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# A review of law and procedure governing recognition and enforcement of foreign arbitral awards in Tanzania

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**Abstract**
This article provides an analytical overview of the law and procedure concerning the enforcement of foreign arbitral awards in Mainland Tanzania. The enforcement of arbitral award is one of important aspects of arbitration process. When parties resolve their disputes through arbitration process, they expect that all will comply with such decision without delay. However, where the losing party refuses to comply with the arbitrator's decision, the wining party may seek such foreign arbitral award to be recognized and enforced in the court of law. Enforcing foreign arbitral awards in Mainland Tanzania presents legal issues requiring legal consideration. This makes it necessary to examine the laws and procedures regulating enforcement of foreign arbitral awards in Mainland Tanzania.

**Keywords:** foreign arbitral awards, law and procedure, Mainland Tanzania

## 1. Introduction

The enforcement of arbitral awards as a final stage of arbitration process is very important without which arbitration turn to be meaningless. Parties agree to resolve their dispute through arbitration process with expectation that each party will comply with the decision of arbitrator without problem. When the losing party comply with the arbitral award voluntarily that avoids the need for the winning party to seek to confirm and enforce the award through the court against the losing party. The compliance with the foreign arbitral awards by the losing party is due to the existence of an international legal regime including the New York Convention, 1958 and the ICSID Convention 1965 that promotes the enforcement of international arbitral awards [1]. This is due to the fact that resisting recognition and enforcement of an international arbitral award foreign arbitral award through these international legal regimes is very difficult [2]. However, the losing party may refuse and resist recognition and enforcement of an international arbitral award in Court if he considers that the award is unfair. This is the essence why it is important to analyze the law and procedure governing enforcement of arbitral award in Tanzania. Therefore, the object of this article is to shed light on the law and procedure for enforcing foreign arbitral award in Tanzania. Thus, Part I introduces the laws governing the procedure of enforcing arbitral awards, part II covers the procedure enforcing arbitral award and Part III deals with grounds for refusal of enforcement of foreign arbitral award and finally conclusion.

### Meaning of foreign arbitral award

The arbitration Act, 1931 does not define the term arbitral award. The term arbitral award refers to the final and binding decisions made by the arbitrator disposing off all legal issues raised by the parties [3]. Arbitral award refer to the decision of the arbitral tribunal in the form of interim award, partial award, consent award and final award [4]. Even though Article I (2) of the New York Convention, 1958 does not expressly define the term foreign arbitral award but foreign arbitral awards are arbitral awards made on the territory of another state [5]. This means an award rendered in the territory of another state other than where enforcement is sought to be is a foreign award.

## 2. Law governing enforcement of arbitration awards in Tanzania

In Tanzania, there are a multiple laws governing recognition and enforcement of foreign arbitral award. Actions to enforce foreign arbitral awards in Tanzania is governed by the Arbitration Act, 1931, the Arbitration Rules 1957 and the Law of Limitation Act 1971 as well as international instruments to which Tanzania is a signatory including the Geneva Protocol of Arbitration Clause, 1923, the Geneva Convention on enforcement of foreign arbitral award and the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. Also Tanzania is party to ICSID Convention, 1965 as well as several BITs.

### The court with jurisdiction to enforce foreign arbitral award

In Tanzania, foreign arbitral awards can be enforced in the High Court of Tanzania [6]. The Court of Appeal as a highest court in Tanzania lack jurisdiction to receive the application

[1] James, H. C, and John F(ed)., *International commercial arbitration in New York*, Oxford: Oxford University Press, 2010, p.358.
[2] *Ibid.*
[3] Article 31 of UNCITRAL Model Law
[4] Clayton Utz' *A Guide to International Arbitration*, 2012.p.12 available at www.claytonutz.com (accessed on 17/1/2019).
[5] Under Article 1 (3) of the New York Convention, 1958 states that when signing, ratifying or acceding to this Convention, State may on the basis of reciprocity declare that it will apply the Convention to the recognition and Enforcement of awards made only in the territory of another Contracting State.'
[6] Section 2 and 3 of the Arbitration Act, 1931 [Cap 15 R.E 2002

for filing foreign arbitration for recognition and enforcement in the first instance. However, the Court of Appeal has the powers to receive appeal against decisions of the High Court of Tanzania regarding to refusal enforcement of foreign arbitral awards in Mainland Tanzania.

The foreign arbitral award may be filed in the Ordinary Registry of the High Court or in the High Court Commercial Division of Tanzania subject to Order IV, r.1 (3) of the Civil Procedure Code, 1966 which provides that:

No suit shall be instituted in the Commercial Division of the High Court concerning a commercial matter which is pending before another court or tribunal of competent jurisdiction or which falls within the competency of a lower court [7].

This means that, a party seeking to enforce an arbitral award has an option of filing an award in the Ordinary Registry of the High Court or in the Commercial Division of the High Court of Tanzania. However, an award filed at the Ordinary Registry of the High Court may be transferred to the High Court Commercial Division.

## 3. Enforcement of foreign arbitral award

### 3.1 Registration of Foreign Arbitral Awards

For the foreign arbitral award to be enforced in Tanzania, the law requires that such arbitral award must be registered in the High Court of Tanzania. Once an arbitral award is pronounced, the winning party to enforce in Tanzania must request the arbitrator to file an arbitral award in the High Court of Tanzania for registration [8]. The foreign arbitral award must be registered in the High Court of Tanzania for recognition before it can be enforced in the court [9]. Registration of the foreign arbitral award in the High Court of Tanzania is, therefore, a mandatory requirement for the foreign arbitral award to be converted into the order of the court and awarded the status of the judgment of the High Court of Tanzania [10]. As mentioned above the party seeking to enforce foreign arbitral award in Tanzania must apply by either bringing an action or petition in the High Court of Tanzania [11]. All applications for recognition and enforcement of a foreign arbitral award must be made in writing, numbered and registered as a suit between the applicant as plaintiff and the other party as defendant [12].

The time limit to make application to enforce a foreign arbitral award is 60 days from the date on which the award was made [13] as indicated by the arbitrators [14].

As one can say to the outdated legal position, in order to be recognized and enforced in Tanzania the foreign arbitral award must be proved to be final. The final arbitral award is defined as an award which is not open for challenge in the country where it was rendered [15]. Thus, the winning party must make an application first where such foreign arbitral award was rendered to obtain the leave proving that the foreign arbitral award is "final [16] and binding" on the parties as a pre-condition of enforcing a foreign award in Tanzania [17]. The needs for evidence of finality of the award before can be recognised in Tanzania amounts to *double exchequer*. This is unnecessary and outdated legal position which was removed by the New York Convention on the Recognition and enforcement of Foreign Arbitral Award, 1958 which requires the applicant to prove that an arbitral award is binding upon the parties without necessary proving its finality [18].

In *Dowans Holding SA and another v. Tanzania Electric Supply Co Ltd* [19], the court considered whether pending petitions to set aside the ICC Award in the home jurisdiction (Tanzania) mean that the Award is *not yet binding* within the meaning of s103(2)(f). The court concluded that the issue of whether the award has become binding on the parties is one for it, by way of deciding whether a UK court is in a position to recognise and enforce an NYC award, and not by way of deciding whether a Tanzanian court would consider it binding. That it was persuaded by the clear statements expressed by Steyn J in *Rosseel N.V. v. Oriental Commercial & Supply Co (UK) Ltd* [20], a case in which there was no application pending in New York to set aside or suspend a New York award, but the defendants resisted enforcement on the basis that it had *not yet become binding*. Steyn J, stated as follows at 628 (LHC):

> The New York Convention eliminated the "double exequatur" requirement under the earlier Geneva Convention. Under the Geneva Convention a party who sought to enforce an award, had to prove an exequatur (leave to enforce) issued in the country in which the award was made as well as leave to enforce in the country in which he sought enforcement. The New York Convention abolished the need to obtain leave to enforce in the country where the award was made.

