber application is premised on the fact that the relief sought in an Article 27 application is merely procedural in nature.[120]

From the foregoing, it is respectfully submitted that an application for executory assistance may be made by application to the High Court and supported by:[121]

(a) The names and addresses of the parties and the arbitrators;
(b) The general nature of the claim and the relief sought;
(c) A copy of the arbitration agreement;
(d) The facts relied upon by the arbitral tribunal or a party to the arbitration, including the steps taken in the arbitral proceedings and the particulars of such proceedings;

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112 Roth (n 4 above) 1073.
113 Analytical Commentary on Draft Text of a Model Law on International Arbitration, A/CN.9/264 (25 March 1985) 58.
114 Rule 57(14) of the High Court Rules, 2021.
115 Rule 57(14) of the High Court Rules, 2021.
116 Rule 57(33) of the High Court Rules, 2021.
117 Rule 57(34) of the High Court Rules, 2021.
118 Rule 57(1) of the High Court Rules, 2021.
119 Rule 59(1) of the High Court Rules, 2021.
120 Rule 59(2)(c) of the High Court Rules, 2021.
121 KK Mwenda *Principles of arbitration law* (2003) 80.

(e) A copy of the arbitral tribunal's approval for a party to seek executory assistance;
(f) Stating the nature of the executory assistance required; and
(g) Stating the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
(h) The description of any document to be produced or property to be inspected.[122]

It is submitted that the Arbitration Act [Chapter 7:15] covers practically every matter that could lawfully be the subject to arbitration. In other words, in adopting the Model Law as the law for Zimbabwe in arbitration matters, the legislature did not intend that any request made in terms of Article 27 of the Model law should not be subject to appeal. It is submitted that this aspect of the law may require clarification.[123]

6.2. The Issuance of subpoenas in arbitral proceedings

In terms of Article 27 (2) (a) of the Model Law, the High Court in Zimbabwe can compel on application by a party with the preliminary approval of an arbitral tribunal, or a request by an arbitral tribunal for a *subpoena* to compel the attendance of a witness before the tribunal to give evidence or to produce documents.[124] The system of practice and procedure in regard to evidence in Zimbabwe is based on the English system. 'Now, in England, if a witness is subpoenaed, *duces tecum*, and is simply called to produce, without giving evidence or identifying the documents he need not be sworn.'[125] An order for the production of documents or to give evidence will not be made by the High Court unless the court is of the opinion that the documents are *prima facie* relevant and necessary to the arbitral proceedings.[126]

A request for documents is not a 'fishing bill' neither is it a 'fishing expedition'.[127] It is for this reason that a request for documents should specify the identity of the particular

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122 Analytical Commentary on Draft Text of a Model Law on International Arbitration, A/CN.9/264 (25 March 1985) 58.
123 For guidance and clarification, in terms of the Model Law lists the requests which are not subject to appeal in Zimbabwe. For instance, Article 9 (arbitration agreement and interim measure by court), Article 11 (appointment of arbitrators), Article 13 (challenge procedure), Article 14 (failure or impossibility to act), Article 16 (competence of arbitral tribunal to rule on its own jurisdiction).
124 *Vibroflotation A.G. v Express Builders Co Ltd* [1994] 3 HKC 263 (HC).
125 *Waterhouse v Shields* 1924 CPD 115.
126 *Netone Cellular (Pvt) Ltd & Another v Econet Wireless (Pvt) Ltd & Another* S 47-18.
127 *Gale v Denman Picture Houses Ltd* [1930] 1 KB 588; *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53.

documents sought and information on how the documents are relevant and material to the outcome of the arbitral proceedings.[128] It is not the function of the High Court to act as a mere rubber stamp of an arbitral tribunal or a party to the arbitral proceedings to issue a subpoena.[129]

6.3. An order for witness examination under oath in arbitral proceedings

The purpose of having any witness submit to examination on oath is for affirmation. That is to ensure that the evidence that is given under oath is reliable. In terms of Article 27 (2) (b) of the Model Law, the High Court has the discretion to issue an order for any witness to submit to examination on oath before the arbitral tribunal, an officer of the court[130] or any other person for the use of the arbitral tribunal.

6.4. An order for the discovery of documents and interrogatories in arbitral proceedings

In terms of Article 27 (2) (c) (i) the High Court has the discretion to make an order for the discovery of documents and interrogatories. The process of document production in court proceedings is known as discovery. The discovery of documents is essential as it enables the other party to obtain information from the other so as to effectively prepare its case.[131] Put differently, discovery contains information that enables the other party in the arbitral proceedings to either advance its own case or to damage that of its adversary.[132]

The High Court has the discretion to accept or reject arguments for the granting of an order for the discovery of documents. Where the documents sought are

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128 *South Tyneside Borough Council v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm) para 23.

129 *Samsung C&T Corporation, Re Samsung C&T Corporation* [2017] FCA 1169; *UDP Pty Ltd v Esposito Holdings Pty Ltd & Others* [2018] VSC 316.

130 For purposes of Article 27 (2) (b) of the Model Law, examination of oath by be made before a registered legal practitioner or the Registrar of the High Court in whose area of jurisdiction the arbitration takes place.

131 L de Villers van Winsen, AC Cilliers & C Loots *Herbstein and Van Winsen: the civil practice of the High Courts and Supreme Court of Appeal of South Africa* (1997) 582.

132 *Loh v Rob Salamon & Others* [1980] HKC 383.

inadmissible[133] as they may have been procured illegally or unlawfully[134] or not relevant and necessary to the arbitral proceedings, the High Court will not grant an order for the discovery of documents.[135]

As indicated earlier, in terms of Article 27(2)(c)(i) of the Model Law the High Court has the discretion to make an order for interrogatories. The term 'interrogatories' is derived from the word interrogatory. It refers to a formal 'written question submitted by one party to civil litigation to another party and required to be answered on oath.'[136] One commentator has observed that interrogatories are a list of written questions 'directed to a party representative or witness, under the party's control to elicit written responses concerning matters in dispute.'[137] Therefore, a party with the approval of an arbitral tribunal or the arbitral tribunal itself, may make a chamber application for directions for an order giving the party leave to serve on any other party interrogatories. These interrogatories may relate to any matter in question between the parties to the arbitral proceedings[138] requiring that the other party answer the interrogatories on affidavit,[139] within a specified period.[140]

6.5. A commission or request for the taking of evidence out of the jurisdiction

In terms of Article 27 (2) (c) (ii) of the Model Law, the High Court has discretion to make an order for a commission. The purpose of a commission is to examine

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133 BB Guerrina & JH Rubinstein 'The attorney-client privilege and international arbitration' (2001) Vol 18 *Journal of International Arbitration* 587 – 602.

134 A Armstrong 'Torture, inhuman and degrading treatment and the admissibility of evidence' (1987) Vol 5 *Zimbabwe Law Review* 95 – 107; JH Boykin & M Havalic 'Fruits of the poisonous tree: the admissibility of unlawfully obtained evidence in international arbitration' (2014) *Transnational Dispute Management* 1 – 38.

135 JP Zammit, R Hambridge & J Hu 'Disclosure and admission of evidence in international arbitration of intellectual property disputes' in TD Halket (ed) *Arbitration of International Intellectual Property Disputes* (2012) 374.

136 AEA Martin (ed) *Oxford dictionary of law* (2003) 263

137 O'Malley (n 11 above) 17.

138 Rule 51 (1) (a) of the High Court Rules, 2021.

139 W Winsen et al *Herbstein and Van Winsen: The Civil Practice of the Superior Courts in South Africa* (1979) 443 where it is stated:
"An affidavit should be sworn to before a Commissioner of Oaths who is independent of the office in which it was drawn. The court will not admit affidavits sworn to before an attorney or employer or partner of an attorney acting for the deponent or a person having an interest in such affidavit."

