



# INTRODUCTION TO ARBITRATION IN UGANDA

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# Contents



## Part A: Introduction

- What is ADR?
- ADR Mechanisms & Classifications



## Part B: Arbitration

- Definition
- Types
- Characteristics
- Comparison with Litigation



## Part C: Relevance

- Advantages
- Disadvantages
- Case for Arbitration



## Part D: Evolution

- Introduction of Arbitration in Uganda



## Part E: Regulatory Framework

- Legal & Policy Framework
- Institutional Framework



## Part F: Key Concepts

- Party Autonomy
- Equality
- Arbitration Agreement
- Separability
- Arbitral Tribunal
- Law Applicable
- Seat of Arbitration
- Court Intervention
- Confidentiality & Privacy



## Part G: Drafting Effective Arbitration Agreements

- Types of Agreements
- Components
- Pitfalls



## Part H: Arbitral Proceedings

- Dispute or Difference
- Commencement (Reference & Request)
- Appointment of the Arbitrator
- Pre-Arbitration Meeting
- Pleadings
- Scheduling Conference
- Hearing
- Dealing with 'Difficult' Parties (Default)
- Submissions
- Writing the Arbitral Award



## Part I: Post-Arbitration

- Settings aside Awards
- Appeals
- Recognition & Enforcement

# Introduction: ADR

## What is Alternative Dispute Resolution?

- The word “**alternative**” means [of one or more things] available as another possibility or choice.
- ADR means a wide **variety of dispute resolution mechanisms** that are **short of, or alternative to full-scale court process**.
- ADR is a set of **practices and techniques** that aim (1) to permit legal disputes to be resolved **outside the courts** for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject, or (3) to prevent legal disputes that would otherwise likely to be brought to the courts.

## Categorization

- Traditional Mechanisms vs Modern Mechanisms
- Civil Mechanisms v Criminal Mechanisms
- Binding Mechanisms v Non-Binding Mechanisms
- Interests-based Mechanisms\* v Rights-based Mechanisms\*\*

*\*Interest-based Mechanisms* aim at resolving the dispute in a way that reflects the real interests of the parties, such as fairness & maintenance of the long-term relationship.

*\*\*Rights-based Mechanisms* are more legalistic (Do you want damages?)

# Examples of ADR Mechanisms

## Traditional Mechanisms\*

- Ailuc (Iteso & Madi)
- Culo Kwor (Acholi & Langi)
- Mato Oput (Acholi)
- Tonu ci Koka
- Informal mediation
- Informal negotiation

## Modern Mechanisms\*\*

- Mediation
- Negotiation
- Arbitration
- Conciliation
- Adjudication
- Neutral Evaluation
- Fact-finding

## Criminal Mechanisms

- Reconciliation
- Plea bargain

## Binding Mechanisms

- Arbitration\*\*\*\*
- Adjudication

## Non-Binding Mechanisms/Interest-based Mechanisms

- Mediation\*\*\*
- Negotiation
- Conciliation
- Adjudication
- Neutral Evaluation
- Fact-finding

\*Refer to the *Agreement on Accountability and Reconciliation Between the Government of Uganda and the Lord's Resistance Army*

\*\*These are also **Civil** in nature.

\*\*\*Mediation, though not binding, can give rise to a binding result such as a Consent Judgment or Memorandum of Understanding.

\*\*\*\* Also Rights-based

# ARBITRATION

## What is Arbitration?

- “**arbitration**” means any arbitration whether or not administered by a **domestic or international institution** where there is **an arbitration agreement. (S.2(1)(b) Arbitration & Conciliation Act Cap. 4)**
- The **process** by which a **dispute or difference** between **two or more parties** as to their **mutual legal rights and responsibilities** is referred to and determined **judicially and with binding effect** by the **application of law** by **one or more persons (the arbitral tribunal) instead of by a court of law.**
- A **method** of dispute resolution involving **one or more neutral third parties** who are **agreed to** by the disputing parties and whose **decision is binding.**
- The **submission** of a **dispute** to **one or more impartial persons** for a **final binding decision** on a dispute.

# Types of Arbitration

## **Ad hoc Arbitration**

The type of arbitration which is not conducted by an institution, where the parties and the arbitrator will conduct the arbitration according to procedures agreed by the parties or, in default of an agreement, as laid down by the arbitrator at a preliminary meeting when arbitration commences.

## **Institutional Arbitration**

This is arbitration conducted by an institution. The parties may agree to have a dispute arbitrated by an arbitral institution instead of an individual.

## **Statutory Arbitration**

This type of arbitration is also known as '*compulsory arbitration*.' It is arbitration which is sanctioned by the law, or which statute compels parties to undertake.

