CRITICAL LEGAL ANALYSIS OF COMMERCIAL ARBITRATION IN UGANDA

BY

MULUMBA SEGANTEBUKA

LLB/54264/151/DU

A RESEARCH DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR AWARD OF BACHELOR OF LAWS DEGREE OF KAMPALA INTERNATIONAL UNIVERSITY

MAY, 2019
DECLARATION

I, declare that this is the work of Mulumba Segantebuka alone, except where due acknowledgment is made in the text. It does not include materials for which any other university

Signature: [Signature]

Mulumba Segantebuka

LLB/54264/151/DU

Date: 15/5/2019
APPROVAL

I certify that this research report has been submitted by Mulumba Segantebuka under my supervision and approval.

Ms. Victoria Gakii Maingi.

Signature: ...........................................

Date: ..................................................
DEDICATION

I dedicate this research paper to the following people who have ensured that my education is a success.

God being my first priority in everything I do, Great thanks to him for the knowledge and wisdom he has granted to me throughout the four years because with God all things are possible.

I sincerely express my gratitude towards my supervisor Ms. Victoria Gakii Maingi, for her great work she has done in supervising my research work without giving me any hardship and ensuring that this research is complete and a success. I therefore pray that God blesses her and the works of his hands now and always.

I am profoundly honoured and exceedingly humbled to express my gratitude towards my beloved parents who have been able to finance my academics throughout my education. May the good Lord bless them abundantly and also bless the work of their hands.
ACKNOWLEDGEMENT

I wish to express my sincere gratitude to the following people because this work would not have been possible without them.

I wish to thank the Almighty God who has given me knowledge, wisdom, life and protected me throughout my academic struggle.

My gratitude goes to my supervisor Ms. Victoria Gakii Maingi for her support and dedication in making everything possible as far as this research paper is concerned.

Finally, my appreciation goes to my uncles, and lastly to my friends for their words of encouragement throughout my academic progress.
## LIST OF ABBREVIATION

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>UBC</td>
<td>Uganda broadcasting corporation.</td>
</tr>
<tr>
<td>DFCU</td>
<td>Development Finance Company of Uganda</td>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
</tr>
<tr>
<td>ACA</td>
<td>Arbitration and Conciliation Act</td>
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<tr>
<td>CPR</td>
<td>Civil Procedure Rules</td>
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<tr>
<td>CADER</td>
<td>Center for Arbitration and Dispute Resolution</td>
</tr>
<tr>
<td>JSC</td>
<td>Judicial service commission</td>
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<tr>
<td>Co</td>
<td>Company</td>
</tr>
<tr>
<td>URA</td>
<td>Uganda revenue authority</td>
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ABSTRACT

The study seeks to critically investigate the law of commercial Arbitration in Uganda. The objectives of the study were; to analyze the legal framework on commercial arbitration, to establish the roles and challenges of commercial Arbitration in reducing and to propose the reforms and recommendations in improving commercial Arbitration as an alternative of accessing justice by the disputants. In order to achieve the objectives of this study the researcher will use the qualitative research techniques for data and information collection during the study. This method was used to generate and establish a detailed description of the legal framework on commercial arbitration. Documented sources from within Uganda and other jurisdictions were reviewed. The researcher also based on information found in various text books, law journals, newspapers, statutes and any other written relevant material for qualification of the findings. The study recommends the Judiciary to spearhead efforts and collaborate with the judicial service Commission (JSC) and the centre for Arbitration and Dispute Resolution (CADER) to sensitize the litigants, advocates and the public about the benefits of Arbitration as a method of resolving disputes and Arbitration at large. The commercial court itself does not have enough judges to try and handle these disputes therefore government should raise the number of judges in the commercial court and the CADER should as well be funded by the government in terms of both funds and the necessary manpower to enhance its role in arbitrating commercial disputes.
CHAPTER ONE

1.0 General Introduction

The Arbitration and Conciliation Act, Cap. 4 was enacted by the Parliament of Uganda on 19th May, 2000 and commenced on the same date to regulate the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. The Act is largely based on the 1985 United Nations Commission on International Trade (UNCITRAL) model law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976. The model law was amended in 2006 to address evolving practices in international arbitration with regard to the form of arbitration agreements and interim measures.

The Uganda Law Reform Commission (ULRC) with support of the Justice Law and Order Sector (JLOS) is undertaking a study to review and reform the Arbitration and Conciliation Act, 2000. The review is intended to update the law, establish the gaps if any in the law, address challenges faced in the implementation of the Act and make proposals for amendment.

Therefore, in this chapter looks at the background of the study, the statement of the problem, the purpose of the study, the objectives, the research questions, scope of the study, methodology, definition of key terms as well as the significance.

1.1 Background of the Study

In an attempt to look at the clinical and legal study of commercial arbitration in Uganda, first there is need to trace the history of arbitration and commercial arbitration both as the new development and as a practice in Uganda. In so doing, in this paper there is a task of looking at the legal and institutional commitments that have been put in place to facilitate this cause. Together with these tasks, it is necessary to try to reconcile the different meanings of commercial Arbitration that have developed over time.

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2 Black's Law Dictionary 2nd Edition
However, if one is to discuss arbitration at large, he or she has to briefly discuss the history of alternative dispute resolution because it gives background of commercial Arbitration as an alternative to the adversarial system. Hence this can be traced as far back as to the transitional /indigenous systems of dispute resolution, for instance the institutional/ council of elders which offered dispute resolution, services to the community. Central to finding of a dispute, was the act of conciliation between the disputants settlement was not complete without reconciliation of the parties.

In its modern form, arbitration movement developed largely in the United States as an alternative to the courts, innovative ways were developed as a way of keeping parties away from the courts because of the ills associated with the court litigation process in the USA, such as high costs of legal representation, a protected system of discovery, overcrowd cause lists resulting into delays due to adversarial systems of court litigation and unnecessary long adjournments.

It therefore follows that there was a traditional perception that alternative Dispute Resolution mechanisms like Arbitration and mediation were somewhat inferior to litigation and therefore they could only be permitted after due inquiry as to the state of mind of the disputants. Further, there was a perception that under the common law system, disputes had to be resolved through an adversarial method of dispute resolution.

This argument appears to be a direct result of the training given to the lawyers and judicial officers. This training is such that a dispute is resolved on a win/lose formula and any sign of concession is regarded as evidence of weakness. In this way, judgment is given to the winning party as against the loser. The position may not be the same where the dispute is resolved through arbitration.

A good example here is the case of Iraqi fund for External Development Vs Attorney General where section 9 has been criticized as being inconsistent with Article 139. The same criticism was raised in the case of Ruth Bember & Another Vs QAFP which the dispute was

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4 Newhouse, Martin J. “Some Reflections on Arbitration and the Changing Role of the Courts" (March/April, 1995) 39 B.B.J. 15,
6 Arguing that the exemption of federal Arbitration from the Freedom of Information Act undermines public accountability
9 HCCS No 1391 of 2000
10 Arbitration and conciliation Act Cap 4
11 1995 Constitution of Uganda
12 HCCS No. 833 of 1989
referred to Arbitration. As a general perception, it is argued that for justice to be seen to be done, arbitration procedures have to be closely supervised by the High Court. This was embodied behind section 11 of the old Arbitration Act that allowed an award of an arbitral tribunal to be forwarded to court for reconsideration.\textsuperscript{13}

From the aforesaid, it is now clear that the traditional perceptions of arbitration are changing, for instance arbitration has now become a credible method of resolving disputes even in common law countries. The first driving factor in changing the traditional perceptions was international trade. This sought to create a dispute resolution mechanism which was universal and yet at the same time insulated from the national courts, which can be based against foreign business concerns.\textsuperscript{14}

In this regard the United Nations Commission on International Trade Law (UNCITRAL) came up with the following documents or codes:

\begin{enumerate}
  \item \textit{The UNCITRAL ARBITRATION RULES 1976}
  \item \textit{The UNCITRAL CONCILIATION RULES 1976 AND}
  \item \textit{The UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 (hereinafter called “model law”)}
\end{enumerate}

Therefore these UNCITRAL documents coupled with the Convention on the Recognition and Enforcement of foreign arbitral Awards\textsuperscript{15} (The New York Convention) of 1958 in which Uganda is a signatory, are the main instruments that influenced the drafting of the new Arbitration and Conciliation Act of Uganda.\textsuperscript{16}

As a result of this international trade angle, there has been push by donor countries such as U.K. Denmark, US to modernize Ugandan commercial laws and court procedures along the lines that actively promote arbitration and by so doing promote trade and investment in the country and this has led to the enactment of the investment Code Act 1991 Cap 92, which under Section 28

\textsuperscript{13}John Adams & Roger Brownword, ‘Understanding law Sweet & Maxwell (1992)
\textsuperscript{15}Recognition and enforcement of foreign Arbitral awards (1958)
\textsuperscript{16}Section 3 of the Arbitration and Conciliation Act ,Cap 4
promotes settlement of investment of disputes amicably through Arbitration or any other machinery.\(^{17}\).

In Uganda, court-based arbitration began to creep into the judicial system in 1990’s one of such driving factors of change came from a report on Judicial Reform made by Justice Sir Herald Platt in 1994 which recommended the increased use of Arbitration and mediation/arbitration alongside court litigation and the creation of the Commercial Court Division of the High Court hence leading to the birth of Commercial Arbitration in Uganda.\(^{18}\).

1.01 History of commercial Arbitration in England.

In England as a colonial master, the history of the practice of commercial Arbitration is relatively older than that in Uganda. In England, the law of Arbitration has been changing over the years. The learned author, Mustill\(^{19}\) cautions us by adding that in England the law of arbitration has been changing over the years and that as far as commercial Arbitration is concerned, any 19th century decision or dictum should be approached with caution because of the changes in circumstances and practices of commercial Arbitration.\(^{20}\).

In England, a country that was late in entering into the mercantile arena, had considerably less of these institutions and combined with difficulties encountered in taking commercial matters in all their complexity to formal courts, private Arbitration began to flourish, and again in the words of Lord Mustil “on a scale which may not have been equalled elsewhere”.\(^{21}\).

While institutionalized Arbitration gained favour on the European continent private or ad hoc Arbitration dominated the resolution of commercial disputes in England especially after the enactment of the Common Law Procedure Act of 1854. Lord Mustil traces the origins of the Common Law Procedure Act to 1698 when the initial attempts were made to legislate towards ameliorating the above challenges.\(^{22}\).

The essence of the solution provided in the Act of 1854 was to bring in the concept of Arbitration ‘pursuant to a rule of court’ where the court employed its judicial power to refer a complex matter

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1 Section 28 of the Investments Code 1991 Cap 92
4 Mauro Cappelletti, ‘Arbitration processes within the framework of the world wide access to justice movement’. (1993) Vol 56 MLR
to Arbitration. This reference being an extension of the ruling of a formal court allowed the court to employ its penal powers to ensure compliance with an award made through Arbitration. This new approach to commercial Arbitration arrived at an opportune moment for English Commerce for it was in the 19th century that the English trading empire began to dominate much of the known world\textsuperscript{23}.

The English law of Arbitration has had a rich in statutory history. The Arbitration Act of 1950\textsuperscript{24} the Act of 1975 and 1979 have continued the piece meal process of expansion, amendment and consolidation which begun with the Arbitration Act of 1889. In this regard, English law also received the rules of the Chartered institute of arbitrators and short form Arbitration Rules 1991\textsuperscript{25} and earlier on the chartered institute of arbitrators Code Rules all of which continued to enrich the practice of Arbitration\textsuperscript{26}.

Not surprisingly however, the English system also faced problems in the infant years of commercial Arbitration in the theory, a legal system could be envisaged which adopted, an attitude of in difference to private Arbitration. Whilst recognizing the right of parties to agree that there dispute should be decided by arbitration, the law would do nothing to enforce the agreement or to reinforce the procedure at its point of potential weakness or to protect the parties against the risk of procedural or substantive injustice\textsuperscript{27}.