140 Rule 51 (1) (b) of the High Court Rules, 2021.

witnesses and to regulate and control the interrogation.[141] A commission is generally set up where it has been established that there are valid reasons for a witness being unable to attend the arbitration proceedings in order to give evidence in person.[142] The High Court has the authority to set up a commission where a witness is beyond the jurisdiction of the court,[143] and such a witness has refused to attend.[144] An order for the establishment of a commission will be granted if the evidence sought to be procured, is material[145] and a commission is appointed in the court's jurisdiction where the witness resides.[146]

In international commercial arbitration, a party or an arbitral tribunal may be 'concerned with evidence which is outside the jurisdiction of the courts at the place of arbitration.'[147] Article 27 (2) (c) (ii) of the Model Law serves as a procedure in terms of which the High Court can issue an order for the taking of evidence outside of Zimbabwe. As Zimbabwe has not acceded to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague Evidence Convention) a party or an arbitral tribunal is precluded from making Letters of Request to foreign courts for assistance in taking evidence in arbitral proceedings. It is therefore imperative that local and international party representatives involved in international commercial arbitration to which one of the parties is Zimbabwe be aware that in Zimbabwe they cannot rely on the Hague Evidence Convention.[148]

6.6. Executory assistance in the detention, preservation or inspection of property

Article 27 (2) (c) (iii) of the Model Law is a unique provision of the Model Law in Zimbabwe. It provides a third category of interim measures in arbitral proceedings in

141 *Receiver of Revenue Port Elizabeth v Jeeva & Others; Klerck and Others NNO v Jeeva & Others* 1996 (2) SA 573 (A).
142 *Federated Insurance Co Ltd v Britz & Another* 1981 (4) SA 74 (T) 75 – 76.
143 *In Re W. W. Mining Finance Corporation of Rhodesia Ltd (In Liquidation)* (1913) SR 83.
144 *Grant v Grant* 1949 (1) SA 22 (C) 30.
145 *Guggenheim v Rosenbaum* (1) 1961 (4) SA 15 (W) 18 – 19.
146 *Segal v Segal* 1949 (4) SA 86 (C) 92.
147 JDM Lew, LA Mistelis & SM Kroll Comparative International Commercial Arbitration (2003) 580.
148 *Pan American Airways Inc v SA Fire and Accidence Insurance Co Ltd* 1965 (3) SA 150 (S); *Randgold and Exploration Company Ltd & Another v Gold Fields Operations Ltd &* Others 2020 (3) SA 251 (GP).

Zimbabwe.[149] This provision is modelled and worded *verbatim* to section 9 (1) (c) of the Indian Arbitration and Conciliation Act, 1996[150] and section 27 of the Australian Arbitration Act, 1996. Notably other leading Model Law jurisdictions also have similarly worded provisions[151] in their enactments on the interim measures that a court can grant with regard to the detention, preservation or inspection of any property or thing that is in issue or relevant to the arbitral proceedings.[152]

One commentator has noted that the purpose of such an interim measure 'is to prevent the property or things from being altered, destroyed or disposed of before the evidence of existing state can be secured for the purpose of arbitration.'[153] Therefore, what can be gleaned from Article 27 (2) (c) (iii) of the Model Law is that it deals with a specific type of interim measure, that is Anton Pillar Orders.[154] In terms of this provision, the High Court has the discretion to grant the arbitral tribunal or a party with the approval of the arbitral tribunal an order for the detention, preservation or inspection of any property or thing which is in issue or relevant to the arbitral proceedings.

This provision is a safeguard that ensures that property (corporeal or incorporeal) is not altered, destroyed, or disposed of, or that the property does not deteriorate.[155] Put differently, an order for detention and preservation in terms of Article 27 (2) (c) (iii) of the Model Law is designed to ensure that there will be no unnecessary loss or damage to any property subject to the arbitral proceedings.[156]

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149 Article 9 and 17 of the Model Law are modified provisions of the Model Law in Zimbabwe which deal with issues concerning interim measures.

150 In India section 9 has now be renumbered as section 9 (1) by the Arbitration and Conciliation (Amendment) Act, 2016.

151 Section 29 (2) of the Malaysian Arbitration Act, 2005 allows the High Court to order the attendance of a witness to give evidence, or where applicable, to produce documents on oath or affirmation before an officer of the High Court or any other person, including an arbitral tribunal. On the other hand, in terms of section 23 (2) of the Nigerian Arbitration and Conciliation Act [Chapter 19] a court or a judge may order a writ of habeas corpus ad testificandum to being a prisoner for examination before an arbitral tribunal.

152 Section 27 of the Australian Arbitration Act, 1996; section 2GB (1) of the Hong Kong Arbitration Ordinance 1990, section 12 (1) of the Singapore International Arbitration Act 2001 and section 14 (3) of the Zambian Arbitration Act, 2000.

153 AK Bansal *Arbitration & ADR* (2009) 42.

154 *Microsoft Corporation v Zimbabwe Express Airlines (Pvt) Ltd* HH 4053-99; *Cooper v Leslie* 2000 (1) ZLR 14 (H); *Dr Dish (Pvt) Ltd v Econet Media Ltd & Others* HH 381-20.

155 LW Newman & C Ong *Interim measures in international arbitration* (2014) xliii.

156 Report of the Secretary General, United Nations Commission on International Trade Law Working Group on Arbitration A/CN.9/WG.II.WP.108 (January 2000), 32nd Session para 104.

The preservation of property includes both movable and immovable property. Tangible and intangible property. Therefore, 'trade secrets and proprietary information'[157] also fall under this provision. Furthermore, the High Court has coercive power in terms of Article 27 (2) (c) (iii) of the Model Law to order a party not to 'terminate agreements, divulge secrets or sell, transfer or destroy goods.'[158]

It is not only documents that require preservation or inspection. Particularly in instances involving the carriage of goods by air, sea, rail or road in which goods can deteriorate or change with time.[159] Inspections by arbitral tribunals are most common in construction and engineering disputes.[160] Therefore, in terms of Article 27 (2) (c) (iii) of the Model Law the High Court has the discretion to grant an interim measure to inspect any site, property, machinery, facility, production line, model line, material or product or process it deems appropriate.[161]

The term 'any person' in Article 27 (2) (c) (iii) should be construed in a wide sense. It includes agents, assignees, and party representatives such as accountants, auditors, directors, legal practitioners, shareholders and trustees. The term ''any person' in Article 27 (2) (c) (iii) of the Model Law also includes any person in an association such as a club, church, partnership, syndicate or any other association of persons. In terms of Article 27 (2) (c) (iii), the High Court has the discretion to order 'any person' including the Sheriff of the High Court of Zimbabwe or the Zimbabwe Republic Police to enter upon any land or building in the possession of a party for the purpose of obtaining full information or evidence. Should the High Court grant an Article 27 (2) (c) (iii) Model Law application on the other party, its official assigns or agents, service is to be effected in terms of the Anton Pillar Order that will permit the Sheriff (the Deputy Sheriff), a Supervising Attorney (the persons) to immediately enter the premises, or the facilities and vehicles on such premises for the purposes of searching for and delivering to the Sheriff or his Deputy any such documents. Such an order will

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157 Holtzmann & Neuhaus (n 72 above) 332 – 333.

158 P Ortolani 'Article 17: power of arbitral tribunal to order interim measures' in I Bantekas et al (eds) *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020) 334.

158 Ortolani (n 205 above) 339.

159 Ortolani (n 205 above) 339.

160 Bantekas (n 142 above) 170.

161 FL Politano 'The rules of selected administrative bodies relevant to intellectual property disputes' in TD Halket (ed) *Arbitration of international intellectual property disputes* (2012) 193.

generally allow the officials, assignees or agents to permit the persons to remain on the premises until the search is completed and if necessary to re-enter the premises on the same or following day(s) to complete the search.

7. Conclusion

The powers of the High Court to assist, when requested, are spelt out in Zimbabwe. Article 27 of the Model Law as it applies to Zimbabwe was modified, as the Model Law did not do so in specific terms. Sight should not be lost that the Model Law was enacted into the country to encourage the use of arbitration as an agreed method of resolving commercial, non – commercial disputes, domestic and international disputes.