## **Court-Directed/Court-Annexed Arbitration**

In certain circumstances, the High Court may refer a matter before it to any special referee or arbitrator. (**S.27 Judicature Act Cap. 13**)

# Features of Arbitration

- **Contractual**

*“Arbitration is a matter of contract, and a party cannot be required to submit to an arbitrator or to arbitration, any dispute which he or she has not agreed so to submit” - (TMA Architects & Anor vs. Prome S Consultants LTD HCMC NO. 0080 OF 2021)*

- **Binding**

- **Process**

- **Private**

- **Neutral Third-Party**

- **Finality**



# Arbitration vs. Litigation

## Similarities

- Both involve a neutral third party.
- Both are binding.
- Both have a final decision.
- Both are enforceable.

## Differences

- Arbitration is a private process.
- Awards from arbitration do not set legal precedents.
- Arbitration is flexible.
- Judges have more control over the parties and proceedings than Arbitrators.
- Easier to appeal court decisions.

# RELEVANCE

## Advantages of Arbitration

- **Control over the procedure/Flexibility**
- **Confidentiality**
- **Neutrality of the Arbitral Tribunal**
- **Cost factor**
- **Time factor**
- **Final and Binding**
- **Enforceability**

# Disadvantages of Arbitration

- **Finality (No appeals except where parties agree)**
- **Expensive (compared to other ADR mechanisms)**
- **Questionable fairness**
- **Unpredictability**
- **Possibility of Default**

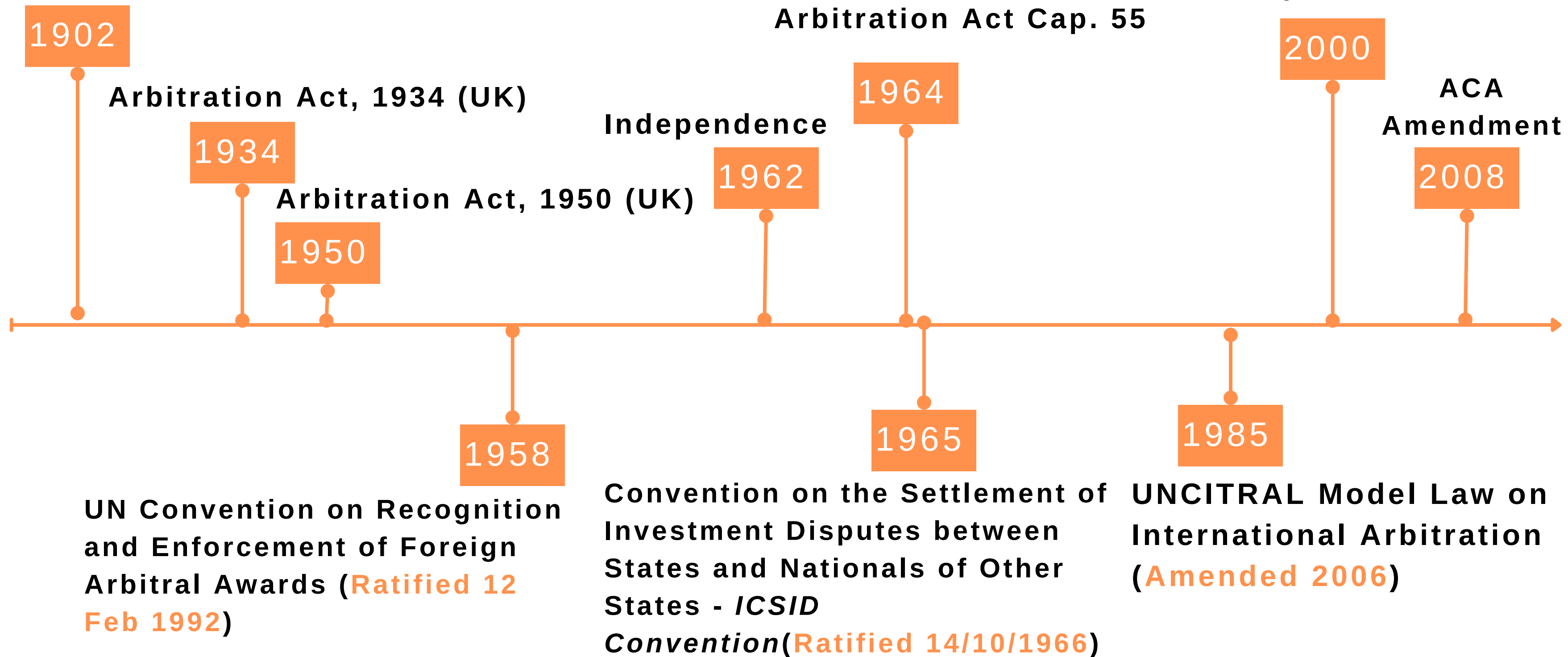
# Making a Case for Arbitration

- Reduces court-case backlog.
- Enhances access to justice.
- Speeds up economic development & growth.
- Client satisfaction.
- Preserves business relationships.
- Cost factor
- Time factor
- Increases trust in dispute resolution.
- Increases effectiveness of courts.
- Affects investors' perceptions.