According to Reynolds\textsuperscript{28} the history of arbitration runs back to the ancient years and it was known to the ancient Romans. The modern law has evolved since Roman times thus culminating in the statutory consolidated of the Arbitration Acts of England from Act of 1950 to that of 1979. Arbitrator law consists of common law rules as well as statutory provisions which in the Arbitration context operate in effect to provide an alternative system and framework for the resolution of disputes outside courts\textsuperscript{29}.

\textsuperscript{23} Michael Mustili& Stewart Boyd, 'Commercial' (1989)
\textsuperscript{24} Commenced on 1 September 1950
\textsuperscript{25} Effective form 1\textsuperscript{st} January 1985
\textsuperscript{26} Hon Justice G. Kiryanwire, Court based Arbitration , a paper delivered by the Hon. Judge of the Commercial Court at the Law Development Centre, 11/06/04
\textsuperscript{27} Mustili, 'Arbitration: History and background (1989) Vol.6 Journal of International Arbitration
\textsuperscript{28} Arbitration — Michael O Reynolds P.3
\textsuperscript{29} The UN Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention)
The courts of England throughout the history of commercial arbitration have been willing, subject to the dictates of natural justice to recognize and sanction trade practices as regarding dispute resolution, courts usually require such practices to be strictly proven but certain practices have become over the years so familiar to the courts that they do take judicial notice of them, for example the use of arbitrators or advocates a good example was in EE & Brian Smith (1928) Ltd Vs wheat sheaf Mills 42 where the court recognized a practice, which greatly modified the application of the doctrine of the res judicata on the facts31.

In tracing the history of arbitration in England, any discussion would be incomplete if we do not talk about Lord Woolfs Report32 which was reported in two stages, an interim report in June 1995 and his final report in July 1996 which has been referred to as the biggest shakeup of the English civil justice system. He highlighted that if a civil justice system was to ensure access to justice then, among other things, it was necessary for it to deal with cases with reasonable speed, be understandable to those who use it33.

He gave proposals that encouraged the revitalization of Alternative Dispute resolution in the sense of resolving disputes without going to court which do not involve litigation.

1.02 The history of Commercial Arbitration in Uganda

The history of Arbitration in Uganda is not as far stretching as the English system. Uganda’s 1st attempt to make alternative dispute resolution was in 1930 in the form of the Arbitration Act Cap 55 of 1930 it was expected that this Act would open opportunities for the practice of Arbitration in a country, where it had never been recognized as part of the judicial system yet the contrary happened. The inherent weakness it had were those shared by the most laws at the time. It was an omnibus transplant and replica of the Arbitration Act of England and with time, it could not resolve the range of commercial and other disputes that arose34.

In Uganda there were no amendments to the Arbitration Act and from the act of 1930 no changes occurred in the law of Arbitration. From this time up to 1998, the law of arbitration continued to

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30 (1939) 63 Lil Rup 237
be applied under the Arbitration Act Cap 55 of 1930, until the civil procedure Rules were amended to give Arbitration better effect\textsuperscript{35}.

On 18\textsuperscript{th} May 1998 the chief Justice acting under the Judicature Statute of 1996 as chairman of the Rules Committee made Civil Procedures (Amendment) Rules 1998 Relevant to the history of Arbitration in Uganda\textsuperscript{36}.

The biggest development in the law of Arbitration in Uganda seems to have been the enactment of the Arbitration and conciliation Act No.7 which was intended to cure the defects or mischief of the 1950 Arbitration Act\textsuperscript{37}. The Act has continued to facilitate the practice of Arbitration and provide a framework for the operation of commercial Arbitration. Its innovation was the establishment of the center for Arbitration and dispute resolution under the high court\textsuperscript{38} to ensure that dispute resolution is a continuing success in Uganda. The history of Arbitration in Uganda may not stretch too far yet it suffices to add and continues to gain prominence and the courts are lending it every support and where the dispute can be resolved without formal litigation, courts use the scheduling conference to effect it\textsuperscript{39}.

The Arbitration and Conciliation Act 2000 ("ACA") supersedes the Arbitration Act Cap 55. As a former British Protectorate, the law of Uganda draws heavily on English legal principles. The old provisions of the Arbitration Act were complex and enforcement of international awards was by no means straightforward. Uganda does not have a long history of formal Arbitration. However, in recent years Uganda has established itself as a willing recipient of foreign direct investment and with that she has embraced the best international standards of arbitral practice reflected in the ACA which closely follows the United Nations Commission on International Trade Law model law ("UNCITRAL" Model Law) including the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules. The ACA eliminates the need for complex analysis of incoherent residual British colonial legislation\textsuperscript{40}.

\textsuperscript{35} Arbitration and Conciliation Act, Cap 4
\textsuperscript{37} Arbitration and Conciliation Act, Cap 4
\textsuperscript{38} Established under the commercial courts (practice) Directions 1446
\textsuperscript{39} Nader Laura. "Controlling Processes in the Practice of Law Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology," (1993), 9 Ohio S. J. on Disp. Resol.1
\textsuperscript{40} UNCITRAL, Conciliation Rules, 1976
It has as well been forcefully argued that the jurisprudential underpinnings of arbitration were often brought to a chief who together with the elders would hear both sides until an agreement was reached. Decision-making was to a large extent by agreement.\(^{41}\)

The law on Arbitration in Uganda, both domestic and foreign, is contained within the ACA. Unless stated otherwise, all references in this chapter are references to sections in the ACA. The Arbitration Rules ("AR") appear in the First Schedule to the ACA. Civil Procedure Rules ("CPR") made under the Civil Procedure Act 1964 (as revised) apply in the Courts of Uganda. The occasional reference is made to CPR Order XL VII in the ACA. This rule pre-dates the ACA and is only of residual relevance; the primary source of Arbitration law is now the ACA. An example is the recent decision in Uganda telecom Ltd v Hi-tech Telecom Pty Ltd, the Federal Court of Australia has confirmed that Australian courts will adopt a pro-Arbitration approach in relation to the enforcement of foreign awards where the domestic and foreign laws were considered in Uganda.\(^{42}\)

\textbf{Section 2 (b) of the Arbitration and Conciliation Act Cap 4} defines arbitration as any arbitration, whether or not administered by a domestic or international institution where there is an Arbitration agreement.\(^{43}\) Halsburgs' laws of England defines it as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction.\(^{44}\) According to Kenneth Glasner QC\(^{45}\), Arbitration is a process by which the parties consent to judgment. The parties come to an agreement that a third party will impose a binding decision between the parties without the aid of or resource to the public dispute resolution system, namely the courts.\(^{46}\)

Arbitration in its simplest sense is a process that can be used to resolve disputes between parties without going through a formal court system. The most common use of international Arbitration today is the resolution of commercial disputes.\(^{47}\)

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\(^{41}\) ARBITRATION as a tool in the administration of justice- Judge Egonda Ntende

\(^{42}\) Steven P. Finizio and Duncan Speller, 'A practical guide to international commercial arbitration: Assessment, planning and strategy' Thomson Reuters 2010

\(^{43}\) Ibid


Some historians hold that Arbitration was used as a means of resolving disputes before the appearance of the court system. These historians point to records of the ancient Egyptians, Greeks and Romans to support this claim. These records indicate that in ancient times, contrary to the practice of today, the arbitrator was generally a person known and trusted by both parties - the better known the arbitrator the more confidence the parties would have in his or her judgment. Philip of Macedon, father of Alexander the Great, is recorded to have used Arbitration to settle territorial disputes arising from a peace treaty with some of the Greek states in 337 BC.

Lord Mustill, Lord Justice of Appeal, commences his article ‘Arbitration— History and Background’ in the Journal of International Arbitration (1989), “Commercial Arbitration must have existed since the dawn of commerce. All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force. Lord Mustill also stresses that of the two types of alternative dispute resolution, namely ad hoc and institutional Arbitration, the latter is more fully documented. Some of forms of institutional Arbitration found in the 1600s listed by Lord Mustil are:

1. The Stannary Courts in Cornwall, England - a pseudo court that functioned in parallel to the state legal system with jurisdiction over matter arising from the extensive tin mining in the region.
2. Arbitral tribunals of Italy and France - These institutions dealt with trade disputes and had their roots in Italy where they were called the officium mercanziale.

Yet according to Michael Reynolds Arbitration may be defined as a consensual process executed in a judicial manner whereby a dispute between two or more persons is finally resolved by the arbitrator’s decision, which is binding upon the parties and enforceable at law. Arbitration must be a consensual process, that is, of or by consent of the parties from whence derive the arbitrator’s powers, terms of reference and jurisdiction.

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50 Holdsworth, 'History of English law' vol siv (1964)
52 Section 3 Cap 4
54 John Adams & Roger Browncword, ‘Understanding law Sweet & Maxwell (1992)
In Arenson V Arenson&Cusson, Bachman, Ritely& Company\(^{55}\) Lord wheathy, defined the determinate features of Arbitration as being:

(a) The existence of a dispute or a difference between the parties which has been formulated and;

(b) The remission of that dispute or difference to another party to resolve in a judicial manner;

(c) The opportunity of the parties to present evidence or submission in support of their respective claims in the dispute;

(d) The agreement of the parties to accept his decision. The award must be binding. It is by virtue of the contract to the Arbitration agreement. It can thus be enforced as an agreement to abide by the arbitrators' award\(^ {56}\).

It has been opined by the learned author, Michael Reynolds in his book Arbitration \(^ {57}\) that even within the different alternative dispute resolution modes, arbitration continues to standout as the most appropriate in resolving commercial disputes. It is not difficult to discern. Indeed, the major difference, which equally doubles as an advantages between arbitration and other forms of alternative disputes Resolution is that Arbitration imposes a binding decision upon the parties while the other forms require the parties themselves to come to a resolution of the dispute with the assistance of the third party\(^ {58}\).

Section 5(1)\(^ {59}\) of the Act mandates a judge or magistrate before whom proceedings are brought in a matter which is subject of an Arbitration agreement, to refer the matter back to Arbitration unless he finds that the Arbitration agreement is null and void or that there is, in fact no dispute.

As if to stress the point in the provision, Lord Goddard CJ once stated in Mediterranean and European Export Co. Ltd V FortressFabrics (Manchester) Ltd that in modern times, the courts must in the case of commercial Arbitration, be hesitant and cautious to upset the outcome and must

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\(^{55}\) HaJsburg's Laws of England 4th edition P225  
\(^{56}\) Ibid  
\(^{57}\) Ibid  
\(^{58}\) Ibid  
\(^{59}\) Cap 4 (Arbitration and conciliation Act)
uphold the awards of skilled arbitrators who have been selected by the parties themselves “The same point had been stated years earlier”.

In Willeford V Watson Lord Selborne had stated in similar terms “if parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then courts have no option but to act upon such an agreement. Once a party moving for a stay (of the court proceedings) has shown that the duties are within a valid subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit it is upon the party opposing the application to stay”.

Under Section 25 (c) unless agreed by the parties, if without showing sufficient cause, any party fails to appear at hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it” The provision was given effect of judicial approval by the then JTSekoko in Coffee Marketing Board V Yugasta Construction when he stated that a refusal by a party to submit to Arbitration does not divest the arbitrator of his jurisdiction because it is conferred upon him/her by the Act and by the contract between the parties where a party is summoned to attend but neglects to do so. The arbitrator can proceed exparte but must give notice of his intention to proceed exparte.

Similarly, in Heyman & Another V Dorwin’s Ltd Lord Macmillan stated that, the law permits the parties to a contract to include in it as one of its terms an agreement to refer to Arbitration, disputes which may arise in connection with it and the courts enforce such a reference by staying legal proceedings in respect of any matter agreed to be referred if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission.