It is common cause that evidence plays an important role in the administration of justice in both arbitration and litigation. Article 27 of the Model Law as it applies to Zimbabwe is based on the recommendations of the LDCZ in its Final Report on Arbitration. The modifications are mainly procedural and reflect the comprehensive way in which assistance can be sought from the High Court. Resultantly, the modifications clarify the issue of court assistance in taking evidence and create the authority in law for the High Court to render such assistance.

For the purposes of Article 27 of the Model Law, the High Court has the discretion to execute any request for assistance within its own competence and according to its rules on taking evidence.[162] Whilst the Arbitration Act [Chapter 7:15] which incorporated the Model Law in Zimbabwe covers practically every matter that could lawfully be the subject to arbitration in the country, it is respectfully submitted that, Article 27 of the Model Law may require clarification, as it does not specifically mention whether a request made to the High Court is precluded from appeal.[163]

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162 Article 27(1) of the Model Law.

163 For guidance and clarification, in terms of the Model Law lists the requests which are not subject to appeal in Zimbabwe. For instance, Article 9 (arbitration agreement and interim measure by court), Article 11 (appointment of arbitrators), Article 13 (challenge procedure), Article 14 (failure or impossibility to act), Article 16 (competence of arbitral tribunal to rule on its own jurisdiction).

Dissecting the meaning of 'award' in Zimbabwe: The case of Riozim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another SC 32-22

Noah Maringe*

Abstract

The research analyses the meaning of 'award' in Zimbabwe in light of the decision in the case of Riozim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another SC 32-22. The analysis is motivated by the different kinds of awards that are recognised in the Model Law as modified in Zimbabwe. Special focus is accorded to the legal status of interim, interlocutory and partial awards. To begin with, it is shown that the Supreme Court's decision in the Riozim Ltd & Another was largely influenced by the rules of statutory interpretation. The research shows that the term 'award' in Zimbabwe includes interim, interlocutory and partial awards. All these types of awards can be set aside in terms of Article 34 of the Model Law. In addition, they can be recognised and enforced in terms of Article 35 of the Model Law. These important articles do not distinguish between different types of awards. Article 32, which provides for the termination of arbitral proceedings through a final award should be taken to be a final decision regarding certain matters. A final decision can be part of a partial award or any other types of an award, if it brings that issue to an end. To that end, the research concludes that the Supreme Court in the Riozim Ltd & Another case took the correct approach when it held that a ruling is different from an award. Thus, the procedure under Article 16 with regards to a ruling on a preliminary issue is not available when one is dealing with an award. Similarly, the procedure for the setting aside of an arbitral award under Article 34 of the Model Law is not available to a challenge on a ruling that has been made as a preliminary decision in terms of Article 16 of the Model Law. A challenge based on prescription, or any other grounds not provided for under the Article 16 procedure can be dealt with in terms of Article 34 of the Model Law.

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1. Introduction

Arbitration is one of the alternative dispute resolution mechanisms that are available to disputing parties in Zimbabwe.[1] It is informal, less antagonistic and quicker.[2] To that end, it becomes justified to explore legal developments in this area. The main source of arbitration procedure in Zimbabwe is the Arbitration Act.[3] It is based on the Model Law of the United Nations Commission on International Trade Law (UNCITRAL). However, some of the provisions in the Arbitration Act were modified in order to adapt to the local context. Thus, the approach of the court in the case of *Riozim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another*[4] should be understood in the light of this background. The research analyses the meaning of 'award' in Zimbabwe. The analysis is motivated by the different kinds of awards that are recognised in the Model Law as modified in Zimbabwe. Special focus is accorded to the legal status of interim, interlocutory and partial awards. The discussion commences with the brief facts of the *Riozim Ltd & Another* case. This is followed by an analysis of the case, which is largely influenced by the rules of statutory interpretation and the meaning accorded to the term 'award' in Zimbabwe and in international arbitration.

2. Brief facts and issues before the court

The two appellants and the first respondent were registered Zimbabwean companies while the second respondent was an arbitrator who had presided over a dispute between the appellants and first respondent. The second appellant was a wholly owned subsidiary of the first appellant. The first appellant and the first respondent entered into a Memorandum of Shareholders Agreement on 19 January 2010. The Shareholder's Agreement required the first appellant to ensure that forty percent of the issued shares in the second appellant were to be transferred in favour of the first respondent at no cost. The first respondent alleged a breach of certain parts of the

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1 Other forms of alternative dispute resolution mechanisms in Zimbabwe include mediation and conciliation.

2 https//afaa.ngo/page-18097 (accessed 19 October 2022).

3 [Chapter 7:15].

4 *Riozim Ltd & Another v Maranatha Ferrochrome (Pvt) Ltd & Another* SC 32-22 (hereinafter referred to as the *Riozim Ltd & Another* case).

agreement by the first appellant and indicated its intention to refer the matter to an arbitrator. As a result, the parties agreed to refer the dispute to the second respondent, the arbitrator.

The first respondent raised preliminary points which included prescription and jurisdiction. All the preliminary points were dismissed by the second respondent (arbitrator).[5] In view of the arbitrator's decision, the appellants applied to the High Court for an order setting aside the second respondent's interim award. It was argued on behalf of the first respondent that the application before the High Court had been filed out of the time and this was contrary to Article 16(3) of the Model Law which required thirty days from the date the concerned party became aware of the ruling.[6] This ground was upheld by the High Court. It further held that the award that was made by the second respondent was an interim award dismissing the special pleas by the appellants. As such the award could not be set aside as it did not have the effect of terminating the arbitral proceedings.

The High Court further noted that the appellants should have proceeded in terms of Article 16(3) of the Model Law instead of Article 34(3) of the same law because the procedure under Article 34 was designed to terminate a final award and not an interim one.[7] It reasoned that the appellants had used a wrong procedure because they knew that they were out of time in terms of Article 16 of the Model Law. What is clear from the case is that the High Court failed to make a clear distinction between a ruling and an interim award as spelt out in different parts of the Model Law. In addition, it did not distinguish between a special plea challenging the jurisdiction of the arbitrator and that of prescription when it dismissed the matter. It was on this basis that the appellants approached the Supreme Court for relief.

3. The decision of the court

This part analyses the decision of the Supreme Court with particular reference to the meaning of an arbitral award in its different forms in Zimbabwe. The sole issue for

5 *Riozim Ltd & Another* case at 3-4.
6 *Riozim Ltd & Another* case at 4.
7 *Riozim Ltd & Another* case at 5. The wording and effect of Articles 16(3) and 34(3) shall be discussed later.

determination by the Supreme Court was whether or not the High Court had wrongly dismissed the appellants' application to set aside an arbitral award in terms of Article 34 of the Model Law.

As alluded to earlier on, the decision in the *Riozim Ltd and Another* case was largely premised on statutory interpretation. Thus, the court correctly pointed to Article 2(3) of the Model Law which provides that in interpreting it, one should pay attention to its "… international origin and to the desirability of achieving international uniformity in its interpretation and application"[8] Where there is no absurdity in the language of the text, it must be interpreted in accordance with its grammatical meaning (*ipsissima verba*).[9]

The South African case of *Natal Joint Municipality Pension Fund v Endumeni Municipality*[10] provides the following useful insights about statutory interpretation that are germane to this case:

> "Interpretation is the process of attributing meaning to the words in a document be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production."

The above cited case is a clear authority for the proposition that the Court does not rely on a single rule of interpretation in arriving at the proper meaning of a provision.

The Supreme Court upheld the High Court's finding that there was no proper application before it in respect of the second respondent's jurisdiction and the existence and validity of the arbitral agreement. The Supreme Court reasoned that the appellants could not rely on Article 34 to set aside the interim ruling when the

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8 *Riozim Ltd & Another* case at 7.