Thus, the court in this case affirmed the abolition of double *exequatur* and that arbitral awards once considered binding would potentially be enforceable, despite applications to set aside in the courts of a seat of arbitration. However, the Government of Tanzania has not yet domesticated the New York Convention, 1958. This makes the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 continue to be relevant to those states which are contracting parties to it, but are not yet contracting parties to the New York Convention, 1958 posing the same problem of a *double exchequer* in respect of states not bound by the application of the New York Convention, 1958 [21].

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[7] The Arbitration Act, 1931 [Cap 33 R.E 2002].

[8] Section 12(2) of the Arbitration Act, 1931 [Cap 15 R.E 2002].

[9] Section 2 of the Arbitration Act, 1931 [Cap 15 R.E 2002] read together with Section 29 of the same Act.

[10] Section 12 of the Arbitration Act, 1931 [Cap 15 R.E 2002].

[11] *Ibid.,* Section 29(1).

[12] *Ibid.,* Section 29(1).

[13] Item 21 of Part III of the First Schedule to the Law of Limitation Act, 1971.

[14] see, Article 25(3) of ICC Rules of Arbitration, Article 26 (1) of the LCIA Arbitration Rules, (1998), Article 32 (4) of the UNCITRAL Arbitration Rules, (1976).

[15] Section 32 of the Arbitration Act, 1931 [Cap 15 R.E 2002], see, Article 1 (d) of the Convention on the Execution of Foreign Arbitral Awards, 1927.

[16] Section 31(1)(b) of the Arbitration Act, 1931 [Ca 15 R.E 2002] and Article 1(2)(d) of the Geneva Convention, 1927 an award is "final" and thus enforceable abroad when all available post-award judicial proceedings were exhausted. This requirement gives rise to the cumbersome system of "double *exequatur*," by which a winning party is often required to move successfully to enforce the award in the awarding jurisdiction and then again in the foreign jurisdiction.

[17] Section 30 (1)(d) of the Arbitration, 1931, see, also Article1 (d) of the Convention on the Execution of Foreign Arbitral Awards, 1927.

[18] Article V(1)(e) of the New York Convention, 1958.

[19] [2011] EWHC 1957 (Comm).

[20] [1991] 2 Lloyd's Law Rep 625.

[21] Article VII(2) of the New York Convention, 1958 provides that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall

Once a foreign arbitral award is registered in the High Court of Tanzania, the award will be recognised by the High Court of Tanzania upon converting it into the court judgment in accordance with the terms of the arbitral award then, the court will extract the decree from such arbitral award. It is, therefore, the court decree extracted which is enforceable in court [22].

### 3.2 Evidence Required for Enforcement

The party seeking recognition and enforcement of foreign arbitral awards must at the time of filing the application submit to the High Court of Tanzania the following evidence:

1. The original award or its copy duly authenticated in the manner required by the law of the country in which it was made [23]. The applicant to enforce an award must annex the award in the application. The arbitral award so annexed should be the original one or otherwise must be a certified copy of the original that it is a true copy of the original award. This procedure may require the applicant to seek such certification in the diplomatic office of Tanzania available in that state where the award was made.
2. Evidence proving that the award has become final [24]. This means that it is important for the petitioner intending to enforce the foreign arbitral award seek a leave of the court in the country where the award was made evidencing that an award is final before it can be enforced in Mainland Tanzania. This has been also treated as a *double exchequer* due to the fact that even after the court where the award was made has granted such a leave, still the petitioner must also seek the leave in the High Court of Tanzania in order to enforce the foreign arbitral award. This is the outdated requirement which has been removed by the development of the New York Convention, 1958.

The arbitration agreement is also another a pre-requisite document to be submitted when making application in court to show that there was a valid written arbitration agreement. The arbitration agreement helps to establish that the party against whom an arbitral award sought to be enforced was the party to the dispute as a requirement under the New York Convention, 1958 [25].

The production of these documents as evidence may not be enough for the court to enforce the award. The courts have power to demand the party applying for enforcement of foreign arbitral award to produce further necessary evidence [26]. The law requires that, if the documents produced are in a foreign language other than English language, they must be translated into English language and certified as a true copy of the original documents by a diplomatic or consular agent of Tanzania, or certified as correct in such other manners as may be sufficient according to the law of Tanzania [27].

### 3.3 Judicial Discretion in Enforcing Foreign Arbitral Awards

Under Section 30 (1) of the Arbitration Act, 1931 [28] the High Court has residual discretion powers to enforce foreign arbitral awards beyond the grounds stated in Section 30 (1) and (2) of the Arbitration Act, 1931 [29].

Even if all condition stated under Section 30 (1) of the Arbitration Act, 1931 is satisfied, the recognition and enforcement of foreign arbitral awards is not a question of an automatic. The court may refuse or recognize and enforce such arbitral award. In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [30], the English Court of Appeal observed that, even if an award has been set aside in the home jurisdiction upon one or other of the grounds set out in the subsections, the English courts still retain discretion to enforce the award.

However, this position of the court to exercise its discretion remain an area which likely to create uncertainty and unpredictability of decision of the High Court in respect of recognition and enforcement of foreign arbitral awards

### 3.4 Challenging enforcement of foreign arbitral award

While a winning party desire is to see his award recognised and enforced, the losing party wish is to see the award is refused ecognition and enforcement of foreign arbitral award. A person seeking to challenge foreign arbitral award has two procedural options: firstly, he may make an application to the supervising court at the place of seat of arbitration or under the law of which, the award was made to set aside the award [31]. If an award is successfully set aside in the country where it was rendered, such award lack legal effect in the forum in which it was vacated thereby losing the status of being enforced in Tanzania.

Secondly, he may make an application in the High Court of Tanzania resisting recognition and enforcement of the foreign arbitral award [32] when the arbitral award is already filed in the High Court of Tanzania. This view is also subscribed by Redfern and Hunter in the International Commercial Arbitration on p. 474 where they observed:

> He may decide to take the initiative and challenge the award or he may decide to do nothing but to resist any attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one to act or not to act.

This means that the applicant resisting the enforcement of the foreign arbitral awards in Tanzania, may ask the court to adjourn the enforcement proceedings in order to be allowed to file an action for setting aside in the country where such a foreign arbitral award was rendered [33]. This is due to the fact that the High Courts of Tanzania have no powers to set aside foreign arbitral awards. When dealing with an application for recognition and enforcement of foreign arbitral awards, the powers of the High Court is limited either to recognise or refuse recognition and enforcement of

cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

22 Section 17(1) of the Arbitration Act, 1931 [Cap 15 R.E 2002].
23 *Ibid.,* Section 31(1)(a).
24 *Ibid.,* Section 31(1)(b).
25 Article II of the New York Convention, 1958.
26 Section 31(1)(c) of the Arbitration Act, 1931 [Cap 15 R.E 2002].
27 *Ibid.*
28 *Ibid.*
29 *Ibid.*
30 [2010] 1 Lloyd's Law Rep 119 at paragraphs 58-61.
31 *Newspeed International Ltd v. Citus Trading Pte Ltd* [2001] SGHC 126.
32 *Ibid.*
33 Section 30(3) of the Arbitration Act, 1931 [Cap 15 R.E 2002].

the foreign arbitral awards [34].
The powers to set aside foreign arbitral awards are vested in the court of the country (primary jurisdiction) where the foreign arbitral awards was rendered in accordance with the domestic arbitral law of that country rather than the court in the country (secondary jurisdiction) where the enforcement of the award is sought to be [35]. In the case of *Celine Gueyffier v. Ann Summers Ltd* [36], it was observed that:

> The New York Convention, 1958, mandates specifically that the state in which, or under the law of which, the award is made will be free to set aside or modify an award in accordance with its domestic arbitral law.