In the end, the author is at peace with the opinion that commercial Arbitration as a specie of Arbitration and alternative dispute resolution generally can be properly conducted only if so done in a judicial manner. This does not necessarily mean that arbitrators have the same powers as

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60 European Export Co. Ltd V Fortress Fabrics (Manchester) Ltd
61 (1873) LR 8 Ch. App 473 at 480
62 Ibid
63 Arbitration cause No. 1 of 1994
65 (1942) AC 336 at 369
judges but rather it means, that in executing their duties, the arbitrators exercise a function kin to that of a judge and they do not act arbitrarily but they must like judge’s act judiciously.67

In the last decade, arbitration has taken significance in legal and judicial practice within the common law jurisdictions. Originally it started as a standalone mechanism largely operating outside the court system, however as time went on their emerged court based alternative dispute resolution.68

In Uganda the Civil Procedure Rules were amended in 1998 to include OXB69 to provide for alternative Dispute Resolution and in 1996 pursuant to commercial court (practice) Directions 199670

The Arbitration and Conciliation Act 2001 ("ACA") supersedes the Arbitration Act Cap 55. As former British Protectorate, the law of Uganda draws heavily on English legal principles. The old provisions of the Arbitration Act were complex and enforcement of international awards was by no means straightforward. Uganda does not have a long history of formal Arbitration. However, in recent years Uganda has established itself as a willing recipient of foreign direct investment and with that she has embraced the best international standards of arbitral practice reflected in the ACA which closely follows the United Nations Commission on International Trade Law model law ("UNCITRAL” Model Law) including the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules. The ACA eliminates the need for complex analysis of incoherent residual British colonial legislation71.

The statutory instrument setting up the commercial court in an apparent break from the prevailing judicial practice enjoined the commercial judge to be proactive it also made it the objective of the court to deliver to the commercial community an efficient, expeditious and cost effective mode of adjudicating disputes. The instrument setting up the commercial court therefore allowed the court to explore more efficient and effective methods of dispute resolution outside the conventional method of litigation.72

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68 Nader Laura, “Controlling Processes in the Practice of Law Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology,” (1993), 9 Ohio S. J. on Disp. Resol.1
69 Statutory instrument N. 26 of 1998
70 Statutory instrument N. 26 of 1998
71 The 1995 Constitution of the republic of Uganda
1.2 Statement of the problem

Whereas after the establishment of the commercial court, it was hoped that it would help bring down the trend of case backlog in the High Court to bare minimum, especially in commercial cases, however this was not effective enough hence leading to slow and increased case backlog in the high court. Currently, the Arbitration and Conciliation Act (Cap. 4) does not provide for the immunity of an arbitrator. The lack of immunity would cause fear of liability for decisions that could have been made out of improper interpretation of the law. Having a law that supports an arbitrator’s immunity ensures the efficient and speedy administration of justice. This have necessitated the use of other methods as an alternative leading to arbitration. This study therefore considers whether arbitration would be the best alternative method to be used to resolve commercial disputes which would help in clearance of case backlog in the world of commerce.

1.3 Objectives of the Study

The study seeks to critically analysis the law of commercial Arbitration in Uganda.

1.3.1 Specific objectives of the study

1. To analyze the legal framework on commercial arbitration
2. To establish the roles and challenges of commercial Arbitration in reducing
3. To propose reforms and recommendations in improving commercial Arbitration as an alternative of accessing justice by the disputants.

1.4 Research questions

1. What are the legal framework on commercial arbitration?
2. What are the roles and challenges of commercial Arbitration?
3. What are the reforms and recommendations in improving commercial Arbitration as an alternative of accessing justice by the disputants?

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34 Arbitration and Conciliation Act, Cap 4
1.5 Hypothesis

*The study shall be guided by the hypothesis;*

The commercial Arbitration has since its establishment been instrumental in reducing the rate of case backlog in Uganda courts.

1.6 Significance of the study

The findings of the study will help in dispersing knowledge about commercial Arbitration in Uganda.

The study will help policy makers in resolving disputes of a civil nature and this will be instrumental in reducing case backlog in our courts. It will also help donors to prioritize this area as a vital one in the field of administration of justice.

It will also important in that it assists administrators; parties and advocates in resolving disputes which are of a civil nature thereby reducing the case backlog in the court.

1.7 Methodology of Research

In order to achieve the objectives of this study the researcher will use the qualitative research techniques for data and information collection during the study. This method will be used to generate and establish a detailed description of the legal framework on commercial arbitration.

Documented sources from within Uganda and other jurisdictions were reviewed. The researcher also based on information found in various text books, law journals, newspapers, statutes and any other written relevant material for qualification of the findings. These will be reviewed from KIU, Makerere University, Law Development Centre, FIDA Uganda etc.

1.8 Synopsis of Chapters.

The dissertation is divided into five chapters.

**Chapter One**

The general introduction and it covers the background to the research, the statement of the problem, objectives and significance of the study, research questions, the literature review, and the methodology to be used.

**Chapter two**
This chapter focused on literature review. Quite a lot of literature has been written about this subject both locally and internationally. The first step in examination of national and international commercial Arbitration trends is to examine the current thinking around Arbitration models.

Chapter Three
This chapter looked at the legal framework of commercial Arbitration in reducing case backlog in the court.

Chapter Four
Focused on the roles and challenges of commercial Arbitration

Chapter Five
Focused on the reforms/recommendations/conclusion in improving commercial Arbitration as an alternative of accessing justice by the disputants.

1.9 Conclusion
The Arbitration and Conciliation Act under section 2(c) defines an arbitration agreement as an agreement by the parties to submit to arbitration all or certain dispute which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. The definition of an agreement under Arbitration and Conciliation Act was based on the model law of 1985 which has since been amended. The new definition takes into consideration among others the form and has broadened the means of communication to include electronic communication that the parties make by means of data message. This definition is all inclusive and has taken care of the new forms of communication that have since evolved and there is a need to incorporate it in our law to make such agreements effective.
CHAPTER TWO
LITERATURE REVIEW

2.0 Introduction
Quite a lot of literature has been written about this subject both locally and internationally. The first step in examination of national and international commercial Arbitration trends is to examine the current thinking around Arbitration models. Under this, theoretical review and related literature have been examined.

2.1 Related Literature
Arbitration in its simplest sense is a process that can be used to resolve disputes between parties without going through a formal court system. The most common use of international Arbitration today is the resolution of commercial disputes.

Briefly Boulle (1998) summarized that the main objective by settlement is to encourage incremental bargaining towards a central point between the two parties’ positions. He argued that the arbitrator who is a neutral third party works to bring the parties off their positions to a compromise.

Allan Redfern and Martin Hunter in their book, the law and practice on international commercial Arbitration talks about commercial Arbitration but from the international view of point and a part from highlighting the special advantages that it has, it does not consider the challenges of commercial Arbitration that it is facing neither does it try to propose any recommendation for its modification but its applicability more attractive in the laws of Uganda. The learned author Michael P. Reynolds talks about Arbitration broadly but does not consider specifics of commercial Arbitration and obviously he does his research on the Uganda’s socio-economic, legal and how they have affected the law of commercial Arbitration in Uganda.

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74 Nader that ‘harmony ideology was a response to the law reform discourse of the 1960s and that Arbitration placates its participants without vindicating their legal rights.
75 Boulle (1998) on settlements
76 Second edition (1991) sweet and Maxwell
78 Lloyds list practical guides (1993)
79 Holdsworth, 'History of English law' vol xiv (1964)
Neil Vidmar in his article “procedural justice and alternative Dispute Resolution” makes an attempt at answering the questions whether settlement provides better justice than judgment and is more focused on highlighting the salient differences between alternative dispute resolutions and adjudication. This research is concerned particularly with commercial Arbitration and will be more than simply answer the question whether commercial Arbitration as an alternative dispute resolution mechanism is better than adjudication. It shall seek to propose recommendations to make commercial Arbitration a better system. In the same meeting Judge John Morosso in his paper discussed at length the practice and development of alternative dispute resolution in Tanzania but he admitted that his presentation would be restricted to Tanzania’s legal system which he understood best clearly his presentation is of help in looking at the advantages and challenges of commercial Arbitration in Uganda which is the concern of this research.

Besides, Henry James F. “No Longe, in his books at dispute resolution programs as being developed by state courts he finds that state courts have long been fertile ground for the development of such programs and that specialized courts, in particular, sponsor some of the latest innovations. He noted that such examples are probate courts, adult guardianship Arbitration and family group conferencing. The article also supports the continued adaptation and refinement of dispute resolution programs by state courts and upholds that there is need for greater communication and coordination between these programs.

Furthermore, Wayne D. Brazil and Jennifer smith in their strong article also identified key values and concerns that arise when deciding how to structure court-connected Arbitration. The Article also looks at the most common ways that court connected Arbitration programs are structured. The authors find that the specific purposes and priorities of the program at hand must be identified as they are central to shaping the structure. This can be done by court appointing direct a particular neutral arbitrator or give a list of arbitrators to the parties who will take up their choice. Sir Herald Platt in his report made some recommendations which include inter alia an

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82 Extracted from procedural justice (1997)
83 Judge in the high court of Tanzania
85 Henry James F. “No Longer a Rarity, Judicial Arbitration is Preparing for Great Growth—But Much Care is Needed” (1991) 9 Alternatives to the High Cost of Litigation 95
86 Wayne D. Brazil & Jennifer Smith Article on how to structure court connected arbitration
increased use of Arbitration alongside court litigation and the creation of the commercial Arbitration to the high court division to handle commercial disputes.  

Deborah Henslur suggests that there is a potential gap between the arbitration movement and the way that arbitration is happening in courts or business as usual. The article states that very little is known about most important aspects of court annexed arbitration. Hensler outlines an agenda for research, with particular emphasis on qualitative research that would draw out “thick descriptions” of arbitration to be carried out by courts.

2.2 Theoretical perspective

The study was best on four theories of commercial arbitration. An understanding of these theories is necessary because the scope and limits of the national court’s intervention in the arbitral process as well as the scope and limits of the powers of the arbiters is influenced to a very great extent by the theory of arbitration accepted in a particular jurisdiction. These four theories are: the Jurisdictional theory, the Contractual theory, the Mixed or Hybrid theory and Autonomous theory.

The Jurisdictional Theory: The main focus of this theory is the significance of the supervisory power of the States to regulate all arbitration procedures taking place within its territory. Proponents of Jurisdictional theory clearly ignored the significant of the will of disputant parties to an ICA. They maintains that the validity of the arbitration agreement, the authorities of the arbiters, the scope of submission, the arbitration procedures and validity of an arbitral award is decided by the rule of laws of the seat and the enforcing State in the same way as judgment made by the national courts. The theory therefore stress that there is a close linked between arbitration agreement and a State law. So, validity of arbitration agreement cannot be carried out without the regulation of a national legal system.

One of the most famous protagonists of this school of thought was Professor Mann, Fritz Alexander. He maintains every country has the right to regulate and supervise any activities carried...
out within its territory\textsuperscript{92}. Therefore, the State where the arbitration is conducted regulates the arbitral proceedings and the efficacy of the process.\textsuperscript{58} The parties’ arbitration agreement is binding on them not just because they have mutually consented to such an agreement, but because a national legal system decides to attach legal consequences to their agreement. Any acts of arbiters that against the Public Policy and mandatory rules of the place of arbitration are regarded as judicially unjustified\textsuperscript{93}. In other words, the intention of the disputant parties as manifested in their agreement can only be binding to the extent to which they are sanctioned within the mandatory rule of laws and Public Policy of the place where the arbitration is conducted. Following this premise, for example, the US Supreme Court in case Mitsubishi \textit{Motors Corp. v. Soler Chrysler-Plymouth Inc.}, clearly stated that the praise’s arbitration agreement for resolving an anti-trust dispute with domestic context is contradict the Federal policy of USA\textsuperscript{94}. The same idea can also be found in Mann’s work:

"\textit{No one has ever or anywhere being able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of autonomy of the parties exists only by virtue of a given system of municipal law and in different system may have different characteristics and effects.}"\textsuperscript{95}

\textbf{Judgment Theory}: This theory is based on the argument, that task of the arbiter was to judge and the arbitral award, he produce, was, consequently, to be treated as an act of jurisdiction. In the first half of the 20th Century was developed the theory that in the absence of the arbitration agreement, the arbitral award would not have the legal existence. Absolutely, it didn’t mean that award was a contract. It was crystal that arbiters were not judges and that their arbitral award was not a judgment. The duty of the arbiter was to evaluate and examine the submission of the parties, resolve the dispute, that is to say, judge.