9 L du Plessis *Re-interpretation of Statutes* (2002) 93; *Chikoyo v Ndlovu & Others* HH 321-14; *Ngaru v Kusano* HH 265-21; *Endeavour Foundation & Another v Commissioner of Taxes* 1995 (1) ZLR 339 (S); *Zambezi Gas Zimbabwe (Pvt) Ltd v N.R. Barber (Pvt) & Another* SC 03-20.

10 2012 (4) SA 593, par 18.

legislature had in terms of Article 16(3) clearly provided the procedure to be followed.[11] As such, the Supreme Court disagreed with the High Court in respect of the issue of prescription which is not provided for in Article 16.

3.1 The difference between an award and a ruling

Article 16 of the Model Law makes an important distinction between a ruling and an award. An arbitral tribunal has the power to rule on its own jurisdiction or the existence or validity of the arbitration agreement.[12] With a plea of absence of jurisdiction, the arbitral tribunal may rule on it as a preliminary question or in an award on the merits. Importantly, If the arbitral tribunal:

> "rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the High Court to decide the matter which decision shall be subject to no appeal; while such a request is pending the arbitral tribunal may continue the arbitral proceedings and make an award."

The Supreme Court pointed out that Article 16(3) of the Model Law clearly distinguishes between a ruling on preliminary issues and an award that may be granted at the end of the proceedings.[13] It has already been highlighted that where the language of a text is clear, the lateral rule of interpretation should be applied.[14] It is clear that Article 16(3) provides a procedure in the case of a ruling that is different from an award at the end of the proceedings. An application to the High Court only applies where a ruling on jurisdiction or the validity of an agreement is made as a preliminary decision. Therefore, the Supreme Court correctly pointed out that procedure of applying to the High Court is not available where a decision on jurisdiction is made a part of the final award.[15] The same approach was made with regards to the issue of prescription which could have been challenged under Article 34 of the Model Law, as it was not covered by the wording of Article 16 that deals with

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11 Riozim & Another Case at 14.
12 Article 16 of the Model Law.
13 *Riozim Ltd & Another* case at 9.
14 L du Plessis (n8 above) 93; See also the South African case of *Volschenk v Volschenk* 1946 TPD 486, wherein it was held that the most important rule of interpretation is to give words their ordinary meaning.
15 *Riozim Ltd & Another* case at 9.

rulings. Hence, the court decided that it was permissible to challenge prescription in terms of the Article 34 procedure.[16] To buttress the difference between a ruling and an award, the United Nations Conference on Trade and Development (UNCTAD) acknowledges the fact that some decisions or orders do not qualify as awards.[17]

3.2. The status of different forms of awards

The Model Law provides for different forms which an award may take. It becomes necessary to discuss the legal effect, if any, of distinguishing between different categories of awards with a focus on their recognition, enforcement or setting aside. To begin with, the Model Law makes a provision for the granting of an interim, interlocutory or partial award.[18] The provision was introduced as a local modification.[19] Despite the fact that the provision is a local modification, the meaning and effect of these terms has already been considered at international level. The United Nations Conference on Trade and Development has defined a partial award to mean an award that finally settles some matters but leaves out some matters to be determined separately.[20] It follows that a partial award is a final award on all the issues that it disposes of. With an interim award, it is issued while the arbitration process is still going on. It is generally regarded as having two meanings. Firstly, it may mean a partial award that finally settles a dispute in relation to a portion of it.[21] In its more appropriate sense, it is limited to those awards that do not finally settle the main issues at hand such as interim measures of protection.[22] Despite the different meanings that such awards may take, what looms large is that they still qualify as awards just like a final award. The same reasoning goes with interlocutory awards which may be granted to preserve the *status quo* pending the main proceedings.

16 Ibid at 17.
17 United Nations, 2005>www.unctad.org (accessed 19 October 2022).
18 Article 31 (7) of the Model Law provides that "unless otherwise agreed by the parties, an arbitral tribunal shall have the power to make an interim, interlocutory or partial award."
19 This is because it is italicised and the Arbitration Act provides under the heading 'Model Law' that modifications appear in italics.
20 www.unctad.org (accessed 19 October 2022).
21 Ibid.
22 Ibid.

Other forms of arbitral awards include an award made by consent of the parties[23] and an additional award.[24] Even the use of terms "corrected" or "interpreted" awards in Article 33 of the Model Law does not change the character of such awards.

3.3. Setting aside of interim, interlocutory and partial awards

Article 34 of the Model Law empowers the High Court to set aside an arbitral award on application. The grounds for the setting aside of an award include incapacity by either party, legal invalidity of the agreement itself, absence of proper notice on the other party, failure to uphold the rules of natural justice or to act within the arbitrator's terms of reference and failure to follow an agreed procedure provided it is not contrary to the Model Law.[25] In that regard, the court noted that Article 34 does not distinguish between different types of awards. This is because it uses the word 'award' as opposed to a 'final award'.[26]

The South African case of *Stellenbosch Farmers' Winery v Distillers Corporation (SA) Ltd*[27] provides further authority for the assertion that a court should consider the language of the whole statute when interpreting it.[28] By the same reasoning, the court correctly observed that all forms of awards can be set aside in terms of Article 34 of the Model Law. These include interim, partial and interlocutory awards. Examples which emanate from reading the whole statute (which were also observed by the court) include the reference to an "award" (in its generic sense) under Article 34 of the Model Law as opposed to a "final award" under Article 32 and the distinction between a "ruling" and an "award" under Article 16 of the Model Law.

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23 Article 29 of the Model Law provides that parties may settle the dispute during arbitral proceedings and such settlement terminates the proceedings if requested by the parties and the arbitral tribunal does not object. The settlement should be recorded as an award and it has the same effect like any other award.

24 Article 33(3) of the Model Law provides that, unless there is an agreement by the parties, a party may request the arbitral tribunal on notice, within 30 days of receipt of the award to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The additional award should be made within 60 days if the arbitral tribunal agrees with the request.

25 Article 34(2) of the Model Law.

26 *Riozim Ltd & Another* case at 13.

27 1962 (1) SA 458 (A) at 476 E-F.

28 C Botha *Statutory Interpretation: An introduction for Students* (2012) 111.

3.4. Recognition and enforcement of interim, interlocutory and partial awards

Article 35 of the Model law provides for the recognition and enforcement of arbitral awards.[29] Just like Article 34, article 35 does not distinguish between different forms of awards as it merely uses the terms "arbitral award" and "award". In the same vein, it clearly covers interim, interlocutory and partial wards. It has already been highlighted that courts should consider the purpose and background of legislation when interpreting it.[30] Some of the purposes and background to the Arbitration Act are:

> "… to give effect to domestic and international arbitration agreements; to apply, with modifications, the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on the 21st June, 1985, thereby giving effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York on the 10th June, 1985 …"[31]

The purposive approach to statutory interpretation is long established in Zimbabwe. In the case of *Van Wyk v Tarcon (Pvt) Ltd*[32] the court made the following observations;

> "The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to the semantic and grammatical analysis …. The interpreter must endeavour to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach which allows an unconditional examination of all internal and external sources …"

It is submitted that Article 35 is a mere vehicle for the recognition and enforcements of domestic and international awards in line with the tenor and spirit of the Model Law and Zimbabwe's international obligations, which seek to promote trade and

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29 It provides as follows, "(1) An Arbitral award, irrespective of the country in which it was made shall be recognised as binding and upon application in writing to the High Court, shall be enforced subject to the provisions of this article and of article 36. (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or duly certified copy thereof and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in English Language, the party shall supply a duly certified translation into the English language."

30 See again, the case of *Natal Joint Municipal Pension Fund v Endumeni Municipal* 2012 (4) SA 593.

31 See the long title to the Arbitration Act [Chapter 7:15].

32 HH 474-14.

investments. Such trade and investments require the recognition and enforcement of all forms of awards including interim, interlocutory and partial awards.