The powers of the High Court of Tanzania to set aside arbitral awards are limited to the domestic arbitral awards only. This position is strongly supported widely in courts practices in many jurisdictions [37]. Similarly, the courts in the secondary jurisdiction have no powers to review foreign arbitral award. If the courts in the secondary jurisdiction are to be given powers to review the merits of a foreign arbitral award, that would undermine the effectiveness of arbitration as a viable method of dispute resolution. In *Gulf Petro trading company v. Nigerian Petroleum Corporation* [38], it was held that:

> It would seriously undermine the functioning of the Convention if the fact that the opportunity for judicial review of an award in the primary jurisdiction has passed could open the door to otherwise impermissible review in a Secondary jurisdiction.

The Arbitration Act, 1931, contains no provisions granting jurisdiction to the High Court of Tanzania to hear recourse to set aside foreign arbitral award.

### 3.4.1 Request for Refusing Recognition and Enforcement of ICSID Arbitral Awards

According to Article 53(1) of the ICSID Convention, 1965 an arbitral award made by ICSID tribunal is binding on all parties to the arbitration proceeding [39]. The ICSID award is final and binding on all parties to the proceeding [40]. A person seeking to enforce ICSID award in Tanzania Mainland must provide with the High Court of Tanzania which is the court competent to enforce foreign arbitral award a certified copy of award by the Secretary General.[41] An award of ICSID tribunal is enforceable like the judgement of courts of law [42]. For the purpose of enforcement of ICSID awards, states members to the ICSID Convention, 1965 are required to designate court competent to recognise and enforce ICSID awards [43]. Thus, the High Court, when dealing with a foreign arbitral award, its jurisdiction is only limited either to refuse or recognise the enforcement of the foreign arbitral award. The powers of the domestic courts when dealing with ICSID awards are limited to examining the authentic of the ICSID award, and enforce it [44].
There is no review permitted to ICSID award by domestic courts at the stage of recognition and enforcement.[45] The ICSID Convention clearly establishes a self-contained and exclusive mechanism for reviewing ICSID awards.[46] The powers to revise and set aside an ICSID award are vested on the ICSID tribunal itself. The aggrieved party by an ICSID award cannot seek any other remedy in any other tribunal or domestic court [47]. Since the ICSID tribunal has the power to revise its own award [48].
The aggrieved party by decision of the ICSID tribunal has the right to make an application to in writing addressed to the Secretary-General requesting revision [49] or annulment of the award [50]. The applicant requesting revision of the award must establish that there are new facts which were unknown at the time the award was made [51]. This means that the applicant's ignorance of that fact should not be attributed to his negligence. Once the new facts are discovered, an application for review must be made within 90 days of the discovery and within three year from when an award was rendered [52]. The time limit of three years is calculated from the date of the award's dispatch to the parties [53].
As mentioned above, the aggrieved party may also make application for annulment of the ICSID Award [54]. Article 52 of the ICSID Convention, 1965 sets out list of grounds upon which the ICSID tribunal may be requested to set aside its own arbitral award as follows:
Firstly, an ICSID award may be challenged by establishing that there was corruption on the part of a member(s) constituting the Tribunal that rendered it [55]. Secondly, failure of the tribunal to state reasons upon which the award rendered is based [56]. Failure to state reasons to be a genuine ground for annulment of ICSID award must leave the decision on a particular point essentially lacking in any express rational and such point must be very important for the validity of the decision [57]. The violation must be

[34] *Ibid.*
[35] Article V(2)(b) of the New York Convention, 1958.
[36] 43 CAL. 4TH 1179, 184 P.3D 739, 77 CAL. RPTR. 3D 613.
[37] Jean-François, P, and Sebastian B., *Comparative Law of International Arbitration,* op.cit.p.851.
[38] 2008 1 ARB 137 & AIR 2008 SC 1061.
[39] Article 53(1) of the ICSID Convention, 1965.
[40] Article 52 of the Arbitration (Additional Facility) Rules provides in part that the award shall be final and binding on the parties 2006.
[41] Article 49(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), 2006.
[42] Ibid, Article 54(1).
[43] *Ibid.,* Article 54(2).
[44] Rudolf, D, and Christoph S., *Principles of International Investment Law*, op.cit. p.310.
[45] *Ibid.*
[46] Chiara, G., *Litigating International Investment Disputes: A practitioner's Guide*, Boston: BRILL NIJHOFF Publishers, 2014.p.470
[47] Rudolf, D, and Christoph S., *Principles of International Investment Law*, op.cit. p.310.
[48] Article 51 of the ICSID Convention, 1965 read together with Article 50 and 51 of the Arbitration Rules, 2006.
[49] *Ibid.,* Article 51(1).
[50] *Ibid.,* Article 52(1).
[51] *Ibid.,* Article 51(1).
[52] *Ibid.,* Article 51(2)
[53] Christoph, H. S, *et al., The ICSID Convention: A Commentary, A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* second edition, Cambridge: Cambridge University Press, 2009.p.841.
[54] Article 52(1) of the ICSID Convention, 1965.
[55] *Ibid,* Art. 52(1)(c).
[56] *Ibid,* Article 48(3).
[57] In *Compañia De Aguas Del Aconquija S.A. and Vivendi Universal (Formerly Compagnie Générale Des Eaux) v. Argentine Republic,* Case No. ARB/97/3, Decision on Annulment, 3rd July, 2002 at para 65,the Arbitral Tribunal stated that annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially

serious to the extent of infringing fundament principle of justice. If reasons are implicitly stated that is, sufficient if can be inferred from the conclusion of the award [58]. Thus, an award cannot be annulled if the reasons are apparent on the face of the award.

In *Standard Chartered Bank (Hong Kong) Limited. v. Tanzania Electric Supply Company Limited (TANESCO)* [59]. TANESCO applied for annulment of the Award under Art. 52(1)(e) on the grounds that the award failed to state the reasons on which it was based. The Committee agreed at para 603 that, as correctly stated by TANESCO, Article 48(3) of the ICSID Convention imposes upon a tribunal the duty of ensuring that an award states the reasons on which it is based. If the tribunal does not comply with this obligation, any party can request annulment of the award under Article 52(1)(e) of the ICSID Convention, 1965. However, the Committee refuted this ground by stating that:

> Not only must there be a failure to state reasons, but the reasons themselves must be necessary to the tribunal's decision. That the annulment will only occur if (i) the Tribunal's failure to state reasons left the decision on a particular point essentially lacking in any expressed rationale and if that point was itself necessary to the Tribunal's decision, or (ii) if the Tribunal stated contradictory reasons that completely cancel each other out, leaving the Award with a total absence of reasons.

The above decision is in line with the decision in the case of *Joseph C. Lemire v. Ukraine* [60], in which the Committee stated that annulment under Article 52(1)(e) should only occur when two conditions are met: (i) the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and (ii) that point must itself be necessary to the tribunal's decision.

Thirdly, the aggrieved party can challenge the ICSID award on the ground that the arbitral tribunal acted in excess of its power. This means that lack of jurisdiction or acting in excess of the jurisdiction is a ground for annulling the ICSID award. The Jurisdiction of ICSID tribunal is established in accordance with Article 25 of the Convention, 1965. The dispute submitted must be the legal dispute arising from an investment and the party must be a Contracting State and a national of another Contracting State [61]. In *Standard Chartered Bank (Hong Kong) Limited. v. Tanzania Electric Supply Company Limited (TANESCO)* [62],TANESCO made a request for annulment arguing that the Tribunal exceeded its powers because the Tribunal's exercise of jurisdiction in the absence of a qualifying investment since a loan is not an investment as envisaged by Article 25 of the ICSID Convention, 1965 and SCB HK's purchase of the loan was only a commercial transaction made for its own financial benefit not to the benefit of Tanzania. After the ad hoc committee considered such argument held that:

> The dispute must have been a legal dispute arising directly out of an investment (condition *ratione materiae)* the requirement which was satisfied, since by virtue of its purchase of the outstanding debt under the loans to IPTL and the assigning of the rights under the relevant agreements, SCB HK has an investment for the purposes of Article 25(1) of the ICSID Convention, 1965.