This theory corresponds with the ideas of \textit{Lainé 66, klein 67 and pillet}\textsuperscript{96}, who support the idea that the award has an alike effect to judgment. They stated that no arbitration can legally exist or

\textsuperscript{94} 473 U.S.614 (1985).
\textsuperscript{95} Mann, Fritz Alexander., 1986. op.cit., 160.
\textsuperscript{96} A. Samuel , 1989. op.cit., 52.
be performed without the parties' agreement; however, they denied that the parties' arbitration agreement comprises the jurisdiction of the arbitration.69

The Contractual Theory: The Contractual theorists contented that arbitration is a contractually chosen substitute for the national courts and that any recourse to the courts is a deviation from the process agreed to by the parties. Therefore, arbitration is based on the agreement between the parties. Contemporary disciples of the Contractual Theory thus argue that because arbitration is contractually chosen by the parties, when their dispute is resolved by the arbiters, there is no dispute to take to the courts. 76According to the proponents of this theory, the parties have the maximum freedom to decide the relevant issues concerning the arbitration procedures and this maximum freedom should generally not be interfered with by the powers of any States.97 Although they admit in fact that the disputant parties' agreement can be directly influenced by relevant national laws. They also believed that there is not exist any strong link between the law of the place in which the arbitration take place and the arbitration proceedings.

The Mixed (Hybrid) Theory: The Jurisdictional Theory and the Contractual Theory provides an unsatisfactory and analogical explanation of the modern framework of ICA. Under these situations, as Dr. Lew pointed out, it is not unexpected that a compromise theory with a mixed or hybrid character has developed.83The Mixed (Hybrid) theory tries to reconcile the dual nature of arbitration, that is, the Contractual and the Quasijudicial nature of arbitration. The Mixed (Hybrid) theory was created by Professor Surville, and developed in 1952 by Professor G.Sauser-Hall.

The Autonomous Theory: The Autonomous theory views arbitration from a perspective quite different from Jurisdictional Contractual and Hybrid (Mixed) theories, which is relatively new. Compared to the aforesaid theories, it has gone beyond the reality of modern ICA. This theory was created in 1965 by Dr. Rubellin Devichi. She believed that the real character of arbitration (flexible, speedy and easy-controlled character of the arbitration proceedings) should be recognized as an autonomous character of ICA.90.

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2.3 Conclusion
A few books and scholarly writings have been written on critically analyzing the law of commercial Arbitration in Uganda, quite a number of foreign published literature has been made available for example in libraries like Kampala International University Library and Uganda National Library.
CHAPTER THREE

THE LEGAL FRAMEWORK ON COMMERCIAL ARBITRATION

3.0 Introduction
This chapter seeks to highlight the legal framework on commercial arbitration which constitutes
the International legal framework, legal framework governing commercial in Uganda and the
Institutional frame work of commercial Arbitration.

3.1 Analyzing the International legal framework on Commercial Arbitration
The International Chamber of Commerce (ICC) was established in 1919 and became the voice of
the international business community. The ICC has also been a strong supporter of arbitration as
a means of resolving international commercial disputes.

Globalization of international arbitration can be traced to the Geneva Protocol of 1923 and the
Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In the words of Fali S
Nariman, a distinguished constitutional jurist and one time Additional Solicitor General of India
“These international instruments were, however, largely ineffective.” and “so they went the way
of the League of Nations, which had sponsored them”

The failure of the 1927 Geneva Convention to enforce foreign arbitration awards added impetus
to create a more effective mechanism.

The main developments that fuelled the process were the New York Convention of 1958, the

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
provides for international recognition and enforcement of arbitration agreements and awards. The
convention in addition to making arbitral awards enforceable also require courts of contracting
states to stay, upon request, any action in a national court, that has been brought in contravention
of a valid arbitration agreement. Lord Mustill says of the 1958 convention “This Convention has
been the most successful international instrument in the field of arbitration, and perhaps could lay
claim to be the most effective instance of international legislation in the entire history of
commercial law”.

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As at December 2012 there are 148 signatories to the convention and a substantial body of international case law has developed in the process of its application. Sri Lanka became a signatory to the convention on 9th April 1962 without reservation. With the growing success of international commercial arbitration, a number of dedicated institutions have come in to being across the globe.

By the 1970’s a demand was felt for a set of defined, neutral arbitration rules suitable for use in adhoc arbitration. This was done by the United Nations Commission on International Trade Law (UNCITRAL) and came in to operation in 1976. These rules aim to address the different areas of the arbitration process and include procedural rules and a model arbitration clause. These rules were thought out to be deemed acceptable in different economic systems as well as to countries in different stages of development and operating under either common or civil law systems. The UNCITRAL working group II began work on a revision of the initial rules in 2006 and proposed revisions were completed by 2010. The 2010 revision was adopted by the UNCITRAL at its 43 session and recommended for use by General Assembly resolution 65/22 (57th plenary meeting, 6 Dec 2010).

The Model Law on arbitration from UNCITRAL was another significant milestone that emerged in 1985. Redfern and Hunter state “If the New York Convention propelled international arbitration onto the world stage, the Model law made it a star, with appearances in states across the world. A number of countries have adopted the model law outright, while many other countries have based their arbitration laws on it. Shortfalls in the original law led to a revision which was adopted as the Revised Model Law by the UN in Dec 2006 - the key changes in the revision include an allowance for the requirement of an arbitration agreement to be in writing to be defined in very broad terms.

In Sri Lanka a new Arbitration Act (No 11 of 1995) was enacted to remodel national arbitration legislation on the UNCITRAL model. While the Act largely follows the Model Law there are departures from it nevertheless.

3.2 Analyze the Legal framework governing commercial in Uganda
Internationally, Arbitration legal and regulatory framework includes a system of laws, bylaws, rules and regulations that may be related to arbitration. All Arbitration regulations may be broadly divided into two categories namely legislation that enables Arbitration and legislation that supports
arbitration. Arbitration enabling legislation provides a minimum recognition of general principles such as confidentiality, without prejudice and enforceability of settlement contract or Arbitration awards.

Arbitration supportive legislation provides incentives for parties to consider and use arbitration. This may give powers to courts to order the disputing parties in certain cases to engage in arbitration, offer credit for judges for successful case regards to mediation or may reduce case fees for parties who decide to mediate/arbitrate.

All arbitration laws in Uganda originate from this constitution of the republic of Uganda. The Constitution promotes conflicts resolution through peaceful means. This is emphasized both in the state objectives and the constitutional provisions of the law.

State objective III of the Constitution of the Republic of Uganda declares that courts should establish and nurture institutions and procedures for the resolution of conflicts fairly and peacefully again objective xxviii promotes settlement of international disputes by peaceful means.

Further under Article 126 (b) one of the cardinal principles of justice in Uganda is that justice shall not be delayed; and Article 126 (2) (d) gives support to the above objectives and makes it mandatory that courts while adjudicating disputes must ensure that conciliation between parties shall be promoted. It goes on to say under Article 126 (2) that substantive justice shall be administered without undue regard to technicalities. Therefore it is against these provisions of the constitution that arbitration process is fundamentally less formal and come up with flexible rules of procedures which do not involve complex litigation.

In Uganda today commercial arbitration is not operating in vacuum, it is now protected by a fully-fledged legal system. It is clear enough that the most indispensable legal assistance is sought from the Judicature Act cap 13.

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98 The 1995 constitution of the Republic of Uganda
99 State Objective iii of the 1995 Constitution of Uganda
100 State objective xxviii of the 1995 constitution of Uganda
101 Article 126 of the 1995 constitution of the republic of Uganda
102 Supra
103 Supra
And under Section 27\textsuperscript{104} courts are empowered to refer all matters except criminal cases to mediators or special referees called arbitrators or arbitral tribunals for inquiry and imposes an obligation to such arbitrators to make reports to court. The arbitrators report shall indicate whether the dispute has been settled or not or it is partly settled. This direction of dispute resolution through arbitration is in accordance with the provisions of Article 126 (2)\textsuperscript{105} which provides for speed trial of disputes by an impartial and competent court in order to achieve positive results under this arrangement, the parties with binding decisions must attend the session.

**Krone Vs DFCU Bank HCCS\textsuperscript{106}** in that case all the parties attended mediation before His worship Henry Hadoli (mediator) and the matter was settled in one day with the intervention of an interested third party who flew in from America. As a result of this settlement other related cases which were lying in other divisions including land division were concluded.

In 2000, the Arbitration Act of 1930 was repealed and in its place was passed the Arbitration and conciliation Act which it was believed would cure the ills of the 1930 Arbitration act. Since then the Arbitration and conciliation Act Cap 4 has been the frame work to further the practice of Alternative Dispute Resolution generally and commercial Arbitration has in particular equally benefited.

The Act generally talks about Arbitration in its part II, which runs from section 3 to 38 of Act Cap 4. Arbitration can be defined as an adversarial system of justice designed to present a disputed case to a neutral and impartial third party for decision. It’s very much like a court process but a bit less formal.

**Section 5 (1)\textsuperscript{107}** mandates a judge or magistrate to stay legal proceedings in a matter subject to an Arbitration agreement and refer the parties back to arbitration and in pursuance of such, **Section 6 (1)\textsuperscript{108}** a party to an Arbitration agreement can apply to court before or during arbitral proceedings for an interim measure of protection and the court may grant that measure and under section 9 of the Arbitration an conciliation Act Cap 4 provides that except as provided in the Act, no court

\textsuperscript{104} Section 27 of the Judicature Act
\textsuperscript{105} ibid
\textsuperscript{106} HCCS No. 621 of 2005 (unreported)
\textsuperscript{107} Arbitration and conciliation Act Cap 4
\textsuperscript{108} ibid
shall intervene in matters governed by the Act and Section 19 and 20 gives parties powers to determine rules of procedure and place of Arbitration respectively.

The very spirit of the Act in its attempt to amicably settle disputes is reflected in section 30 (1) of Cap 4 that if, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms.

In the case of Bhangwanja Raya Vs Swaran Singh the parties consented to the appointment of an arbitrator by order of court. The arbitrator was given a specific period within which to file the ward. He did not do so and this was used as a ground of appeal. It was further stated that the court by specifying the time within which the award should be filed, effectively limited the time for its being made.

Sir Forbes V.P in his judgment had this to say, I accept that the making of an award is not the same as filing of an award in my opinion however, the order in the instance case that the award be filed by a given date is sufficient compliance with the rule, though an indirect one. However, court is empowered under order 47 rule 8 of the Civil Procedure Rules to extend time within which the award should be made if the arbitrator or umpire has reasonable grounds for not complying with the order.

Sometimes Arbitration is done independently on the agreement of the parties, here Arbitration proceedings may be pursuant to the agreement of the parties under the contract it is however important to note that under this arrangement, both parties agree on one arbitrator and each side selects an arbitrator and the two arbitrator select a third arbitrator to comprise a panel. Usually arbitration hearings last only a few hours and opinions are private record. Under the agreement the parties undertake to submit a dispute to arbitration by inclusion of an Arbitration clause. Terms of reference are provided by the parties and the fees are determined by the arbitrator; this in effect is more expensive to employ.