4. Conclusion

It has become clear from the above analysis that the term 'award' in Zimbabwe includes interim, interlocutory and partial awards. All these types of awards can be set aside in terms of Article 34 of the Model Law. In addition, they can be recognised and enforced in terms of Article 35 of the Model Law. These important articles do not distinguish between different types of awards. Article 32, which provides for the termination of arbitral proceedings through a final award should be taken to mean a final decision with regard to certain matters. A final decision can be part of a partial award or any other types of an award if it puts that issue to an end. This reasoning is fortified by the fact that an award at the end of arbitral proceedings can be supplemented by an additional award. In other words, it cannot be regarded as a final award upon the conclusion of proceedings if certain issues arise later.

In view of the foregoing, the court in *Riozim Ltd & Another* took the correct approach when it held that a ruling is different from an award. Thus, the procedure under Article 16 with regards to a ruling on a preliminary issue is not available when one is dealing with an award. Similarly, the procedure for the setting aside of an arbitral award under Article 34 of the Model Law is not available to a challenge on a ruling that has been made as a preliminary decision in terms of Article 16 of the Model Law. A challenge based on prescription, or any other grounds not provided for under the Article 16 procedure can be dealt with in terms of Article 34 of the Model Law.

The Enforcement of Arbitral Awards - Complications of Public Policy in Refusal of Registration of Arbitral Awards: *Gwanda Rural District Council v Botha SC 174 – 20*

Musebenzi Douglas*

Abstract

Arbitration has been a cause of concern in public debate particularly the public policy phenomenon, which fails the test of the precise application of law. Arbitration is essentially an alternative dispute resolution mechanism that involves resolving a dispute between two parties by a decision given by a third party called the arbitrator. Arbitration is therefore identified as a means of resolving disputes where the dispute is submitted to arbitrators for the purpose of its authoritative resolution. An arbitral award has the characteristics of the judgment of the court. An arbitral award does not carry any element of sanction until a court of law breathes enforcement into it. Enforcement of arbitral awards is a fundamental process for the arbitration process to be effective and respected. The registration of an arbitral award is carried out for enforcement purposes in circumstances where the unsuccessful party refuses to observe it. The enforceability of arbitral awards marks an essential feature of arbitration in establishing the integrity and dependability of the arbitration process. However, the enforceability of arbitral awards is generally marred by vagueness, complications and ambiguities in applying public policy in the refusal of the registration of arbitral awards. The traces of ambiguity and unpredictability connected to the concept of public policy have impeded the efficacy of arbitration. This case note interrogated the paradox of public policy as an exception to the enforcement of arbitral awards. The case of Gwanda Rural District Council v Botha SC 174 – 20 was used to explore the notion of public policy in the enforcement of arbitral awards. The principal national arbitration legislation in Zimbabwe, the Arbitration Act [Chapter 7:15] and the Model Law in arbitration was used to explore the phenomenon of public policy in the enforcement of arbitral awards. Jurisprudence on Supreme Court cases in Zimbabwe

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on public policy in the enforcement of arbitral awards was also examined. An analysis of the jurisprudence of the Supreme Court on the issue of public policy showed that the approach that the court has taken on the issue of public policy has been inconsistent. It is abundantly clear from this case that uncertainties still remain as to the contours of public policy. Courts are hesitant to describe public policy comprehensively. Whereas South Africa, the United Kingdom, and other developed nations are using a restrictive approach in the application of public policy to ensure optimal enforcement of arbitral awards, there is no contradiction in the fact that public policy should be applied very narrowly. The International Law Association (ILA) has noted that a broad interpretation of public policy would defeat arbitral finality and the objectives of arbitration. Therefore, it is submitted that The New York Convention and UNCITRAL Model Law should be improved to ensure a stricter interpretation of the public policy phenomenon.

1. Introduction

Arbitration has been a source of criticism in public debate particularly the public policy phenomenon which fails to ensure the accurate application of law. Arbitration is an alternative mechanism for resolving disputes.[1] Arbitration essentially involves the resolving a dispute between two parties by a decision given by a third party the arbitrator.[2] Arbitration is perceived as means of resolving disputes where the dispute is submitted to one or more individuals (arbitrators) for the purpose of its authoritative resolution.[3] Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or two, or more persons who derive their powers from a private agreement and in terms of which they must decide such question.[4]

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1 K, Vlahna etal Arbitration and the Importance of the Arbitration Agreement (2020) Vol 5 (2) *European Journal of Educational & Social Sciences,160.*

2 K, Vlahna Arbitration and the Importance of the Arbitration Agreement European Journal of Educational & Social Sciences (2020) Volume 5 p160; K, Sumit, Arbitral Award It Challenges & enforcement, http://www.legalservicesindia.com/article/433/Arbitral-Award-Its-Challenge-&-Enforcement.html (Date Accessed 18 October 2022); T, E. Carbonneau The Law and Practice of Arbitration https://arbitrationlaw.com/library/arbitration-defined-chapter-1-law-and-practice-arbitration-4th-edition (Date Accessed 18 October 2022).

3 AJ Belohlavek *B2C Arbitration:Consumer Protection in Arbitration* (2012) 9.

4 DM Julian etal Comparative International Commercial Arbitration (2003) 2.

An arbitral award has the characteristics of the judgment of the court[5] and does not carry any element of sanction until a court of law breathes enforcement into it.[6] Enforcement of arbitral awards is critically important for the arbitration process to be effective and valuable. The registration of an arbitral award is carried out for enforcement purposes in circumstances where the unsuccessful party refuses to observe it.[7]The enforceability of arbitral awards marks an essential feature of arbitration in the establishment of integrity and dependability of the arbitration process.[8] However, the enforceability of arbitral awards is usually marred by vagueness, complications and ambiguities in the application of public policy in the refusal of the registration of arbitral awards. The traces of ambiguity and unpredictability connected to the concept of public policy have impeded the efficacy of arbitration. This case note attempts to interrogate the enigma of public policy as an exception to the enforcement of arbitral awards.

In Zimbabwe, the principal domestic legislation on arbitration is the Arbitration Act [Chapter 7:15].[9] Zimbabwe is one of the few African countries that has adopted the *UNCITRAL Model Law* on arbitration. Pursuant to Article 36(1)(b)(ii) of the Model Law, the enforcement of an arbitral award may be repudiated if the court finds that such enforcement would be contrary to the public policy.[10] Public policy may be invoked in the refusal of a registration of an arbitral award. Section 4(2) of the Zimbabwe Arbitration Act 1996[11] lists matters that are not arbitrable, which includes matters relating to public policy.[12] The public policy phenomenon in the Zimbabwe arbitration mechanism is evident in legislation. This commentary will dissect the vagueness, complications and ambiguities of public policy in the refusal of the registration of arbitral awards.

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5 *Mangoma v Zimbabwe Educational Scientific and Cultural Workers Union* HH 38 -22.

6 BR, Adeuti 'The Legal Analysis of the Enforcement of an Arbitral' (2020) Vol 65 *American Scientific Research Journal for Engineering, Technology, and Sciences (ASRJETS) 84.*

7 Ibid *82.*

8 H,Choong-Lyong 'The Finality of Arbitral Awards: The U.S. Practices '(2020) Vol 30 *Journal of Arbitration Studies* 5.

9 Official Gazette, Acts, pp. 59-80. Current version available at <http://www.ilo.org/dyn/natlex/docs/ ELECTRONIC/45807/122048/F-1571038578/ZWE45807%202006.pdf> (Date accessed 15 October 2022)

10 Article 36(1)(b)(ii) of the Arbitration Act [Chapter 7:15].

11 Article 4 (2) of the Arbitration Act [Chapter 7:15].

12 AO, Ogunranti 'Separating the Wheat from the Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa' (2019) Vol 10 *AFE Babalola University: Journal. of Sustainable Development Law & Policy 114.*

The arbitration community has long been troubled by the vagueness, ambiguities and complications of the public policy in the refusal of the registration of arbitral awards.[13] Public policy is a concept that has caused a lot of misconstructions in its implementation and courts have been reluctant to invoke it. Therefore, it is problematic to have public policy in the principal arbitration statute in Zimbabwe and in the Model Law when its application is marred by ambiguities and shrouded in mystery and vagueness. In terms of Article 34(2)(b)(ii) of the (UNCITRAL) Model Law, an arbitral award may be set aside if it conflicts with public policy.[14] Public policy norms present scenarios that complicate choice of law determinations for arbitration.[15] The traces of ambiguity, bias and irregularity in public policy has considerably frustrated the effectiveness and efficiency of arbitration process. This case note is a commentary on the complications, vagueness and ambiguities of the notion of public policy in the refusal of registration of arbitral awards in Zimbabwean courts. The commentary is important as it examines a Supreme Court of Zimbabwe judgement where the notion of public policy was considered. The commentary will critically review the restrictive application of the public policy phenomenon by the court.