Also the Tribunal may be considered to improperly assuming jurisdiction over dispute if it decides such dispute without written consent by the Contracting State and the investor that the dispute be settled through ICSID arbitration [63]. This is a requirement which may be fulfilled if proved as established by the express wording of Article 25(1) of the ICSID Convention, 1965 that the dispute is between Contracting State and a national of another Contracting State. Thus, one side must be a Contracting State and the other a national of another Contracting State.

Fourthly, a serious departure from a fundamental rule of procedure is one of the grounds for annulment of the ICSID awards. The tribunal may if lack of impartiality may lead it to be the charged of a serious departure from a fundamental rule of procedure [64]. However, it has been argued that not every violation of a rule of procedure would automatically lead to nullity [65]. In *Maritime International Nominees Establishment v. Republic of Guinea* [66], the *ad hoc* Committee stated that:

> A clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides that the parties shall be treated with equality and each party shall be given full opportunity of presenting his case. The term “fundamental rule of procedure” is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.

The alleged violation must be serious and the rule thus violated must be fundamental like the violation of the principle of natural justice [67]. This means denying both parties equal opportunity to be heard and lack of adequate opportunity for rebuttal may constitute the violation of the principle of natural justice to the extent of violating fundamental rule of procedure.

Also under Article 52 of the ICSID Convention, 1965 an award may be annulled by the ICSID tribunal if the arbitral tribunal which rendered it improperly constituted. This ground covers a variety of situations including absence or invalidity of an agreement between the parties, non-compliance with a nationality requirement or another form

lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision.

[58] *Standard Chartered Bank (Hong Kong) Limited. v. Tanzania Electric Supply Company Limited (TANESCO)*, (ICSID Case No. ARB/10/20), Decision on the Application for Annulment on 22nd August, 2018, Para 609.

[59] *Ibid.,* para.606.

[60] ICSID Case No. ARB/06/18 at para 278 the Committee observed that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. The correctness of the reasons is irrelevant in terms of this ground for annulment.

[61] Article 25(1) of the ICSID Convention, 1965.

[62] (ICSID Case No. ARB/10/20).

[63] Article 25(1) of the ICSID Convention, 1965.

[64] *Ibid*., Article 52(1)(d).

[65] Christoph, H. S, *et al., The ICSID Convention: A Commentary, A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* op.cit. p.675.

[66] ICSID Case No. ARB/84/4 at para. 5.06.

[67] *Ibid*.

of ineligibility to submit the dispute to ICSID Centre [68]. This means that if the arbitral tribunal was formed contrary to the agreement between the parties in the dispute, the decision rendered by it may be annulled.

When there is application to annul an ICSID award pending with ICSID tribunal, the aggrieved party in order to avoid the recognition and enforcement of the ICSID award must make application for a stay of enforcement of the ICSID award. Such application for stay of execution must be made to the ICSID Centre.

For non-ICSID foreign arbitral awards, the New York Convention, 1958 to which Tanzania is a party, also contains no provisions granting general jurisdiction to national courts to hear recourse to set aside a foreign arbitral award. Both the Arbitration Act, 1931 and the New York Convention, 1958 provides the grounds on which the courts may deny recognition or enforcement of a foreign arbitral award.

The national courts at the place of arbitration retain the power to set aside a foreign arbitral award. This argument is based on the fact that if a foreign arbitral award has been set aside in the country of origin, it cannot be enforced in Mainland Tanzania [69] Therefore, the setting aside of an arbitral award pertains to the exclusive jurisdiction of the courts in the country where the award was rendered.

The law places the burden of proof on the party seeking enforcement of foreign arbitral award to prove on the balance of probability in the High Court of Tanzania conditions in section 30 (1)(a) (b) (c) and (d) of the Arbitration Act, 1931. This poses a major challenge to a person seeking to enforce a foreign arbitral award in Mainland Tanzania contrary to the rules governing the burden of proof in civil cases. A person against whom the recognition or enforcement of a foreign arbitral award is sought may take advantage and raise such above conditions as legal defences without being limited to those conditions and grounds expressly established under Section 30(2) of the Arbitration Act, 1931[70].These conditions are:

1. That an award was made in accordance with valid agreement for arbitration;
2. That an arbitral award was made by the arbitral tribunal constituted in accordance with the manner agreed upon by the parties;
3. That an arbitral award was made in conformity with the law governing the arbitration procedure;
4. That arbitral award had become final in the country (primary jurisdiction) in which it was rendered;
5. That an award was made on the basis of the subject matter that can lawfully be referred to arbitration under the law of Tanzania;
6. That the enforcement of such an arbitral award is not contrary to the public policy or the law of Tanzania.

This means that if the petitioner filing an award for recognition and enforcement of foreign arbitral award fails to establish the above condition provided under section 30(1) of the Arbitration Act, 1931 in his favour, a foreign arbitral award may be denied recognition and enforcement in Mainland Tanzania. However, under the New York Convention, 1958 the burden of proof has been transferred from the party seeking enforcement to the party opposing it [71].

Again, under condition number 4 above, a party seeking to enforce a foreign arbitral award is required to establish the finality and binding of arbitral award before the award can be recognised in Mainland Tanzania. However, this procedure appears to be unnecessary because where an application to set aside the award in a country where it was rendered is unsuccessful, the enforcement of a foreign arbitral award is not automatic. The High Court of Tanzania is not bound by the decision of the courts at the place where the arbitral award was rendered because such decisions are persuasive in Tanzania. The procedure requiring a party seeking enforcement of foreign arbitral award finality is an outdated procedure only to add to unnecessary delays in the enforcement of foreign arbitral awards.

As a matter of practice, issues which were determined by the arbitral tribunal cannot be raised as grounds for refusal enforcement of a foreign arbitral award because that constitutes estoppels to court and disputing parties. This was observed in *Tanzania Electric Supply Company v. Dowans Holdings Sa (Costa Rica) and Dowans Tanzania Limited (Tanzania)* [72], where Mushi J, stated that:

> It is enough to state that the Arbitral Tribunal considered and decided the main issues referred to it by the Parties [....]. Assuming, (for the sake of it), that the Tribunal made an erroneous decision, still this court cannot interfere with the decision of the Tribunal, in the light of the long established legal principles that, *matters of law specifically referred to an arbitral Tribunal cannot be challenged.*

The court fears in dealing with issues which were submitted to arbitrator and determined to avoid re-opening and re-arguing of the issues that the parties agreed to submit to the arbitral tribunal for determination [73]. Therefore, application resisting the enforcement of a foreign arbitral award in Tanzania must be made on the basis of issues which were submitted to the arbitral tribunal but the arbitral tribunal failed to deal with them.

### 3.4.2 Request for refusing enforcement of Non- ICSID foreign arbitral awards

In Tanzania, application for refusal of recognition and enforcement of foreign arbitral awards may be made in accordance with Section 30 (2) of the Arbitration Act, 1931 and Article 2 of the Geneva Convention on enforcement of foreign arbitral award, 1927 which was incorporated in the Arbitration Act, 1931 through the Fourth Schedule in accordance with Section 28 of the Arbitration Act, 1931 as well as Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The New York Convention, 1958 has been signed and ratified by the Government of Tanzania. Therefore, this

68 Christoph, H. S, *et al., The ICSID Convention: A Commentary, A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, op.cit. p.934.

69 Section 30(2)(a) of the Arbitration Act, 1931 and Article V(1)(e) of the New York Convention, 1958.

70 *Ibid.*

71 Article V(1) of the New York Convention, 1958 place the burden of proving the grounds for refusing to recognize and enforce an arbitral award on the party against whom the award is invoked.