109 Ibid
110 (1992) EA 288
111 Order 47 rule 8 of the civil procedure Rules S.1 71-1
Before 2000, an attempt had already been made towards alternative dispute resolution generally albeit in a broad spectrum. In 1998, the civil procedure rules were amended\(^{112}\) to include order xB and introduce the spirit to Uganda’s legal system. The title of the order, “scheduling conference and alternative dispute resolution”, spells clearly about what the order entails and is aimed to do. Under x B sub rule 1 (1) (a) within seven days after the order on delivery of interrogatories.

Also the Judicature commercial court Division (mediation) rules 2007, are applied to all civil actions filed in the commercial court. The law has made mediation/ Arbitration a mandatory requirement in all matters filed in the commercial court before trial begins. Under Section 8 of these rules are partly is required to go for except where a party allowed by an order of court not to do so\(^{113}\)

Frequently UNCITRAL model Arbitration law-based National Laws govern not only International, but also domestic Arbitrations. These conventions are above national laws and constitute a system of international Arbitration that provides for the enforcement and recognition of the Foreign Arbitration awards and the principal convention is the New York Convention on the Recognition and enforcement of foreign Arbitral Awards 1958 in which Uganda is a signatory\(^{114}\)

This convention allowed enforcement of foreign awards within member countries. Therefore it followed that the participation in the 1958 New York convention is significant indicator of the country’s commitment to the modern international Arbitration regime and more secure investment climate for foreign investors. However, the convention provides that an international arbitral award should not be enforced if;

(a) If it was unfairly obtained

(b) It covered a question outside the scope of the parties Arbitration agreement

(c) If the award violated public policy of the enforcing state.

\(^{112}\) Amended by statutory instrument No. 26 of 1998

\(^{113}\) Rule 8 of mediation Rules 2007

\(^{114}\) An investments climate advisory services of the World Bank
Furthermore the Washington convention on the settlement of investment Dispute between states and Nationals of other states (ICSID) provides an important mechanism for foreign investors and states to settle their investment disputes by conciliation and arbitration.

In conclusion, arbitration is commonly used in commercial matters where disputes arise because it is quick, saves time, cheap and promotes business relationships between parties its private nature gives parties. Confidence in whatever they discuss in the Arbitration sessions. The end result of it all is case backlog clearance at the court.

3.3 The Institutional framework of commercial Arbitration

It's not difficult to visualize the rudimentary nature of the arbitral process in its early history. Two traders in dispute over the price or quality of goods delivered would turn to a third whom they trusted for his decision. But so much has changed since then. The modern arbitral process has lost its simplicity. It has become more complex, more legalistic and more institutionalized yet in its essentials it has not changed since there is still the original element of two or more parties faced with dispute, which they cannot resolve for themselves, agreeing that some private individual will resolve it for them by his decision which is final and binding on the parties in translating the practice of commercial Arbitration into a practical reality, Uganda has put up institutions created for the purpose of showing commitment, arbitration and no doubt, commercial Arbitration has benefited business men.

Section 68 provides for the functions of the centre and that shall, in relation to Arbitration and conciliation proceedings under this Act include the following; 68(c) to make appropriate rules, administrative procedure and forms for effective performance of the Arbitration, conciliation or alternative dispute resolution process and section 68 (e) also to qualify and accredit arbitrators, conciliators and experts; section 68 (k) also to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; also under section 68 (f) to provide administrative services and other technical services in aid of Arbitration, conciliation and

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113 Law & practice of international commercial Arbitration (Redfern P.2)
114 Ibid
115 Arbitration and conciliation Act
116 Ibid
117 Ibid
118 Ibid
119 Ibid

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alternative dispute resolution hence the entire section provides for the functions of center for Arbitration and Dispute resolution (CADER) as an institutional frame work.

**Section 69** provides for the governing body of the center for arbitration and dispute resolution hence under **section 69(1)** the governing body for the center for arbitration and dispute resolution shall be a council and it shall be responsible for the formulation and implementation of policy for the centre.

Under **Section 71 (1)** the center (CADER) may make rules for (a) the recognition and enforcement of arbitral awards and all proceedings consequent or incidental to them;

(b) The filing of applications for setting a side arbitral awards,

(c) The staying of any suit for proceedings instituted in an Arbitration agreement.

(d) Generally all proceedings in court under this Act.

And **section 71 (2)** until the rules committee makes rules of court to replace them, the rules specified in the first schedule to this Act shall apply to Arbitration in Uganda being the institutional frame work.

No doubt CADER has been a milestone in the step of encouraging alternative dispute resolution generally and commercial Arbitration has continued to be a concern ever since it was established. The heart of commercial Arbitration now lies a duly recognized forum for dispute resolution. As such, the aspect of dispute resolution by men of commerce is no longer governed by goodwill. It has a well-established mechanism and institutions.

The efficacy to the practice of alternative dispute resolution and in a sense, commercial, was the establishment of the commercial court as a division of the High Court. It was a result of the findings of the Platt commission into judicial service system, which expressed its concern at the apathy of the justice system and a saddening lack of commercial efficacy amongst lawyers. From this report, the ministry of justice and constitutional affairs carried.

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109 Arbitration and conciliation Act Cap 4  
121 Cap 4  
122 Cap 4
Out studies and made a number of proposals to pump life into and revitalize the commercial sector which was the risk of breaking down. One of these forms was the establishment of a commercial court to reduce the backlog of cases, which was one of the most pressing problems and weaknesses of the existing court system.

Acting upon this development, the then chief justice Wambuzi under the Commercial Courts (practise) Directions 1996\(^\text{123}\) established the commercial courts to dispense Justice to Commercial Sector. The directions went along way to ensure that commercial disputes were resolved with all due dispatch and with no or little destruction to relationships, a very vital life lime to business and commerce.

Under Directive 6\(^\text{124}\), a commercial judge is given all discretion to hold a preliminary hearing, the aim of which is to curve out the issues in the case and thereby take necessary steps to resolve them, set reasonable time limits for their hearing and deal with all interlocutory matters. No doubt all this reflects an attempt to create no pathway for the parties to run to the courts and most cases at this stage end up being settled amicably. Indeed, this is a real promise to the practice of commercial Arbitration.

3.4 Conclusion

Uganda's legal system has embraced the alternative dispute resolution practice, which in sense has been the benefit of commercial Arbitration. This new wind of change typically emphasizes the predominance of the autonomy of the parties, the need to avoid unnecessary delay and expense and the most cherished desire to dispense justice with all due dispatch. The preponderance of these legal and institutional developments suggest that the government of Uganda at large, arbitral institutions like CADER, business people and legally enlightened minds to recognize that if Arbitration is to survive as an alternative in the true sense, then potential users must be convinced that it will remain relevant to the needs of commerce. This is not to suggest that commercial arbitration the panacea for all ills rather it is a better option if it is commercial dispute resolution under consideration.

\(^{123}\) Established by legal Notice No. 5 of 1996

\(^{124}\) Commercial Court (practise) Directions 1996.
CHAPTER FOUR

THE ROLE AND CHALLENGES OF COMMERCIAL ARBITRATION IN UGANDA

4.0 Introduction

Commercial Arbitration and alternative dispute resolution generally should never have been seen as replacing formal litigation in courts. In fact, the mere fact that it is called an alternative, it shows that it is envisaged to work side by side with the litigation. Even then, we cannot fail to point out that commercial Arbitration has a number of advantages and has provided very significant benefits in resolving commercial disputes compared to traditional litigious system. This chapter seeks to examine the roles and challenges commercial arbitration in Uganda.

4.1 The roles of Commercial Arbitration

4.1.1 Privacy and confidentiality

An attractive aspect of arbitration is that all the proceedings are held in private and are thus confidential whereas ordinary court proceedings will usually be heard in public. Therefore, the principal attraction of commercial Arbitration is that oral evidence given by a patty will not be heard by the public. All matters relevant to commercial Arbitration are confidential save where the parties agree otherwise.

In Esso Australia Resources Ltd & 20rs V the Hon Sidney James Polwman125 Toohey J. implied that as a matter of law a term requiring into every Arbitration agreement is fundamental and in Hassneh ins co of Israel V mew (Hassneh)126 the arbitral tribunal found a requirement of privacy with regard to documents used in Arbitration hearing and in Hotels Condado Beach V Union de tronquistes local127 the tribunal noted that an Arbitration is a private proceeding which is closed to the public.

The modern consideration of the law has been given in Dolling Baker V Merrett128 where Lord Parherh J stated that "as between the parties to an Arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must

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125 (1995) 2 CLJ 673 at 675
126 P-12 (Q.B 1992)
127 763 (F-d. at C 5
128 (1990) 1 WLR/205 at 1213
in my judgment be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the Arbitration process or notes of the evidence in the Arbitration or the award and indeed not to disclose in any other way what evidence had been given by any witness save with the consent of the other party or pursuant to an order or leave of the court....it is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of Arbitration itself.

According to Redfern\textsuperscript{129} this is a conspicuous advantage in the eyes of those who do not want details of their quarrels, accompanied almost inevitably by attacks on their competence or good faith, to be disclosed in open court with a possibility for further publication elsewhere.

In circumstances of Uganda, this requirement of privacy is important in the sense that Arbitration and alternative dispute resolution being a new concept, the parties are helped to have the confidence that their dispute will be solved without attention usually attracted by court litigation. This is an assurance that their business trade names and reputations will not be unduly strained to the knowledge of the entire world, which inequitably must include their clients. This is the benefit in Uganda where the concept is novel, its utility cannot be unestimated.

According to the executive Director of CADER\textsuperscript{130} it is a policy of the center which doubles as an advantage to respect the privacy of the dispute and save the commercial Arbitration process, the public and media gaze that usually attaches to court litigation. Indeed, details of the Arbitration are private and restricted to the parties and they cannot except with their permission be accessed to the other persons. In so doing the center is induced by the realization that in modern commerce, good will and reputation go to the root of commercial success and this is a value that commercial Arbitration has presented as against litigation.

4.1.2 Procedural flexibility

Flexibility is seen as a key attribute in a decision-maker. Yet the courts have had a long history of a different approach that once a decision has been reached in a case, it should be a binding precedent for other judges to follow in similar future cases\textsuperscript{131}.

\textsuperscript{129}Redfern, Law and practice in commercial Arbitration (2nd edition) P.23
\textsuperscript{130}Mr. Jimmy Muyanja in an interview of him on the 13th May 2004
\textsuperscript{131}Harry Street Justice in the welfare state (1975 P.2-4)
With the range of modern commercial disputes arising, this view of the law would most certainly fail the system. One of the benefits that commercial Arbitration has provided in Uganda over litigation is the beginning of procedures in order to solve commercial disputes.

Under section 21 (1) of the Arbitration and Conciliation, Act 2000 the parties are free to agree on the place of Arbitration and under section 20 (1) subject to the provisions of the Act the parties are free to agree on the procedure to be followed by rules of the arbitral tribunal in the conduct of the proceedings yet under section 11 (1) the parties are free to determine the number of arbitrators. All these represent the procedural flexibility that Arbitration, has our litigation. Under section 29 (1), the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as and applicable to the substance of dispute.

In Harley & 4 ors Vs Overseas International Fisheries\textsuperscript{132}, one of the claimants’ witnesses was in Gypus at the time and would under order 25 of the civil procedure rules of Uganda be required to give evidence by commission but the parties agreed to soften the procedural rigidity and use the faxed statements copy as they waited for the originals. As such in resolving commercial disputes in Uganda, both the commercial court and CADER relax the rules of procedure to suit the commercial dispute at hand. This, they try to do without doing harm to natural justice which is the contrary in court litigation where almost rigidly, rules of procedures as to documents and rules of evidence may override the substance of a case. The benefit here is quite vital to Ugandan circumstance for it is a guarantee, that rigid, following of procedural rules shall not distract justice from being dispensed with all due dispatch. This rhymes best with intention of Article 126 (2) (e) of the 1995\textsuperscript{133} which requires substantive justice to be administered without undue regard to technicalities.