2.1. Brief Facts of the Case

The case of *Gwanda Rural District Council* v *Botha SC 174 – 20* was an appeal against the whole judgment of the High Court, which upheld the respondent's court application for the registration of an arbitral award against the appellant in terms of the Arbitration Act [Chapter7:15]. The appellant was a District Council and was the owner of a farm known as Doddieburn Ranch situate in Gwanda District. The respondent was a signatory to the agreement that formed the basis of the arbitral dispute.

The parties had concluded a written joint venture agreement in terms of which its Clause 8 provided for an arbitration of disputes arising from the contract. The appellant terminated the joint venture agreement whereupon the respondent lodged a claim for compensation. An award was issued in favour of the respondent. Armed with the award, the respondent sought its enforcement in terms of Article 35 of the Model Law

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13 M, Ostrove Award Challenges https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/awards-challenges (Date Accessed18 October 2022).

14 Article 34(2)(b)(ii) of the Arbitration Act [Chapter 7:15].

15 *H, Fazilatfar* 'Public Policy Norms and Choice-of-law Methodology Adjustments in International Arbitration' (2022) Vol 18 *South Carolina Journal of International Law & Business 88.*

which provides for recognition and enforcement of arbitral awards.[16] The respondent approached the court *a quo* for registration of the arbitral award for enforcement purposes. The application was granted in favour of the respondent. Aggrieved by the judgment of the court *a quo*, the appellant approached the Supreme Court.

2.2. The Appellant

The appellant raised four grounds of appeal challenging the decision of the High Court to register the arbitral award. The four grounds of appeal were as follows:

1. The court *a quo* grossly misdirected itself by disregarding the issue of whether the arbitral award is contrary to the law and **public policy (my emphasis)** of Zimbabwe in that the award enforced a joint venture agreement that is null and void *ab initio* because one of the contracting parties is not a juristic person.
3. The court *a quo* erred in law by concluding that there is no basis for refusing to register the arbitral award when the application for the registration was fatally defective by reason of non-compliance with the peremptory provisions of Article 35(2) of the Model law.
3. The court *a quo* erred in law by registering an award that is based on a valuation report that is not sworn to by a valuer as required by law.
4. The court *a quo* erred in registering an arbitral award that is based on a valuation report that is tainted by bias, collusion and impartiality of the valuer, which is against the law and public policy.[17]

It was held that the appellant's complaint was on the registration of the award, which was against public policy as the award was based on a discredited valuation report. The appellant also mentioned that it was against Zimbabwean public policy to register a wrong award based on a defective valuation report.[18] The Supreme Court did not examine the issue of public policy at length and yet the appellant had raised the issue of public policy on the first and last grounds of appeal. The appellant's concern on the violation of public policy by the registration of the arbitral award did not receive the

16 Article 35 of the Arbitration Act [Chapter 7:15].
17 *Gwanda Rural District Council v Botha* SC 174 - 20.
18 Ibid.

Supreme Court's attention at length on the first ground of appeal. It is not clear from the judgement whether public policy was violated or not, on the first ground of appeal.

The judgement does not even discard the notion of public policy raised by the appellant in the first ground of appeal. This is worrying, bearing in mind that the appellant had raised public policy in the first ground of appeal. Though the Supreme Court dismissed the first ground of appeal, it did not in its dismissal mention public policy, yet the appellant had indicated that there was a violation of public policy in the first ground of appeal. The fact that the Supreme Court's dismissal does not refer to public policy raises more questions than answers in that the appellant categorically raised it on the first ground of appeal. From reading of the judgement, it is not clear why public policy is not any issue in this case and yet the applicant raised two grounds of appeal anchored on public policy.

3.0. Decision of the Court

The appeal was dismissed with costs.[19] The Supreme Court did not mention any aspects related to public policy in its decision and yet two out of the four grounds of appeal were anchored on the issue of public policy.

4.0. Registration of Arbitral Awards in Zimbabwe High Court

An arbitral award remains binding on the parties, even in the absence of registration.[20] For as long as the arbitral award has not been suspended or set aside on review or appeal there is no basis upon which the court may decline its registration.[21] Registration of an arbitral award is not cast in stone as it is subject to Article 36, which provides an exception to the general rule that entitles the applicant to register the arbitral award upon fulfilment of the 3 basic requirements for registration[22]

In terms of the applicable law, the essential requirements to be met by the applicant are summarised as follows:

19 *Gwanda Rural District Council v Botha* SC 174 – 20.
20 *Olympio & Ors v Shomet. Industrial Development* HH-191-12.
21 *Mukwenga v Grain Marketing Board* HH 193 -12.
22 Article 36 of the Arbitration Act [Chapter7:15].

i. Presentation to the High Court of the original or a certified copy of the arbitral award.
ii. Presentation to the High Court of the original arbitration agreement.
iii. If the award or arbitral agreement is in a language other than English the applicant must provide a duly certified translation into English.[23]

After an arbitral award has been granted, it can be enforced by registering it at the High Court. This is because arbitral awards are not self-executing like national court judgments. Article 35 and 36 of the UNCITRAL Model Law provides for the recognition and enforcement of arbitral awards and also provides grounds for refusal to enforce an arbitral award.[24] As a rule, the courts are generally loath to invoke this ground except in the most glaring instances of illogicality, injustice or moral turpitude.[25]

In *Mvududu* v *ARDA* 2011 (2) ZLR 440 (H) it was held that in order to qualify for registration, all that an applicant has to do is to satisfy the court that: (a) he is a party to the arbitral proceedings; (b) the award relates to him; and (c) the copy he is presenting for registration has been duly certified by the arbitrator[26] The requirement that the applicant must be a party to the proceedings is not mentioned in *Gwanda Rural District Council* case even though it was the first ground of appeal by the applicant. The appellant mentioned that the award enforced a joint venture agreement that was null and void *ab initio* because one of the contracting parties was not a juristic person. Though the Supreme Court held that the parties had agreed to have Mr. Botha as a party in the arbitration process, the Supreme Court did not bring into issue the notion of public policy in this regard. It is suspicious why the Supreme Court was silent on the notion of public policy referred in the first ground of appeal. The Supreme Court was reluctant to raise the issue of public policy. The reluctance of the court in bringing the issue of public policy to the limelight was a clear indication that courts are reluctant to invoke public policy in their judgements. The courts in Zimbabwe have interpreted the defence of public policy very restrictively and the grounds upon which an award

23 *Gwanda Rural District Council v Botha* SC 174 - 20.
24 Article 35 and 36 of the Arbitration Act [Chapter 7:15].
25 Peruke Investments (Private) Limited v Willoughby's Investments (Private) Limited & Another SC 11 - 15.
26 *Mvududu* v *ARDA* 2011 (2) ZLR 440 (H).

may be set aside are very narrow. Courts are generally reluctant to invoke public policy ground except in glaring instances of irrationality, injustice or immorality.[27]

Section 4(2) of the Zimbabwe Arbitration Act 1996[28] lists matters that are not arbitrable in Zimbabwe. They include matters relating to public policy, although the criteria for determining public policy are not set out.[29] Public policy is therefore evident as a requirement for refusal of the registration of arbitral awards and yet its application is restrictive and ambiguous.