72 High Court of Tanzania at Dar es Salaam, Misc. Civil Application No 8 of 2011, p. 7, (Unreported).

73 *Ibid.,* at p. 73.

makes it necessary that the provision should be read and interpreted harmoniously for effective enforcement of foreign arbitral awards in the country. Under Section 30 (2) the arbitration Act, 1931 set several grounds for refusal enforcement of foreign arbitral awards in Tanzania. These are:

#### 3.4.2.1 The arbitral award is not final

A foreign arbitral award may be refused enforcement if the award is not proved to be final in the country where it was rendered [74]. An arbitral award is deemed to be final if there is no any further proceeding pending in the country in which it was rendered [75]. An arbitral award suspended or set aside by the court in the country where it was rendered cannot be enforced in Tanzania [76]. Unlike under the New York Convention, 1958, an award may not be enforced if it is not binding [77].To establish that the arbitral award is final, the winning party must submit to the High Court of Tanzania the evidence obtained from the court where the award was rendered proving that the award is final [78].

#### 3.4.2.2 The Arbitral Award was made beyond the Arbitration Agreement

A foreign arbitral award may be refused recognition and enforcement if proved that the award was made on matters not contemplated by the parties in their arbitration agreement [79]. As a matter of law, the arbitral tribunal must address only all issues submitted in accordance with the submission between the parties [80], otherwise, its enforcement in Tanzania may be resisted and denied enforcement in Mainland Tanzania [81].

If the arbitral tribunal act *ultra vires* that would invalidates the award to the extent of such *ultra vire*s. In the case of *Mvita Construction Company v. Tanzania Harbours Authority* [82], the Court of Appeal of Tanzania stated that, *the arbitrator had no jurisdiction to determine all disputes/or issues that had not been firstly referred to the arbitrator as per the agreement*. In a similar note, the Indian Supreme Court in the case of *Associated Engineering Co. v. Govt. of Andhra Pradesh and ANR* [83], asserted the supremacy of an arbitration agreement as follows:

> The arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract, if he has travelled outside the bounds of the contract, he has acted without jurisdiction.

To understand what issue was considered during the arbitration proceedings, the court has to take into account the pleadings [84]. The court would consider whether such an issue was raised before the arbitral tribunal.[85] The court would also consider to what extent such an issue which was not determined is of significance in relation to the award filed for recognition and enforcement.[86] This raise the question of having the possibility of partial enforcement of the arbitral award where the decisions on matters properly determined can be separated from those improperly submitted to arbitration [87]. This position is recommended to avoid unnecessary delays in the enforcement of an arbitral award [88]. Similarly, it is recommended that if the party fails to raise his objection at the earliest stage of proceeding [89] while he had such opportunity to do so, that should be deemed to have waived the right to do so at the later stage of the enforcement of the arbitral award [90].

#### 3.4.2.3 Improper Composition of the Arbitral Tribunal

To be enforced in Tanzania, foreign arbitral award must comply with the parties' agreement and the law governing the arbitral procedure [91] However, both the Arbitration Act, 1931[92] and the New York Convention, 1958 [93] provide such a dual jurisdictional standard in respect of the intention of the parties providing the procedures of constituting the arbitral tribunal and the law of the seat of the arbitration without providing a guiding criteria as to how to justify the refusal of recognition or enforcement of the foreign award in the event the arbitral award violates both of them.

[74] Section 30(1)(d) of the Arbitration Act, 1931 [Cap 15 R.E 2002].
[75] *Ibid.,* Section 32.
[76] *Ibid.*
[77] Article V(e) of the New York Convention, 1958.
[78] Section 31(1)(b) of the Arbitration Act, 1931 [Cap 15 R.E 2002]; Article 1(d) of the Geneva Convention, 1927.
[79] Section 30(2)(c).
[80] Article 36 (1)(a) (iii) of the New York Convention, 1958.
[81] Article V(1)(c) of the New York Convention, 1958, Article 34(2)(iii) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006).
[82] [2006] T.L.R. 22 at p. 24.
[83] (1992) AIR 232.

[84] *In F J Bloemen Pty Ltd v. Council of the City of Gold Coast* [1972] 3 All ER 357*, at page 363* Lord Pearson delivering the judgment said that 'The award of an arbitrator on the other hand cannot be viewed in isolation from the submission under which it was made.' In *PT Prima International Development v Kempinski Hotels SA,* [2012] SGCA 35 the Court observed that pleadings and their contents are also relevant as they illuminate the matters that have been submitted to the arbitral tribunal. That "any new fact or change in the law arising after a submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded".
[85] In *Food Corporation of India v. Surendra & Mahendra Transport Company*, Appeal (civil) 1577 of 1994, the question whether the arbitrator has acted in excess of his jurisdiction was considered by the court which observed that in determining such question, the court always takes into account the fact as to whether such question was raised before the arbitrator or not. And it must be considered whether there is a specific term in the contract limiting the arbitrator to determine a particular issue, thereby the arbitrator proceeds to determine the issue, the award passed by the arbitrator in respect thereof would be considered to be in excess of jurisdiction of the arbitral tribunal.
[86] Nigel, B, *et al*, *Redfern and Hunter on International Arbitration,* 5th Edition, Oxford: Oxford University Press, 2009 stated at Para 10.40.
[87] Article V(1)(c) of the New York Convention, 1958.
[88] This would make it the effective and speedy the enforcement of foreign arbitral awards in Tanzania. *In the case of IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp.*, High Court of Justice, England and Wales, 17 April 2008, [2008] EWHC 797 (Comm), para. 103, it was observed by the court that immediate enforcement of discrete parts of the award would go with the grain of the award, not undermine it or second guess it.
[89] Article 4 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006); Article 33 of the ICC Rules; Section 17(3) of the Kenyan Arbitration Act, 1995; Section 73 of the English Arbitration Act, 1996.
[90] Article 4 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006); Article 33 of the ICC Rules; Section 5 read together with Section 17(3) of the Kenyan Arbitration Act, 1995; Section 73 of the English Arbitration Act, 1996.
[91] See, Section 30(1)(b) of the Arbitration Act, 1931 [Cap 15 R.E 2002], Article V(1)(d) of the New York Convention, 1958, Article 34.2(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006).
[92] Section 30(1)(b) and (c) of the Arbitration Act, 1931 [Cap 15 R.E 2002].
[93] Article V(1)(d) of the New York Convention, 1958.

### 3.4.2.4 Lack of Valid Arbitration Agreement [94]

The enforcement of foreign arbitral awards or non-domestic arbitral awards may be resisted on the ground that the award was not made in accordance with the valid arbitration agreement between the parties [95]. If the parties lacked the capacity to enter into the arbitration agreement is the agreement entered is invalid. Also the arbitration agreement may be invalid because of its failure to meet the formal requirements such as written requirements in accordance with the applicable law [96]. The invalidity of the arbitration agreement is determined in accordance with the law chosen by the parties [97]. However, if parties defaulted to decide the applicable law, the invalidity is to be governed by the law of the seat where the arbitral award was rendered [98]. In some jurisdictions, like Kenya and England [99], if the issue was not timely raised in order to be decided by the arbitral tribunal, the opportunity to raise it after the award may be considered to have been waived to the party who failed to take the opportunity during the arbitration proceedings. This is, however, also not covered by the arbitration laws in Mainland Tanzania.

### 3.4.2.5 Subject Matter is not Arbitrable

The Court in Tanzania Mainland may refuse recognition and enforcement of foreign arbitral awards on the ground that the subject-matter of the disputes is not capable of settlement by arbitration under the law of Tanzania [100]. By its nature, the dispute whose subject matter is of a commercial nature is capable of being settled by arbitration except if it is expressly provided otherwise. There is no universality of the application of the non-arbitrability defence because disputes which may be submitted to arbitration differ from one country to another [101].Those issues of public interest in nature, and the extent the decision of the arbitrator will have effect on the third party [102] are likely to be non-arbitrable [103]. The matter of non-arbitrability changes according to the changes happening in the society that is why there is no static list of the subject matter that cannot be submitted to the arbitration.