4.1.3 Costs and Considerations
It is without doubt that in business, time is important. A system which leads to a persistence of the commercial disputes can do grave injury to business. The litigation system is riddled with delays and constant adjournments may make it impossible for justice to be dispensed with all due

\textsuperscript{132} CADER Arbitration case file No. 00019/03
\textsuperscript{133} Constitution of Uganda
dispatch, in litigation, justice often comes at a time when a litigant has paid so much on its pursuit that he may feel it not worth the cost.

This time frame equally means that the costs of litigation are increased. Every adjournment and delay in litigation increase the cost of justice. According to John Adams\(^\text{134}\) litigation is expensive and can be financially ruinous especially bearing in mind the costs follow the event rule. Many people cannot afford to litigate. This rule is one of the discouragements to the average person to litigate in this country.

The advantages that commercial Arbitration provides in Uganda in this regard are obvious and attractive. Time is greatly saved by commercial Arbitration, which equally has an effect on the costs. Under Sc 33 (3)\(^\text{135}\) the arbitral tribunal may terminate the proceedings where there has been an unconscionable delay on the application of either party. Under Section 32 (1)\(^\text{136}\) the arbitrators shall make their award in writing within two months. This will be beneficial to Ugandan Commercial disputes with prompt dispatch devoid of dilatory conduct.

The use of the word “shall “means that it is mandatory for the arbitrator to resolve the dispute within 2 months. Clearly in court litigation one of the parties live with this uncertainty as the business is tremendously affected.

As earlier seen under Order X B of the civil procedure rules, the court may order for alternative dispute resolution and no doubt most commercial disputes are of resolved at the door steps of the court room\(^\text{137}\)

### 4.1.4 Finality of the process

In the business sector of life; one of the greatest weaknesses that can exist is the continuance of the dispute. Indeed one of the attractions of commercial Arbitration is the fact that business is by consent, usually the award of the arbitrator settles the questions of the dispute beyond further controversy. Section 33 (1) of the Arbitration and Conciliation Act, the arbitral proceedings shall be terminated interalia by the final arbitral award or under subsection 2 \(^\text{138}\)by an order for

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\(^{134}\) John Adams & Roger Brownsword understanding Law P.176

\(^{135}\) Arbitration and conciliation Act

\(^{136}\) Arbitration and conciliation Act

\(^{137}\) Justice Kiryabwire supra

\(^{138}\) Arbitration and conciliation Act
termination where the claimant withdraws his or her claim, where the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary.

Yet under Section 31 (1) if parties settle the dispute, the tribunal shall terminate the proceedings and have the award recorded. In **Adams V Great North of Scotland Rail Co** Lord Halsbury LC stated that “where there are real arbitrators and where the parties have selected their judge in such cases, you have to show great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the court can interfere with his award”

In **Ford V Clarksons Holidays** an Arbitration clause in a contract provided that the decision of a mutually independent arbitrator should be accepted by all the parties as final. The plaintiff commenced an action on the contract and the defendant applied to stay the proceedings by reason of the clause. Court held that the action must be stayed because the clause was binding.

In **Kelandan Government V Duff Development Co** Lord Cave stated that: No doubt an award may be set a side for an error of law appearing on the face of it but where a question of construction is the very thing referred for Arbitration, then the decision of the arbitrator upon that point cannot be set side by the court only because the court would itself have come to a different conclusion “courts respect the need for finality of the dispute in Arbitration even to the context, where a question of law may be the question referred to the arbitrator. In **British Westing House Co. V Underground Electric Rys** Channel J stated that “it is equally clear that if a specific question of law is submitted to an arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside otherwise it would be futile ever to submit a question of law to an arbitrator”

It would of course be injurious to justice, even if the arbitrator award was bad in law it were final. In Uganda, Arbitration has continued to be applied and what looks to be clear is that it has not taken the place of formal court litigation. It has now been said that section 10 states that no

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139 Ibid
140 (1891) AC 31 P.39
141 (1971) 3 ALLER 54
142 (1923) AC 395 at 409
143 (1912) Appeal No. 23 of 1995
144 Arbitration and conciliation Act.
court shall intervene in matters governed by this Act and does not oust the powers of court to alter an award.

In the case of Fullgencis Mungereza Vs Price Water House Coopers\(^{145}\) This was an application for stay of proceedings, where the application was seeking an order of reference of the matter to the Arbitration on grounds that the loan agreement contained in an Arbitration clause which provided for a resolution of disputes by Arbitration. The issue for court to decide was whether there was sufficient grounds to order stay of proceedings and whether the matter could be refered to Arbitration. It was held to the effect that an Arbitration agreement was valid, operative, and capable of being performed. Since the application was brought by a party to the suit, and to the loan agreement, this was a proper case for reference of the matter to Arbitration under Section 6 Arbitration and conciliation Act and that the application was allowed and the matter referred to a commercial Arbitration.

Besides in A.G and Uganda Commercial Bank V. Westmonth Land (ASIA)\(^{146}\) The applicant filed two applications seeking an order that the suit by the respondents against them be stayed pending Arbitration proceedings. Both applications were based on grounds that there was binding agreement between the parties to submit any disputes to Arbitration, and that there was no sufficient reason why the matter should not be refered to Arbitration.

The respondents challenged the application for being misconceived that the applicant had no audience before the court having failed to file the defence, and were bad in law for duplicity, and as such pray for diminishing the application.

It was held that an application to stay proceeding pending Arbitration cannot be entertained which specifically governs challenge of jurisdiction of court in relation to irregularity in summons, service of summons or other element of impropriety of summons and that the applicant has to file a defence under order 9 rule 1 of the civil procedure rules.

In Oil seeds (U) Ltd. V Uganda Development Bank\(^{147}\) Order JSC stated that it is now a well established principle of law that if a mistake of law appears on the face of the award of an

\(^{145}\) (Ca. No. 18/2002)


\(^{147}\) Civil appeal No. 23 of 1995/1447/KALR 292
arbitrator, that makes the award bad and it can be set a side. In this case, the trial judge had stated that because the arbitrator had made a decision on the matter then by virtue of the equivalent of section 10 Arbitration and conciliation Act. The court had no powers to interfere with this award. This is not the something as saying that the court can whenever it pleases, set a side the award of the arbitrator.

Also in Roho Construction Ltd Vs AYA Bahery (U) Ltd\textsuperscript{148} the application, brought under section 14 (1), (2), 18, 31 (1) and Rule 13 first schedule Arbitration and conciliation Act and it was seeking court to order that:

(i) The appointing Authority (CADER) terminates the mandate of Arbitrator in the matter.
(ii) That the appointing Authority (CADER) appoints a fresh arbitrator.

That the undue delays caused, permitted, tolerated and granted by the learned Arbitrator, these arbitral proceedings have taken over one year to the prejudice of the applicant.

The appointing Authority (CADER) saw merit in the application effect and said that section 31 (1) Arbitration and conciliation Act the arbitrator can only extend the time within which to deliver the award and not the time within which to hear the matter, “over one year” period does not leave one in doubt that the arbitrator has failed to act without undue delay and hence terminated the mandate of the arbitrator.

According to Justice Kiryabwire\textsuperscript{149} the commercial court unless there exists an apparent mistake or illegality in the award or the fact that the arbitrator has taken it upon himself to decide a question which in fact was not within his submission, will sanction and enforce an arbitral award. Unless, the award has inherent in it a clear illegality, the court will not interfere. Thus the practice of commercial Arbitration has a better potential to ensure finality of disputes than court litigation.

Indeed in King V Thomas Machenna Ltd\textsuperscript{150} Lord Donaldson stated that “the parties have a choice whether to opt for finality in the form of the Arbitration or for finality in the form of litigation”

\textsuperscript{143} (cud./arb/No. 10/2007
\textsuperscript{144} In the interview supra
\textsuperscript{145} (1991) 1 ALLER 653 at 665

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4.1.5 Disputes Resolved by Experts

In commercial Arbitration, unlike litigation, experts can meet without fear of their evidence being given undue legal scrutiny and give expert advice without fear that what they say will be taken down and used in evidence. According to Michael P. Reynolds\(^{151}\) often in Arbitration, the arbitrator himself will be a technical expert and can certainly gauge and judge the quality of the evidence that the expert is giving from a technical point of view sometimes more readily than can be the case in the court.

According to Hunton\(^{152}\) one or more arbitrators may be chosen for their special skill and expertise in commercial laws or other aspects. An experienced arbitral tribunal should be able to grasp the technical issues raised by the dispute and offer the parties the prospect of a sensible award.

In Arenson v Hrenson\(^{153}\) Lord Frasser stated that “many arbitrators are chosen for their expert knowledge of the subject of the Arbitration and many others are chosen from the legal profession, for their expert knowledge of the law or perhaps they are credited with an expertise in holding the balance fairly between the parties” To the contrary in court litigation, judges and lawyers can handle legal matters but it makes a crucial difference when an expert is involved. In commercial Arbitration, disputes will be determined and will be particular to industrial practices because experts are engaged and their submissions are not elousted with the procedural rigidities. In litigation.

According to Harry Street\(^{154}\) the ordinary judge is a jack-of-all-trades and in this sense he may never have the requisite expertise to deal with the technical issues arising out of a dispute.

According to the Executive Director of CADER\(^{155}\) section 27 (1) Arbitration and Conciliation Act which unless the parties agree otherwise, allows the arbitral tribunal to appoint one or more experts to report to it on specific issues requiring such experts is a reliable masterpiece. It helps arbitral be guided by those experts and in fact at times it is more expedient to choose arbitrators who are experts in that very field to reduce undue expenses.

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\(^{151}\) Arbitration P.55
\(^{152}\) ARBITRATION : Arbitration or litigation: http://www.hunton/Arbitration_conc/arb.
\(^{153}\) (1977) Ac 705
\(^{154}\) (Ibid
\(^{155}\) Ibid
Arbitration is applied at the commercial court where Arbitration is the most used method other methods encouraged in commercial court are negotiation, mediation and conciliation.

The adoption of arbitration methods by the commercial court has led to the high rate of case disposal thereby reducing case backlog in the court which has been persistent for long time.

Therefore the primary role of court annexed arbitration is to deal and dispose of case backlog in the commercial courts. As a result the role of arbitration in the commercial court has been characterized by the following features:-

(i) Arbitration: is quicker: Faster resolution of dispute through arbitration saves time as opposed to adversarial litigation which keeps on dragging for long due to necessary civil process. The period of 30 days given to arbitrators to have the matter settled before an arbitrator is much shorter than the period civil litigation takes to its conclusion. This in effect shortens the time and simplifies the process involved in dispute resolution. This requires cooperation and transparency on the part of the advocates and the parties themselves.

At the commercial court a number of cases have been settled on the first or second sitting in Arbitration without wasting time. This is common where parties with binding decisions attend. The key skills required here are persuasion on the part of the arbitrator.

(ii) Arbitration is cheaper: the costs involved in dispute resolution through Arbitration are usually less. Arbitration normally lowers the costs of resolving disputes limiting court and legal fees has compared to litigation. It does not involve the calling of witnesses therefore cutting off transportation and maintenances costs of such witnesses.

This also gives the poor room to have their disputes resolved without any cost or less costs. I conferred with the legal department of Bank of Baroda and they informed me that actually arbitration is the best option for the bank to recover its loans cheaply and quickly. This view is that recovery through litigation is very expensive.

They gave an example of recovery through foreclosure on equitable mortgages. They say that the process involved is expensive especially when there are encumbrances like squatters on land whose interests must be taken care of before any sale takes affect.
But where they settle with mortgagor, they only agree on the mode and schedule of payment acceptable to both parties and the only obligation of the mortgagor is to extinguish the loan. The same view is what I got from the loans department of DFCU Bank.