5.0. Enforcement Arbitral Awards in Zimbabwe Supreme Court

Zimbabwean courts have established a high bar for setting aside an award based on a violation of public policy. The courts have consistently held that the registration process is a procedural issue, and they rarely interfere with the award unless it affects matters relating to public policy.[30]

This is what the learned Chief Justice stated at 465C – 466D:

> "What has to be focused on is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign form would be prepared to recognize and enforce it.'[31]

Any opposition to registration is therefore limited to showing that the applicant has not satisfied any one or more of the three prescribed requirements for registration."[32] In the words of Gubbay CJ (as he then was) in the *locus classicus* on the subject, *Zimbabwe Electricity Supply Authority* v *Maposa* 1999 (2) ZLR 452 (S), at 465D-E:

> "In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold

27 *Peruke Investments (Private) Limited v Willoughby's Investments (Private) Limited & Another* SC 11 - 15.
28 Section 4 (2) of the Arbitration Act [Chapter 7:15].
29 AO, Ogunranti (n 9 above) 114.
30 N,B, Munyuru Enforcement of foreign arbitration aawards in Zimbabwe https://www.ibanet.org/enforcement- foreign-arbitration-awards-Zimbabwe (Date accessed 16 October 2022).
31 *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S).
32 *Matthews v Caster Int. (Pvt) Ltd* HH 497 – 2017.

> such defence applicable only if some fundamental principle of the law or morality or justice is violated."[33]

In this case Justice Gubbay highlighted that the notion of public policy is restrictively applied. The court did not expound the mechanism to be followed in the restrictive application of the notion of public policy in registration of arbitral awards. It is evident that although public policy is restrictively applied in Zimbabwean courts,it is still vague and complicated.

However, Justice Gubbay in elucidating the proper test to be applied, at 466E-H mentioned that:

> "An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside. Under article 34 or 36, the court does not exercise an appeal power and either uphold or set aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it."

The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above."[34]

From Justice Gubbay's elucidation of the notion of public policy, it is not clear how public policy can be applied as it is highly subjective and elusive. In any adjudicative process certainty and consistency in the application of rules is key in the establishment of an effective and efficient judicial system. It is increasingly difficult to ensure certainty

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33 Peruke Investments (Private) Limited v Willoughby's Investments (Private) Limited & Another SC 11 - 15.

34 Ibid.

and consistency in the application of public policy in the refusal of registration of arbitral awards.

In the *Alliance Insurance v Imperial Plastics (Private) Limited & Anor* SC 30/17 it was held that:

> "The question that should be in the mind of a Judge who is faced with this ground (public policy) for setting aside an arbitral award is that, in light of all the submissions and evidence adduced before the arbitrator, is it fathomable that he would have come up with such a conclusion. If the answer is in the affirmative, there is no basis upon which to set aside the award. The appellant's submissions should be considered in the light of these remarks."

The vagueness and ambiguities in the application of the public policy ground for refusal of registration of an arbitral award is evident again in this case. The public policy notion is shrouded in mystery as it is not clear how the rule would be applied effectively and efficiently.

Article 36 of the Model Law as reproduced by Mathonsi J[35] provides that recognition or enforcement of an arbitral award may only be refused at the request of the party against whom it is invoked if that party shows the court proof that: -

1. A party to an arbitration agreement was under some incapacity or the agreement was invalid under the law to which the parties subjected it to or under the law of the country where the award is made.

2. The party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings or was otherwise unable to present his case.

3. The award deals with a dispute not contemplated or not falling within the terms of reference to arbitration.

[35] *Tapera & Ors v Field Spark Investments (Pvt) Ltd* HH 102 – 13.

4. The composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties or the law of the country where the arbitration took place.

5. The award has not yet become binding on the parties or has been set aside or suspended by a court of law.

6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe or recognition or enforcement will be contrary to the **public policy of Zimbabwe (bold for emphasis)**.[36]

6.0. Public Policy Exemption of Arbitral Awards

Public policy is believed to have originated in the fifteenth century in England. Public policy is defined by the House of Lords, England, in 1853 as "that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public or against public good."[37] The vague and amorphous nature of the concept has made many jurists to liken it to an unruly horse as it enables the judges to use it as a guardian angel of the integrity of their respective national legal systems.[38]

The public policy exception to the enforcement of arbitral awards depends on the courts' own motion of what constitutes public policy. The New York Convention contains a public policy exception that allows domestic courts to refuse to enforce an arbitral award if the award violates the public policy. The public policy provision of the Convention has generated debate probably because there is no clear codification of issues that should be regarded as public policy applicable. Public policy is prone to abuse because of its inaccurate definition. The application of the public policy exemption is subject to the interpretation of local courts of the country of enforcement. Public policy serves as the rationale on which a domestic court may refuse the

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36 Ibid.

37 AS, Akoto 'Public Policy: An amorphous Concept in the Enforcement of Arbitral Awards' (2021) Vol 7 Journal *of Liberty and International Affairs 53.*

38 C L,Bansal &S Aggarwal, (2017) "Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach", (2017) Vol 59 *International Journal of Law and Management* 1279.

enforcement of an arbitral award, public policy refers to general policies pursued by the government.[39]

Public policy exception to the enforcement of arbitral awards depends entirely on the courts own notion of what composes public policy.[40] While Article V.2(b) of New York Convention and Article 36 of the UNCITRAL Model law refer to the public policy of the state in which enforcement is sought, there was no attempt to harmonize its definition.[41] It is therefore impossible to have a universally accepted definition of public policy. The notion of public policy is so vague and is increasingly difficult to understand what it entails. Public policy is one of the most controversial exceptions to refusal to enforcement and recognition of arbitral awards.[42]

Public policy defence is also an obstacle to the enforcement and recognition of any arbitral award.[43] The all-encompassing interpretation of public policy has weakened the effectiveness and strength of the New York Convention.[44] Article V(2)(b) of the New York Convention, which provides that "Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country."[45] The International Bar Association declared the Public Policy Exception in the New York Convention as an elusive and evolving concept deficient in precise definitions.[46] Public policy exception is probably the most unsettled, owing to its indeterminate and evolving nature.[47]

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39 F,Ghodoosi 'Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts' (2016) Vol 20 *Lewis & Clark Law Review 272.*

40 UP, Emelonye, U, Emelonye 'Public Policy Exception in the Enforcement of Arbitral Awards in *Nigeria' (2021) Vol 12 Beijing Law Review* 276.

41 Ibid 277.

42 G. S Mahantesh 'Public Policy as a Ground for Refusing Recognition and Enforcement of Foreign Arbitral Awards' (2021) Vol 4 *International Journal of Law Management & Humanities* 3685.

43 Ibid.

44 Ibid 3686.

45 Ibid 3688.

46 AS, Akoto 'Public Policy: An amorphous Concept in the Enforcement of Arbitral Awards' (2021) Vol 7 *Journal of Liberty and International Affairs 64.*

47 Issues relating to Challenging and Enforcing Arbitration Awards, Norton Rose Fulbright https://www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement (Date Accessed 17 October 2022).

7.0. Application of Public Policy Exemption in Zimbabwe

Countries have different definitions of public policy.[48]The concept of public policy varies from time to time.[49] Article 36(1)(b)(ii) of the Arbitration Act, states that a the court may refuse recognition or enforcement of an award if it is contrary to Zimbabwean public policy.[50] For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is in conflict with the public policy of Zimbabwe if— (a) the making of the award was induced or effected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.[51]

Public policy, pursuant to Article V(2)(b), must be construed narrowly. Public policy is a critical ground for setting aside the enforcement of an arbitral award in Zimbabwe. The test to be applied in determining whether an award conflicts with the public policy of Zimbabwe was set out by the Supreme Court in *Zimbabwe Electricity Supply Authority* v *Maposa*.[52] Several cases on public policy in the enforcement of arbitral awards in Zimbabwe have been brought before the Supreme Court of Zimbabwe.[53]

Consistent with Article 34(2)(ii) of the Act on what constitutes an award that conflicts with public policy, the courts have been scrupulous to interpret that provision narrowly.[54] Public policy is always a moving target at any given time and caution is required of judges in the exercise of their discretion.[55] However, for the avoidance of doubt there is an additional declaration under Article 34(5) of the Act to the effect that

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48 GS Mahantesh (note) 684.