### 3.4.2.5 Violation of the due Process

The right to the due process is enshrined in the Constitution of the United Republic of Tanzania in the conduct of the arbitration hearing [104]. The violation of due process during arbitration proceedings is another ground for refusing recognition and enforcement of foreign arbitral awards in Tanzania. For instance, foreign arbitral award may be refused recognition, if proved that one of the parties was not given the notice of the arbitration proceedings which is sufficient in time to enable to present his case or was under some legal incapacity [105] and was not properly represented in his case [106]. This is a demand that during the arbitration hearing, all parties must be given enough time to prepare themselves and attend hearing [107] to defend themselves where so required [108]. Parties have the right to be given a fair hearing and to have the opportunity to present their case and to answer all allegations put by the other party [109]. Parties have the right to deal with arguments which an arbitrator had in contemplation but the arbitrator should focus only on all essential issues [110].Parties should be able to present and hear the evidence against them, but also to test the veracity of such evidence. Given this, the arbitrator must adhere to some rules of evidence in order to observe the rules of natural justice [111]. The arbitrator must be unbiased in terms of decision making with his findings based on probative evidence presented to him by all of the parties.[112] The arbitrator should be able to furnish parties

[94] See, Section 30(1)(*a*) of the Arbitration Act, 1931 [Cap 15 R.E 2002], Article 1*(a)* of the 1927 Geneva Convention, Article V (1) (a) of the New York Convention, 1958, Article 34(2)(a)(i) the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006).

[95] See, Section 30(1)(*a*) of the Arbitration Act, 1931 [Cap 15 R.E 2002], Article 1*(a)* of the 1927 Geneva Convention, Article V (1) (a) of the New York Convention, 1958, Article 34(2)(a)(i) the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006).

[96] Section 2 of the Arbitration Act, [Cap 15 R.E 2002]; Article II (2) of the 1958 New York Convention; Article 7 of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006).

[97] Article V(1) (a) of the New York Convention, 1958.

[98] *Ibid.*

[99] Section 73 of the English Arbitration Act, 1996.

[100] Section 30(1)(e) of the Arbitration Act, 1931 [Cap 15 R.E 2002]. See, Article V(2)(a) of the New York Convention, 1958, see also Article 34(2)(b)(1) and 36(1)(b) (i) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006). In Tanzania, issues like citizenship or legitimacy of marriage, grants of statutory licences, validity of registration or trademarks or patents, copyrights, winding-up of companies, bankruptcies of debtors, administration of estates are non arbitrable.

[101] The Court of Appeal of Singapore in *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd* [2011] 3 SLR 414 at Para 46 analysed "*the concept of non-arbitrability of insolvency provision and held that the concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.*"

[102] The Court of Appeal of Singapore in *Larsen Oil and Gas Pte Ltd v. Petroprod* Ltd [2011] 3 SLR 414 at para 46 analysed the concept of non-arbitrability of insolvency provision and held that *disputes arising from the operation of the statutory provisions of the insolvency regime were per se non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement*.

[103] Gary, B., *International Commercial Arbitration*, The Hague:Kluwer Law International, 2009 p 768.

[104] Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended time to time).

[105] Section 30(2)(b) of the Arbitration Act, 1931 [Cap 15 R.E 2002].

[106] Article V(1)(b) of the New York Convention, 1958.

[107] In *Kanoria & Ors v. Guinness Anor*, [2006] EWCA Civ 222.the party against whom the arbitration award was made had never been given an opportunity to present his case, this was taken as a breach of the rules of natural justice thereby leading the court to refuse to enforce the award.

[108] In *Armstrong v. Manzo,* 380 U. S. 545, 380 U. S. 552 (1965), it was observed by the court that "[t]he fundamental requirement of due process is the opportunity to be heard "at *a meaningful time and in a meaningful manner*."

[109] Section 33(1)(a) of the English Arbitration, 1996.

[110] In *Fidelity Management SA & Ors v. Myriad International Holdings BV & Or* [2005] EWHC 1193, Morison J said 'arbitrators do not have to deal with every argument on every point raised; they should deal with essential issues.'

[111] In *Kempinski Hotels SA v. PT Prima International Development*, [2011] 4 SLR 636 at para 9, the Judge observed that 'natural justice required that the parties should be heard.' But that does not require that the arbitrator should give responses on all submissions made, provided that the tribunal at least considered those substantive submissions.' The arbitrator must always act judicially with an impartial mind and with patience. He must be neutral without taking an adversarial role in the proceedings. The arbitrator's response and words during the arbitration proceedings must be considered when his impartiality and independence is challenged during the enforcement stage of commercial arbitral awards.

[112] Spencer, D., *Essential Dispute Resolution in Australia*, London: Cavendish Publishing Pty Limited, 2002.p.124

with reasons which form part of his final decisions [113].

> However, it should not be enough for the party resisting to allege and provide that there was a violation due process; he must go a further step of establishing how such violation prevented him from presenting the case.[114] The violation of the due-process must be serious to the extent of constituting the ground for denying the enforcement of a foreign arbitral award in the contracting states.[115]

### 3.4.2.6 Violation of a Public Policy or Law

If the foreign arbitral award appears its enforcement would be contrary to the public policy of Tanzania may be denied recognition and enforcement [116]. This ground has been taken as a universal ground used to deny the recognition and enforcement of the foreign award in many countries.[117] The concept of public policy is not, however, defined under the arbitration laws of Tanzania. In the case of *Richardson v Mellish* [118], Burrough J**,** was of the view that:

> If it is illegal, it must be illegal either on the ground that it is against public policy, or against some particular law. The public policy as a ground for denying enforcement of an arbitral award, has been termed as a very *unruly horse of which once you get astride you never know where it will carry you.* It may lead you from the sound law [119].

Similarly, the phrase public policy has received interpretation in the case of *Hebei Import Corp v. Polytek Engineering Co. Ltd* [120], in which the Hong Kong Court observed that:

> The expression *"*contrary to public policy" in the convention and....meant contrary to *the fundamental conceptions of morality and justice of the forum in which enforcement was sought* and that the 'public policy' for refusing enforcement is to be *narrowly construed and applied*.

On the other hand, Mistelis argues that *'the ground of public policy reflects the fundamental economic, legal, moral, political, religious and social standards of every state or extra-national community* [121]. In Tanzania, the challenging of the enforcement of a foreign arbitral award on the basis of public policy violation was raised unsuccessfully in the case of *Tanzania Electric Supply Company Ltd v. Dowans Holdings Sa (Costa Rica) and Dowans Tanzania Limited (Tanzania),*[122] the Petitioner's counsel argued that the foreign arbitral award which was rendered by the ICC was contrary to the public policy of Tanzania because such a foreign arbitral award offends the public policy as it contravenes some provisions of the Public Procurement Act, 2004, whose public policy is embodied in the reasons and objectives of the Public Procurement Bill, and reflected in Section 31(1)(b) and 31 (2) of the PPA, 2004,of Tanzania.
However, this ground was rejected by the High Court of Tanzania. The High Court of Tanzania presided over by Mushi J, on p. 73 observed that:

> Admittedly, an examination of paragraph 459-509 of the ICC Award, it is enough to state that the Arbitral Tribunal considered and decided the main issues referred to it by the Parties regarding the illegality/validity of the POA, and its enforcement, in relation to the Public Policy issue. These were specific issues referred to the Tribunal, and the Tribunal made its decisions. Assuming, (for the sake of it), that *the Tribunal made an erroneous decision, still this court cannot interfere with the decision of the tribunal*, in the light of the long established legal principles that, matters of law specifically referred to an arbitral Tribunal cannot be challenged.