It also discourages long proceedings of litigation and finally the spirit of Arbitration is that where settlement is reached each party bears its own costs.

(iii) **Arbitration proceedings are confidential**: Arbitration proceedings in itself are confidential in nature as required by section 21 of the Arbitration Rules 2007. No stranger is allowed to listen to the business secrets of the parties.

If Arbitration fails, no record of proceedings is forwarded to the trial judge. In fact in the commercial court two files are opened, one for Arbitration for arbitrator’s record and another for the court so that the trial can proceed if Arbitration fails.

On this point I had a chat with some law firms for instance MMAKS Advocates, Kiwanuka & Karugire, ShonubiMusoke & Advocates who informed me that actually there are matters which are so sensitive that their proceedings be kept confidential. They cited one example which was before Hon. Lady Justice Mulyagnja, where they are counsel for the parties. The matter was between URA and a tax payer whom I cannot disclose here. This matter was referred to mediation on the request of the parties themselves.

If the parties reach a settlement they both sign the document. This method is called a win/win process. Equally important to note is that Arbitration proceeding are destroyed as soon as Arbitration fails. Besides, an arbitrator is required to make a report as to the final position of the Arbitration process for proper case management.

(iv) **Arbitration offers professional services**.

ADR involved mediation, Arbitration and conciliation among others. At this point it is better to discuss Arbitration as a form of Arbitration in dispute resolution. It is an adversarial system of justice designed to present a disputed matter to a neutral third party called an arbitrator/ arbitral tribunal for decision. This is very much like court process but less formal. Its decisions are binding on the parties.
Arbitration proceedings can be initiated by the parties themselves under the contract by inclusion of Arbitration clause in the contract or it can be by court where the court finds that the nature of the dispute requires Arbitration. In that regard, it is also pertinent to note that arbitrators are professionals offering professional services.

In order for all the issues involved to be properly investigated so that the court can arrive at a just and fair decision, it is usually important that court appoints an arbitrator as required by 0.47 r2 and refers the matter for Arbitration. The arbitrator so appointed must be a person with technical knowhow in such disputes like building contracts, medical, environmental, patents insurance among others for purposes of producing more effective and better outcomes than the courts can do.

However, private arbitrators are costly to employ. Their fees are determined by the arbitrator and the parties are required to share the costs equally. One important thing to note under Arbitration is that it operates within a given period of time as opposed to traditional justice system which takes much longer time.

(v) Arbitration supports and complements courts reforms: Court annexed arbitration was introduced to give a hand where the civil justice system is characterized by inadequate manpower resources as well as frequent transfers of judicial officers. At the commercial court where there are only 4 judges and one Deputy Registrar, the court annexed Arbitration has been established with one Registrar and 13 arbitrators both accredited and locally recruited. The Arbitration have actually done a tremendous job in reducing case backlog at the commercial court compared to the previous years. This positive feedback has now attracted people and each of them wants his/her case to be handled in Arbitration.

Rule 8 provides that all matters filed at the commercial court shall be referred to Arbitration before the trial begins. This is to give the parties an opportunity to settle their dispute out of court. It is as a result of this provision that Arbitration decision has contributed a lot to the backlog reduction and clearance at the commercial court. It is also important to note that some judicial officers left

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156 Civil procedure rules
157 Bhangwaji's case (supra)
the commercial court for greener pastures such as Hon. Justice Fredrick Egonda Ntende, who is now the chief justice of the Republic of Seychelles islands leaving a gap at the court\textsuperscript{158} it is due to such reasons that Arbitration was introduced to bridge the gap and assist in fighting persistent case backlog at the commercial system of Uganda.

(vi) Parties control over the Arbitration process: one of the advantages of arbitration is that it increases participation and control over the proceedings. It discourages the complex legal requirements and procedures of civil litigation which is a nightmare for the poor and the illiterates.

Application of the law is not required and in matters where lawyers are involved to represent their clients, the arbitrators advise lawyers to put the law aside and handle the matter as lay people. In fact under this arrangement arbitrators or judges tell parties that “now this is the time for you to settle your dispute and be free to participate” This enables parties to understand their dispute even better and also express their interests since they participate in the negotiations themselves.

However, among the respondents interviewed in the case of Suman Kara Vs Bhatia HCCs No 169 of 2009 included the members of the family of Bhatia. In fact it was one of the cases before a mediator, they refused to attend mediation proceedings. They gave instructions to their advocates to withdraw from mediation proceedings, and when the case was called for hearing before Hon. Justice Geoffrey Kiryabwire it was dismissed with costs.

Looking at the above case, it is therefore not proper to leave the parties to control their proceedings without guidance of a professional mediator.

(vii) Arbitration is cost effective and timely: It releases funds or assets that are in dispute faster than the court process for productive purposes. To them they say Arbitration is a waste of time. They believe in court judgment. For example where goods are impounded by URA and the parties agree to arbitrate the dispute, the time taken is shorter than the court process. Release of such goods or funds within a short time enables a party to meet a purpose for which the goods were imported. On the other

\textsuperscript{158} Sunday Vision of 31/03/2010 Kampala, page 6
hand, quick release of funds allows the investor to make proper investment for which such manies were sourced.

(viii) Accessibility: Commercial court annexed Arbitration has now reached the underserved sector which suffers disproportionately from court delays and its associated costs. This has been possible because the commercial court is a model court designed to handle commercial disputes in this country. It is not limited to Kampala only or central but even people from other regions bring in their cases to the commercial court.

Arbitration now being a mandatory requirement for all cases filled at the commercial court, it will then serve the interests of the marginalized groups as well. Hence its costs effectiveness is enjoyed by everybody.

(ix) Training: Establishment of court annexed arbitration at the commercial court has helped in training judges, mediates arbitrators and advocates in key elements of case management and concept of Arbitration. This training has exposed judges and lawyers to a wider area in dispute resolution in addition to the training they get for traditional litigation which ends up with a civil/lose judgment as opposed to a win/win situation.

The judicial officers and advocates talked to M/s TumusiimeKabega and Co. advocates, M/s Muwema and Mugerwa advocates and Kampala Associated Advocates say that training in arbitration skills has opened their minds aloud. The commercial court judges say when they traveled to the Us, UK and Denmark, they did a lot of Arbitration training in those countries where Arbitration is a priority as opposed to litigation. They recommend that more people be trained inorder to assist the public.

However, others like M/S Kulumba, Kiyangi and Co. Advocate, M/S KandeebeNtambirweki and Co. Advocates discourage arbitration saying that it is robbing them of their profession.

(x) Arbitration agreements are easy to execute: It is common knowledge that Arbitration systems emphasize the applications of the doctrine of equity as opposed to strict rules of the law.
They recognize the intervention of the third parties in light of the parties' needs and not an some pre-determined standards. Where as strict and complicated legal standards of civil litigation can bring unhappiness to a party, Arbitration on the other hand can bring a breath of fresh air in the enforcement outcomes.

4.2 The challenges of Commercial Arbitration

4.2.1 Litigation background (among lawyers and clients)

The practice of commercial Arbitration has received very much support from lawyers who have litigation culture and according to Justice Kiryabwire, the ordinary lawyer who is trained in civil procedure and not any other procedure, is therefore molded as a litigation master, hence the legal fraternity rarely gives their clients Arbitration as an option in the storm of a dispute because arbitrators take the same legal fees the lawyers would otherwise have taken. This background, he adds is reflected in the sense that even where a contract contains an Arbitration clause, most lawyers in total disregard of this clause rush the dispute to court for settlement. The clients equally have the same culture and do not expect their lawyers to use any other method to settle the dispute.

According to the registrar of CADER, this litigation culture presents a continuing problem to the practice of commercial Arbitration in that although CADER has approximately 60 registered arbitrators the center on average usually gets only between three to six disputes that need arbitrators to handle the matter every month. The major reason for this trend is that lawyers rarely send their clients for Arbitration because they prefer litigation in court.

4.2.2 Insufficient statutory time for Arbitration.

Under Order XB rule 2(2) where arbitration is done in a court, it shall be completed within 21 days after the date of the order except that time may be extended for such other period not exceeding 15 days. On the other hand, if it is done by CADER, then section 32(1) mandates the arbitrators to make their award in writing within two months after entering it on the reference.

According to the Executive Director of CADER, this time frame represents yet another challenge for it neglects the fact that some Arbitration processes are more complex than others. Both the

\[159 (1965) EA 533 at 539\]
\[160 \text{Civil procedure rules}\]
\[161 \text{Arbitration and conciliation Act}\]
civil procedure rules and the Arbitration and conciliation Act by giving alternative dispute resolution and Arbitration so short time to be perfected, pose a problem to arbitrators and create a risk of the award being hurriedly made without consideration of all the merits. This time is never enough for the Arbitration process to be smoothly accomplished.

4.2.3 Knowledge of Arbitration skills
Lack of Arbitration skills on the part of the arbitrators is another area of concern while addressing challenges of Arbitration in Uganda. Some arbitrators are not competent enough to handle Arbitration sessions. This is due to lack of training or Arbitration skills which include among others good communication skills parties or their advocates may also be ignorant as to which dispute is best fit for Arbitration. A case

4.2.4 Training and sensitization
The judiciary policy has not been able to have formal arrangements of training staff and sensitizing the advocates and the public on the use of arbitration. This has limited the use of arbitration and encourages civil litigation procedures and consequently increasing case backlog. Some people do not even know that Arbitration services are provided at the commercial court and yet they are in need for the same.

4.2.5 Insufficient funding and resources of Arbitration process by government
This is basically inevitable in terms of manpower and space. The resources have been inadequate for full operations of CADER and other related forms of Arbitration. The center for Arbitration and Dispute Resolution (CADER) has been financed with resources from commercial Justice Reform Programmed (JRP) based on a fee per case handled. The funds released were not enough to cover all the files referred to CADER and therefore some files remained not handled. On the other hand the personnel in CADER was so small to handle all the files referred to them in time. Due to this, the arbitrators have increased the fees to be paid while filing a define to

Besides the filing of cases in the commercial court has since increased. This coupled with mandatory Arbitration has given rise to a heavy workload for arbitrators. The arbitrators in the commercial court are 13 in number as against over 400 cases referred to Arbitration all these cases cannot be handled within the stipulated 30 days but may compel arbitrators to apply for extension of time under section 11 of the mediation rules 2007.
It is a fact that CADER is in a better position to handle commercial disputes but to do so it must be adequately financed and facilitated. According to the Executive Director CADER, commercial Arbitration is taking another trend partially because CADER is not well funded by the government. In this regard, commercial Arbitration under CADER is still restricted to the Kampala offices of CADER located at Crusader House and has not be decentralized.

The prospects of commercial Arbitration have been suffocated by poor funding by government. There is a situation where commercial Arbitration has been embraced but the whole process has not been funded fully by the government. This conflict in policy making creates a situation where commercial Arbitration is likely to remain a mere concept because of jurisdictional constraints with only one center and no branches upcountry, the practice of commercial Arbitration cannot and has not stood up to challenge.

4.2.6 Advocate attitude to arbitration

Some advocates regard Arbitration as killing development of jurisprudence. This point is correct because Arbitration does not make precedent. Other advocates regard Arbitration as a cute drop in revenue. The reason for this is that they are not awarded costs. In both scenarios, the lawyers are not willing to go for Arbitration where their services are not paid for. The lawyers also tend to discourage their clients from settling their disputes or attending Arbitration sessions. The idea behind is that they need to litigate so that they are paid fees and costs.

This is borne out by the fact that legal services are a business for lawyers where they earn. The law firms I visited are m/s Kulumba, Kiyingi & Co Advocates, M/s KandeebeNtambirweli & Co. Advocates, argue that even where payment is made on fees and costs, it is just a drop in the ocean.