49 K, Sumit, Arbitral Award It Challenges & enforcement, http://www.legalservicesindia.com/article/433/_Arbitral-Award-Its-Challenge-&-Enforcement.html (Date Accessed 18 October 2022).

50 Article 32(1)(b)(ii) of the Arbitration Act [Chapter 7:15].

51 *Gwanda Rural District Council v Botha* SC 174 - 20.

52 Preminum Leaf Zimbabwe (private) Limited v Tilroy Enterprises (Private) Limited and Another HH 43 – 22.

53 *Zimbabwe Cricket v Harare Sports Club and Another* SC 27 – 22; *Alliance Insurance v Imperial Plastics (Pvt) Ltd. & Another* SC 30 – 17; *Gold Driven Inv. (Pvt) Ltd v Telone (Pvt) Ltd & Another* SC 9 – 2013; *Legacy Hospitality Management Services Limited v African Sun Limited and Another* SC 43 - 22; *Stonewell Searches (Private) Limited v Stone Holdings (Private) Limited and 2 Others* SC 22 – 21.

54 *Legacy Hospitality Management Services Limited v African Sun Limited and Another* SC 43 - 22.

55 T, Mutangi *Fick & Others v the Republic of Zimbabwe:* A national court finally enforces the judgment of the SADC Tribunal as a foreign judgment – a commentary on implications on SADC Community Law Midlands State University Law Review (2014) Vol 1 p 94.

an award would be in conflict with the public policy of Zimbabwe if it was "induced or effected by fraud or corruption", or if a breach of natural justice occurred in making the award.[56] In the Zimbabwean situation the additional declaration further complicates public policy. Questions could arise why fraud and corruption were singled out.

Courts of multiple countries apply a constricted public policy concept.[57] Zimbabwe has modified the text of the UNCITRAL Model Law regarding the public policy exception to its enforcement. However, its modification has been interpreted as emphasising the limited nature of the public policy exception.[58] Zimbabwe's Arbitration Act 2002 supplements the wording of the Model Law, providing in Article 34(5) that for the avoidance of doubt "... it is declared that an award is in conflict with the public policy of Zimbabwe if (a) the making of the award was induced or effected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award."[59]

The court is empowered to set aside an arbitral award if the applicant who wishes to have it set aside establishes that the award is in conflict with the public policy of Zimbabwe.[60] The diversified interpretation of the term public policy lead to the refusal of enforcement of the arbitral awards as every court has its own interpretation.[61] Reliance on the broad interpretation of public policy defence as a means of refusing enforcement could lead to unjustified non-enforcement of awards.[62]

8.0. Comparative Perspective of Public Policy Exemption of Arbitral Awards

Zimbabwe 's legal system is to that of South Africa and the United Kingdom. Section 103(3) of the 1996 UK Arbitration Act includes public policy as one of the grounds for refusal of recognition or enforcement of an arbitral award.[63] The United Kingdom has

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56 Article 34(5) of the Arbitration Act [Chapter 7:15].

57 A, S, Akoto 'Public Policy: An amorphous Concept in the Enforcement of Arbitral Awards' (2021) Vol 7 *Journal of Liberty and International Affairs 53.*

58 UP, Emelonye, U, Emelonye 'Public Policy Exception in the Enforcement of Arbitral Awards in *Nigeria'(2021) Vol 12 Beijing Law Review* 280.

59 Ibid 281.

60 *Pioneer Tpt (Pvt) Ltd v Delta Corp & Anor* 2012 (1) ZLR 58 (H).

61 L.C, Gabagambi 'Critical Analysis on the Challenges Facing Legal and Institutional Frameworks on Recognition and Enforcement of Foreign Arbitral Awards in Tanzania' (2015) Vol 39 *Journal of Law, Policy and Globalization 174.*

62 Ibid.

63 U, P, Emelonye, U, Emelonye (n 63) 279.

shown reluctance to refuse enforcement of an award on the basis that it is contrary to public policy.[64] The UK courts have refused to enforce arbitral awards based on public policy. For example in *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd*, the court held that a contract involving bribes would only be contrary to English domestic public policy if the contract contravened the domestic public policy.[65] Zimbabwe has modified the text of the UNCITRAL Model Law with regard to the public policy exception to its enforcement, but its modification has been interpreted as emphasising the limited nature of the public policy exception.[66]

In *Veldspun (Pty) ltd v. Amalgamated Clothing and Textile Workers Union of South Africa,*[67] the court confirmed that the closed shop agreement contained in the arbitrator's award, constituting an unfair labour practice, was contrary to public policy. United Kingdom and South Africa apply a restrictive approach in the consideration of public policy in the enforcement of arbitral awards. It can be concluded that Zimbabwe, South Africa and United Kingdom have a similar legal history hence they apply public policy restrictively. On the other hand, Indonesia is a common law country with a legal system inherited from the UK adopts of public policy exceptions to arbitral awards widely.[68] It is evident that the application of the public policy phenomenon is varied across the globe and this further complicates the use of the notion of public policy in the enforcement of arbitral awards.

9.0. Conclusion

It is clear from the selected case that uncertainties remain as to the contours of public policy. Courts are hesitant to describe public policy comprehensively.[69] The meaning of public policy is ambiguous, and it is increasingly difficult to get a uniform definition of public policy. Public policy is a concept whose definition is not clear and therefore not exhaustive.[70] Public policy is a highly subjective term that refers to the fundamental

64 Ibid.
65 Ibid.
66 U, P, Emelonye, U, Emelonye (n 63) 280.
67 *Veldspun (Pty) Ltd* v. *Amalgamated Clothing and Textile Workers Union of South Africa* (3) SA 880 (E) 898G (1992).
68 U, P, Emelonye, U, Emelonye (n 63) 282.
69 U. P, Emelonye, U, Emelonye (note 62) 276.
70 B Le Bars 'Investment Arbitration Tribunals: Beyond the Civil-Common Law Dichotomy' (2017) *Vol 83 The International Journal of Arbitration, Mediation and Dispute Management 471.*

notions of morality and justice that are necessary for the protection of the common interests of the state and is widely acknowledged among practitioners to vary based on place and time. Uncertainty of the proper definition of public policy results in the whole process of arbitral registration being shrouded in complications. An analysis of the Supreme Court's practice in other jurisdictions points to the same conclusion**.** The public policy phenomenon is evolving and there has been noted development in the interpretation of public policy.

Whereas United Kingdom, South Africa and other developed nations are using a restrictive approach in the application of the public policy concept to ensure optimal enforcement of arbitral awards, there is no contradiction on the fact that public policy should be applied very narrowly. Based on the global trend vis-à-vis the situation in Zimbabwe, the reliance on public policy as anti-enforcement measures will not thrive for a long time to come but will certainly fade away with the passage of time. The New York Convention and UNCITRAL Model Law could certainly be improved to ensure stricter interpretation of the public policy phenomenon. On the other hand, the text of domestic legal frameworks could be improved to address the lacuna in the definition of public policy rather than leaving it to the discretion of the responsible state. It is paramount for the judiciary to recognise the importance of a fair and just decision-making process. An analysis of the jurisprudence of the Supreme Court on the issue of public policy shows that the approach that the court has taken on the issue of public policy has been inconsistent. Matters arising from an illegal contract cannot be arbitrated. The International Law Association (ILA) has also noted that a broad interpretation of public policy would defeat arbitral finality and the objectives of arbitration. It can be concluded that most nations prefer a restrictive approach, but it remains vague, and complicated whether the restrictive approach is the best approach in public policy.

MIDLANDS STATE UNIVERSITY

Law Review

THE ARBITRATION ACT (CHAPTER 7:15) ENDURING LEGACY

SPECIAL ISSUE

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ISSN
Midlands State University Law Review (Print), 3006-9300
Midlands State University Law Review (Online) 3006-9319