The Judge in the case of *Tanzania Electric Supply Company Ltd v. Dowans Holdings Sa (Costa Rica) and Dowans Tanzania Limited (Tanzania)* continued to observe that it is not proper for the Court to interfere with the arbitral tribunal's findings on public policy issue because doing so would amount to re-opening and re-arguing of the issues that the parties agreed to submit to the tribunal for determination [123].
Again, the concept of public policy received the court attention in *Labio Farm S.A v. Yong Shun Construction Company Limited* [124], in which the Judge observed that, 'the concept as what is public good or public interest varies from time to time. In our case here, the term public policy has to be interpreted in the context of the Jurisdiction of this court. As rightly pointed out, to except *a contract arising out of forgeries*, not only is against Section 6 of the Banking and Financial Institution [Credit Concentration and other Exposure Limits] Regulations, 2008, but is also against the public policy in a Tanzania context. The judge proceeded to state:

> If the arbitration process does not dispense justice, it cannot truly be reflective of an alternative dispute resolution mechanism. Hence, *if the award has resulted*

[113] Spencer, D., *Essential Dispute Resolution in Australia*, op.cit. p.129.
[114] This was cemented in the case of *John Holland Pty Ltd v. Toyo Engineering Corp (Japan),* [2001] 2 SLR 262 in which the High Court of Singapore observed that 'in order to establish a breach of the rules of natural justice thereby justifying a setting aside the award, it is important first to establish which part of rule of natural justice was breached; secondly, how it was breached; thirdly, in what way the breach was going to the root of the making of the award and fourthly, how the breach had prejudiced its rights.
[115] See the Hong Kong case of *Paklito Investment Ltd v. Klockner East Asia Ltd,* [1993] 2 HKLR 39.
[116] Section 30(1)(e) of the Arbitration Act, 1931 [Cap 15 R.E 2002], Article V(2) of the New York Convention, 1958.
[117] Loukas, A. M., "International Law Association London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards," *2 Int'l L.F. D. Int'l* 248 2000.p.248. Available at http://heinonline.org accessed on 26/1/2015.
[118] (1824) 2 Bing. 229 at p.252. Available at http://caselawquotes.net/P/Public_Policy_Doctrine.html (accessed on 20/6/2016)
[119] *Ibid.,* (1824) 2 Bing. 229 at p.252.
[120] [1999]1HKLRD 665.
[121] Loukas, A. M., "International Law Association - London Conference (2000) Committee on International Commercial Arbitration Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards" *2 Int'l L.F. D. Int'l* 248 2000.p.250. available at http://heinonline.org accessed on 26/1/2015.
[122] High Court of Tanzania at Dar es Salaam, Misc. Civil Application No 8 of 2011 (Unreported).
[123] *Ibid.*
[124] High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Civil Application No. 202 of 2013 (Unreported).

*in an injustice, a court would be well placed within its limited scope in upholding the challenge to the award on the ground that it offends the public policy of Tanzania, a policy which sees it that no person can keep an advantage which he has obtained by fraud. So, such an award can be set aside* [125].

Therefore, from the decision of *Labio Farm S.A v. Yong Shun Construction Company Limited* [126], it is clear that fraud is contrary to the public policy of Tanzania. The arbitral awards based on illegal transactions remain also illegal thereby construed to be contrary to the public policy of Tanzania.

With that in mind, the foreign arbitral award resulting from illegal transactions cannot be enforced for a want of finality of the arbitral award to the detriment of violating the fundamental public policy of Tanzania. This is the correct position rather than the position which was adopted in the case of *Tanzania Electric Supply Company Ltd v. Dowans Holdings Sa (Costa Rica) and Dowans Tanzania Limited (Tanzania).*

It is well long established that even if the arbitration agreement between the parties remain invalid, an arbitrator does not have jurisdiction to award damages on an illegal contract between the parties [127]. This is truly because enforcing a foreign arbitral award resulting from illegal transactions would undermine the integrity of the arbitration process as an alternative dispute resolution mechanism over court litigation.[128] There is a need in this area for the court to be active in promoting integrity with regard to commercial transactions relating to investment. The promotion of investments in developing countries like Tanzania without fighting against illegal transactions is meaningless. Thus, the foreign arbitral awards which results from an illegal contracts is not enforceable [129] because illegal transaction is inconsistent and contrary to justice or morality.

### 3.4.2.7 Award Set Aside Abroad

The recognition and enforcement of a foreign arbitral award in Tanzania Mainland may be resisted on the legal basis that it has been nullified in the country where it was rendered by a competent authority [130]. Section 30(2)(a) of the Arbitration Act, 1931[131] provides [s]ubject to the provisions of this subsection, *a foreign award shall not be enforceable* under this Part if the court is satisfied that *the award has been annulled in the country in which it was made*. This provision corresponds with Article V(1)(e) of the New York Convention, 1958 and Article 36(1)(b) of the UNCITRAL Model Law, 1985. The foreign arbitral award not to be enforced must have been annulled by a competent authority of the country where it was rendered [132].

### 3.4.2.8 Adjournment of Enforcement of Foreign Arbitral Awards

Courts in Tanzania have a restrictive and limited jurisdiction to deal with foreign arbitral awards. They have the powers to recognise and enforce the foreign arbitral award or refuse recognition and enforcement of the foreign arbitral award [133]. Parties resisting the enforcement of the foreign arbitral award, have the right of making application for staying enforcement proceedings of foreign arbitral awards in the High Court of Tanzania pending the determination by the court where the award was rendered [134]. This is due to the fact that the foreign arbitral award becomes enforceable once it is only final in the country where it was rendered. It is the public policy of Tanzania of not re-opening and re-arguing the decision of the arbitrator in order to ensure that there is an end of dispute [135].

The powers of the High Court under section 30 (3) of the Arbitration Act, 1931[136] are, therefore, limited to adjourning the enforcement proceedings of the foreign arbitral award where necessary, thus, letting the party resisting enforcement to make application for setting aside such an award where it was rendered by the competent authority [137]. However, the application for adjournment of the enforcement of foreign arbitral award is subject to the condition that the court may order the party resisting enforcement to give security for cost [138].

The discretion as to whether to enforce or adjourn the matter must be exercised judiciously. In *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd* [139], Mr Justice Burton J, in paragraph 49 observed that *the court discretion should be 'rationally exercised.'*

It is submitted that, the adjournment must be granted with caution to avoid unnecessary delays in the enforcement proceedings of the arbitral award. This is due to the fact that the objective of arbitration is to resolve commercial disputes expeditiously.

Also, before the court can grant adjournment, it must take into account the fact that an arbitral award is timely

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[125] *Ibid.*

[126] *Ibid*.

[127] In the case of *David Taylor & Son Ltd v. Barnett* [1953] 1 All ER 843 at p. 847, Denning LJ observed that: 'An arbitrator has no jurisdiction or authority to award damages on an illegal contract …'

[128] In *Soleimany v. Soleimany* [1999] 3 All ER 847, the arbitral award was challenged at the enforcement stage on the basis that the underlying contract was an illegal transaction. It was held that "the court would not enforce an arbitration award, whether *foreign or domestic*, if enforcement would be contrary to *English public policy*. Such policy would not allow the parties to conceal, through the procurement of an arbitration that one of them sought to enforce an illegal contract, since a private agreement could not override the court's *concern to preserve the integrity of its process." (*emphasis mine)**.**

[129] In *Archbolds* (*Freightage*) *Ltd v. S Spanglett Ltd* (*Randall, third party*) [1961] 1 All ER 417 at p.424, Devlin, L.J. said "*The effect of illegality on a contract may be threefold*. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is enforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it, he has to rely on his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio*, and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."

[130] *Ibid*, Section 30(2)(a).

[131] *Ibid*.

[132] Article V (1)(e) of the New York Convention, 1958.

[133] Section 30 (3) of the Arbitration Act, 1931 [Cap 15 R.E 2002].

[134] Ibid.

[135] *Tanzania Electric Supply Company v. Dowans Holdings Sa (Costa Rica) and Dowans Tanzania Limited (Tanzania)*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No 8 of 2011, at p. 43 (Unreported).

[136] The Arbitration Act, 1931 [Cap 15 R.E 2002].

[137] Section 30(3) of the Arbitration Act, 1931 [Cap 15 R.E 2002] and Article VI of the New York Convention, 1958.

[138] The proviso in Section 30(2)(c) of the Arbitration Act, 1931 [Cap 15 R.E 2002], See also Article VI of the New York Convention, 1958.

[139] [2011] EWHC1957.

enforced. This was considered in the case of *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd* [140], in which the court held that "*the comparison must be between the position of the would-be enforcing party if he were allowed to enforce immediately, and his position if any steps by way of enforcement were delayed as a result of the grant of an adjournment*."