4.2.7 Litigants perspective of arbitration

One of the most outstanding challenges to arbitration is the litigants' perception. Some litigants do not take Arbitration as a serious method of resolving disputes. They believe in the traditional litigation where judgment is highly respected. They do not trust Arbitration outcomes as a serious judgment like that of court. It is therefore clear that where the parties are not willing to settle their disputes outside court, the backlog goes up. A gain they regard Arbitration as ousting costs jurisdiction.
4.2.8 Attendance of parties
This is inevitable in dispute resolution. For any dispute to be resolved, the attendance of the final decision maker as a party is vital. This is most required in disputes involving companies. The principal officers of the companies must attend as their decision bind the companies. Failure of such parties to attend Arbitration sessions will definitely lead to failure to reach a settlement by the disputants hence case backlog.

It is usually common to find that where a decision maker gives a brief to his assistant, the assistant will stick to the position of the company before the session is held. But when the decision maker is called into Arbitration, he or she quickly takes decision that had been reached earlier. It is therefore necessary for final decision makers to attend Arbitration and not sending assistants. This is common with cases involving A.G where bureaucracy is followed.

On the other hand a party cannot be compelled to attend Arbitration. There are instances a party fails to attend Arbitration irrespective of a number of times summoned. It may even be the plaintiff himself.

In such a situation there no legal provisions to dismiss the plaintiff’s case if he does not attend Arbitration. Similarly judgment cannot be entered against a defendant who fails to attend Arbitration such a case is treated as failed Arbitration which now adds to the existing backlog 30 days Arbitration period having been wasted. I have the benefit of interacting with individual commercial court userse.g Wenendeya, Begumisa and others who said that Arbitration is useless and a waste of time, while others were giving it a blessing.

4.2.9 Arbitration as an expensive alternative
There is a belief that Arbitration will always be cheaper than ordinary court litigation. This may be true but not always. It is not accurate where the dispute relates to complex issues expert witness or even technical issues.

According to Justice Kiraybwire, Arbitration in being increasingly costly risks becoming unpopular. In court proceedings, the judge is not paid by the parties. They as well have to pay for the venue where the Arbitration takes place in cases where there is more than one arbitrator CADER has a right according to its rules to increase the total fees upto a maximum of three times the fee payable to one arbitrator. In the same way the CADER Rules are to the effect that the
parties must pay an advance on costs and expenses incurred by the arbitrator(s) in addition, a registration fee of Ugshs. 150,000 is payable by the requesting party in respect of each request made to CADER to appoint an arbitrator. No request for appointment of an arbitrator will be entertained unless such fee is paid which fee is not recoverable and becomes the property of CADER. Commercial Arbitration, therefore, is not necessarily cheap and often times men of commerce do not see the difference between it and court litigation in terms of costs. In the same sense, it is increasingly excluding poor parties who cannot cover the costs and expenses of the arbitrators and the Arbitration process. The challenges faced by commercial Arbitration in Uganda therefore is that it is increasingly becoming a costly and expensive process to parties who may not afford its costs and its rule as an alternative may be blurred.

4.2.10 Balancing Rule of Law against non Procedural Justice.
Commercial Arbitration with all the advantages, it has created a potential chance of the arbitrators abandoning rules of law at the heart of which lie the very notions of natural justice. Under Section 29 (4) of the Act it is provided that the arbitral tribunal shall decide on the substance of the dispute according to considerations justice and fairness without being bound by the rules of law except if the parties have expressly authorized it to do so.

The legal challenge presented to commercial Arbitration is the desire to dispense justice without necessarily relying on rules of law or evidence. This presents a conflict of interest because of the need to achieve justice by sacrificing procedural rules yet natural justice for most of the times is achieved using legal procedure. According to Michael Reynolds although in commercial Arbitration it is now popular to try to dispense with the rules of evidence and totally distinguish Arbitration from litigation, in that sense, that does entail certain risks of allegations of misconduct and to the parties, possibly further costs and further proceedings in court as to review of the award.

In expressing his own fears, Lord Justice forwell in Re Enoch and Zaretzhy Boch& Co stated that,

"It is plain that the courts do allow considerable latitude in practices at any rate, to the reception of evidence by empires, but to say as a general proposition that they are not
According to Justice Kiryabwire\textsuperscript{165} this conflict presents a challenge to the practice of commercial Arbitration because usually court has to set aside or review the awards of arbitrators by reason of being in total disregard of the ordinary rules of natural justice and law. Commercial Arbitration therefore suffers a challenge and a risk that it may provide only a ‘second class’ justice because almost inevitably, the arbitrators in the process often lack, in part at least, those safeguards of independence and training that are present in respect of ordinary judges in ordinary court litigation.

In the same way, the procedures arbitrators use might themselves often lack those formal guarantees of procedural fairness which are typical of ordinary litigation.

The challenge therefore created is to trust the Arbitration process with arbitrators who may not always have the necessary skill and experience. The practice of commercial Arbitration often time fails to deliver the justice that it is intended to deliver.

4.2.11 Law Students
This is one of the challenges faced by Arbitration as a new era of legal study. This is because the lecturers teaching Arbitration, mediation are teaching theory, students require practical skills since most of the disputes filed in the commercial court are business conflicts. Because of its confidential nature under section 21 of the mediation rules 2007, students have no access to mediation session, Arbitration sessions hence denying them opportunity to know how mediation is conducted.

4.2.12 Limited powers Arbitration
Another critical challenge faced by commercial Arbitration in Uganda is the limited powers which the arbitral tribunal may exercise. The tribunal must depend for its full effectiveness upon an underlying national system of law powers possessed by arbitrators whilst generally adequate for the purpose of resolving the matters in dispute fall short of those conferred upon a court of law. For example, the power to require the attendance of witnesses under penalty of fine or imprisonment or to enforce awards by the sequestration of assets are powers which may only be

\textsuperscript{165} Ibid

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exercised no state is likely to delegate to the private arbitral tribunal however eminent or well intentioned the arbitral tribunal may be.

In practice if it becomes necessary for an arbitral tribunal to take coercive action in order to deal properly with a case before it, such action must usually be taken indirectly through the machinery of the court rather than directly as a judge himself can do.

The challenge faced by commercial Arbitration in Uganda therefore, is that the powers if an arbitral tribunal are only limited to those conferred upon it by the parties themselves within the limits allowed by the applicable law together with any additional powers which may be conferred by operation of law. This problem was highlighted by Sir Udo Uduma C.J in National Union of Clerical, Commercial and Technical employees Vs Uganda Bookshop wherein he stated that,

"It is an accepted proposition of law that one of the cardinal duties of an arbitrator is to decide in the absence of any expressed provisions in this terms of reference or expressed submission to the contrary, the question submitted to him according to legal rights of the parties and not according to what may consider fair and reasonable or appropriate in the circumstances"

The setback therefore is that the arbitrator does not have a wide discretion which a court in ordinary litigation has to make any orders in settling the dispute at hand.

4.3 Conclusion

The above represent the challenges that the practice of commercial Arbitration is facing in Uganda if these challenges are not overcome, then commercial Arbitration will remain hindered in its role as an alternative to court litigation in the resolution of commercial disputes. All stakeholders must be involved in the process of finding solutions to these challenges if men of commerce are to see the difference that commercial Arbitration makes compared to the adversarial system of ordinary litigation. In totally, it is submitted that it can never be stated that commercial Arbitration can and has probably taken the place of formal court litigation. In fact it remains an alternative but an alternative which has very admirable benefits and advantages over litigation. According to Klaus

\[166\] (1965) EA 533 at 539
F ROhi\textsuperscript{167} adjudication is viewed as inappropriate for resolving many legal disputes yet to meilvidmar\textsuperscript{168} adjudication can be best summarized as a system which is rule based, adversarial, blame fixing, coercive, public, formal and restricted in the types of solutions that can be imposed and disputants have no control over the final decision about how the conflict will be resolved.

As a consequence of these characteristics he states, adjudication is said to polarize attitudes, prevent the creation of resolutions sensitive to the particular needs of disputants, cause them to feel a loss of resolution over the conflict and foster frustration in both losers and winners on the other hand. When we are regarding commercial disputes, commercial Arbitration is an irresistible alternative.

\textsuperscript{167} Procedural justice 1997
\textsuperscript{168} Procedural justice and ARBITRATION does settlement provide better justice than judgment At P. 122.
CHAPTER FIVE
THE REFORMS AND RECOMMENDATIONS IN IMPROVING COMMERCIAL ARBITRATION AS AN ALTERNATIVE OF ACCESSING JUSTICE BY THE DISPUTANTS

5.0 Introduction
As this research has labored to show, Arbitration and in particular commercial, must not be taken as taking the place of formal litigation instead, the two systems must be used to complement each other in resolving commercial disputes. The practice of commercial Arbitration has several challenges as seen in the previous chapter. This chapter provides the proposals and recommendations that will give efficacy to the law and practice of commercial Arbitration in Uganda.

5.1 Reforms and Recommendations
• The Judiciary should spearhead efforts and collaborate with the judicial service Commission (JSC) and the centre for Arbitration and Dispute Resolution (CADER) to sensitize the litigants, advocates and the public about the benefits of Arbitration as a method of resolving disputes and Arbitration at large.
• The commercial court itself does not have enough judges to try and handle these disputes therefore government should raise the number of judges in the commercial court and the CADER should as well be funded by the government in terms of both funds and the necessary manpower to enhance its role in arbitrating commercial disputes.
• The center for Arbitration and dispute Resolution (CADER) should be catered for in the budget as a statutory institution so as to enable it carry on its activities effectively.
• The judiciary should strain and sensitize judicial officers on the use and benefits of Arbitration rules to regulate the process and they should be put in place to guide officers in all courts of judicature.
• Arbitration should also be rolled out to other high court Divisions as well as the magistrate’s courts.
• The Judiciary should also make a proactive arrangement of ensuring that trained arbitrators are availed to operationalize Arbitration in all courts. Management should have a comprehensive arrangement to fast track the process of rolling out Arbitration to all courts.
• The judiciary should put in place detailed procedures of handling adjournments to eradicate unnecessary delays in the commercial Arbitration.

• Requests made by the parties for adjournments which are made in good faith should be done in writing and agreed upon by all parties with their arbitrators to avoid bad recourse at the and encourage confidentiality.

• The judiciary should design a mechanism of facilitating arbitrators promptly to enable them to attend Arbitration sessions as scheduled.

5.2 Conclusion

The Arbitration system has played a bigger role in addressing the case backlog at the courts of judicature and the commercial court in particular. It’s timeliness and effectiveness has attracted the public attention which has resulted to most disputes being resolved in Arbitration and mediation which has been seen as the cheapest means of accessing. Justice however there are a number of challenges that still a fact the use of arbitration in our courts. These among others are litigation background of our people, advocates, attitude towards Arbitration and inadequate resources in terms of man power and funding these must be addressed in order to achieve full operation of arbitration systems in our courts. Empowering the people to arbitrate their own disputes does not oust the core mandate and function of courts in the contract of corporate governance. Arbitration clauses must not and not exclude the jurisdiction of courts. However in so conceding, we must as well be indifferent to its weaknesses which Arbitration tries to cure.

Commercial Arbitration has to present itself as a true alternative to litigation for it to gain widespread acceptability within the private sector. It should be effective and enforceable and it must not be used as a delaying tactic in a dispute. In this case, it is a lot easier and perhaps more desirable, to market commercial Arbitration as an option or complementary dispute resolution mechanism to litigation rather than a substitute. An arbitration as an optional private process is increasingly regarded as the favorite method of dispute settlement in international trade. In the lack of a single international Court having jurisdiction over international commercial disputes, the disputants to such disputes have to resort to settlement mechanisms upon which they can all agree. Arbitration provides the disputants with such a mechanism.
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