This is to ensure the general objectives of arbitration of resolving disputes expeditiously and without necessary expenses [141]. The court should also take into account whether the award is manifestly invalid or valid before ordering security for cost [142].

> It may, therefore, be concluded that a court asked to grant adjournment of the enforcement proceedings pending determination of application for setting aside an arbitral award, should ascertain that (a) the application for setting aside an arbitral award in the country where such an award was rendered, has a chance of success and was made not by way of delaying tactics, (b) the extent such an adjournment may produce delays and expensive litigation, (c) the hardships to the parties in case the application for setting aside fails and (d) the needs for appropriate security for cost [143]

[140] *Ibid.*

[141] The United States Court of Appeals, Second Circuit in the case of *Europcar Italia, S.p.A. v. Maiellano Tours, Inc,* 663,F.Supp.871,875 (S.N.N.Y.1998), instructed the District Courts in considering whether or not to delay confirmation of the arbitral award under Article VI of the New York Convention, 1958, should take into account adequately several factors, including;(1) the general objectives of arbitration-the expeditious resolution of disputes and the avoidance of protracted and expensive litigation, (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved, (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings including (i) whether they were brought to enforce an award (which would tend to weigh in favour of a stay) or to set the award aside (which would tend to weigh in favour of enforcement), (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity, (iii) whether they were initiated by the party now seeking to enforce the award in the federal court and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute and (5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed under Article VI of the New York Convention, 1958 the party seeking enforcement may receive "suitable security" and that, under Article V of the New York Convention, 1958 an award should not be enforced if it is set aside or suspended in the originating country (noting that insolvency of one party may play a role in determining relative hardships).

[142] In England, the issue of granting security was discussed in the case of *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation* [1993] 2 Lloyd's Rep 208, when the Court of Appeal held that two factors were relevant to an inquiry into whether to order security. The first factor was the strength of the arguments as to the award's invalidity. If the award is manifestly invalid, the court should not order security. If the award is manifestly valid, the court should order either immediate enforcement or substantial security. There would be a range of possibilities in between. The second factor was the difficulty or ease of enforcement. The case for security would be stronger if enforcement would be more difficult if delayed, and weaker if there would be insufficient assets in any event. In this case, the Court found it seriously arguable that the award was invalid on the ground of invalid arbitrator appointment.

[143] *Continental Transfer Technique Ltd v Nigeria & Ors* [2010] EWHC 780 (Comm) (30 March 2010), at para 16 available at http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2010/780.html&query=(IPCO)+AND+((Nigeria))+AND+(Limited)+AND+(v)+AND+(Nigeria)+AND+(National)+AND+(Petroleum)+AND+(Corporation)#disp46 (accessed on 25/6/2016).

### 7.8 Effects of Foreign Arbitral Awards

The recognised foreign arbitral award carries legal effects to the extent of being used as a defence to bar further suit on the basis of the same cause of action in future [144]. The award may be used as a defence or set-off against the arbitral award debtor in any later proceedings on the same cause of action in the court. Under Paragraph 8 of the First Schedule of the Arbitration Act, 1931[145] an arbitral award is final and binding on the parties and the persons thereby claiming under the parties to the arbitration agreement respectively [146] This means that, the final award is binding on the parties with effect of the *res judicata* to the extent that, the court cannot re-open an issue already determined by the arbitration proceedings [147]. Therefore, arbitration is not the first step on endless disputes.

The finality of an arbitral award is one of the public policies in Tanzania. It was discussed in *Tanzania Electric Supply Company v. Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)* [148], by Mushi, J, observing that:

> ...finality to disputes/arbitral Awards is embodied in our Civil Procedure Code and for that matter, the Arbitration Act. Both pieces of legislation provide for arbitration, as an alternative mechanism for dispute (especially commercial disputes) resolution, out of court litigation, with the view that, the parties, on their own agreement, would reach an amicable and speedy solution of their disputes, and that the solution would be final and binding upon them. Therefore, it is my decided opinion that, *it is also one aspect of our "public policy" towards the need to having finality of disputes and arbitral commercial awards* [Emphasis added].

Therefore, an arbitral award which determines substantive issues of the dispute between the parties has the *res judicata* effect. Thus, the doctrine of *res judicata* applies to arbitration. The court in the case of *Econ Piling Pte Ltd and another (both formerly trading as Econ-NCC Joint Venture) v. Shanghai Tunnel Engineering Co Ltd*,[149] provides that the doctrine of *res judicata* as it applies to the proceedings in court, applies similarly to matters referred to arbitration.

Once the award is made on the matter in dispute by the arbitral tribunal properly constituted, the original cause of action as determined by the arbitrator is extinguished [150]. The successful party cannot rely on the original cause of action to bring an action to the court, but he has the right to enforce the award in its terms [151]. Thus, accepting the

[144] Section 29(2) of the Arbitration Act, 1931 [Cap 15 R.E 2002].

[145] The Arbitration Act, 1931 [Cap 15 R.E 2002].

[146] *Ibid.*

[147] In the case of *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732, V K Rajah J.A observed that *there are many reasons why parties may choose to resolve disputes by arbitration rather than litigation such as* first, *an arbitral award, once made, is immediately enforceable both nationally and internationally in all treaty states.* Second, *parties choose arbitration because of confidentiality, procedural flexibility and the choice of an arbitrator who is an expert compared if the dispute is submitted for court litigation where the parties have no right to choose the judge to preside over their dispute.* Third, *the finality of the arbitral award is another reason for its choice*.

[148] High Court of Tanzania at Dar es Salaam, Misc. Civil Application No 8 of 2011, at p. 43 (Unreported).

[149] [2011] 1 SLR 271 at para 58.

[150] *Ibid.*

[151] *Ibid.*

jurisdiction of the arbitrator to resolve the dispute, the question of jurisdiction becomes *res judicata* and cannot be revisited [152]. Under the international commercial arbitration instruments, arbitral awards also have *res judicata* effect by providing that arbitral awards shall be recognised as binding between the parties [153]. Indeed, some of the major international rules of some specific institutions also recognize the doctrine of *res judicata* [154]. Therefore, parties to the foreign arbitral award must carry out the award without delay and should not seek to re-open and re-argue the matters that have been determined into its finality [155].

## 4. Conclusion

It can be concluded that the arbitration laws of Tanzania governing enforcement of foreign arbitral award are inadequate. The rules and procedures governing the enforcement of foreign arbitral awards in Mainland Tanzania are inadequate. There are uncertainties like courts have residual discretion in line with recognition and enforcement of an arbitral award, which create loopholes for endless disputes at the stage of enforcement even if the challenges filed in courts against arbitral awards are frivolous. Tanzania ratifies without domesticating the New York Convention in 1988 which remove the use of Geneva Protocol and Convention into use. Tanzania is also a party to ICSID Convention 1965 and other BITs. Under the existing Arbitration Act,1931 the judge during enforcement stage cannot act like an appeals court judge thereby re-opening the matter which decided by the arbitrator rather he is there to examine whether the award is with matter of conformity' of the award with law applicable in Tanzania. Therefore, a new law which is comprehensive law is needed which is in line with the UNCITRAL Model Law as amended in 2006.

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[152] *Astro Nusantara International BV and others v. PT Ayunda Prima Mitra and others* [2013] 1 SLR 686.

[153] Article III of the New York Convention, 1958, Art. 35 (1) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 (Revised 2006) states that "[a]n arbitral award, irrespective of the country in which it was made, shall be recognized as binding….." Similarly under Article 34(2) of the UNCITRAL Arbitration Rules all arbitral award made in writing are final and binding on the parties.

[154] Article 26(9) and Article 26(7) of the LCIA Rules; 2014 Article 28(6) of the ICC Rules of Arbitration, 2012

[155] *Astro Nusantara International BV and others v. PT Ayunda Prima Mitra and others* [2013] 1 SLR 686.