# History of Arbitration in Uganda

The Uganda Order in Council

Arbitration & Conciliation Act  
Cap.4



# REGULATORY FRAMEWORK

## Legal Framework

### ✓ **Judicature Act Cap. 13**

The High Court is granted powers to refer a dispute, other than a criminal offence, to an official or special referee/arbitrator for inquiry and report any question arising in any cause or matter (S.27).

### ✓ **Arbitration & Conciliation Act Cap. 4 (ACA), as amended**

The ACA was enacted to amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, and to define the law relating to conciliation of disputes. It provides for the procedure for conducting arbitral proceedings in Uganda as well as recognition and enforcement of arbitral awards (domestic & foreign - Under the UN Convention & ICSID Convention)

### ✓ **Civil Procedure Rules S.I. 71-1, As amended**

Rules provide that Court shall hold a scheduling conference to, *inter alia*, consider the possibility of settling the dispute through mediation, arbitration, or any other means (Order 12 rule 1(1)).

# Policy Framework

- ✓ **National ADR Policy, 2023 (Draft), Proposed Reforms**
  - Seeks to establish a National ADR Council for oversight
  - Enable establishment of ADR Centres (for capacity building & accreditation)
  - Establish a Register of Certified Arbitrators.
  - Strengthen the legal framework for Arbitration
  - Foster quality & standard of ADR practice (Timeframe and Training)

# Institutional Framework

## ✓ The High Court of Uganda

- Empowered to refer a matter for arbitration (S.27 Judicature Act)
- Grants interim measures of protection (Injunction, Interim Orders) before or during arbitral proceedings (S.6(1) ACA) - EXCEPT where the arbitrator has already ruled on a matter.
- Determines appeals on Arbitrators' decisions on their jurisdiction (S.16(6) ACA).
- May assist an arbitrator to take evidence at the request of the arbitrator or party to the proceedings with the arbitrator's approval (S.27 ACA).
- Recognizes and enforces Arbitral Awards (S.35 ACA).
- Determines applications for setting aside arbitral awards (S.34 ACA).
- Determines appeals from Arbitral Awards (S.38 ACA).



# Institutional Framework

## ✔ Centre for Arbitration & Dispute Resolution (CADER)

A body corporate established under the ACA (**S.67**).

Governed by a Council comprising the chairperson, an executive director, the president of the Commercial Court, three (3) representatives from existing private sector organisations and a representative of the Uganda Law Society (**S.69 ACA**).

### Responsible for;

- Acting as an appointing authority for arbitrators & conciliators (**S.68(a) ACA**).
- Establishing a roster of competent and qualified arbitrators (**S.68(h) ACA**).
- Making rules, administrative procedures and forms for the effective performance of arbitration (**S.68(c) ACA**).
- Establishing and enforcing a code of ethics for arbitrators in Uganda (**S.68(d) ACA**).
- Qualifying and accrediting arbitrators (**S.68(e) ACA**), ETC.

# Institutional Framework

## ✔ **Appointing Authorities**

An institution, body or person appointed by the Minister to perform the functions of appointing arbitrators and conciliators. E.g., **The International Centre for Arbitration and Mediation in Kampala (ICAMEK)**

## ✔ **Private Arbitration Centres**

Either act as stand-alone tribunals with on-site arbitrators do arbitration capacity building, or both. E.g. **CIARB-Uganda Chapter, Praxis Conflict Centre, Resolve-360,**

## ✔ **International Arbitration Centres/Tribunals**

Arbitral awards made in a country or State other than Uganda that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) (S.43 ACA) or the ICSID Convention (S.47 ACA) are binding on the parties and enforceable in Uganda. E.g., **the International Center for Settlement of Investment Disputes, the International Court of Arbitration, the International Chamber of Commerce, the London Court of International Arbitration & the World Intellectual Property Organization Arbitration and Mediation Centre, ETC.**

# KEY CONCEPTS

## ✔ Party Autonomy

- In arbitration, the autonomy of the parties is kept at the highest pedestal (*Uganda Development Corporation v Rocktrust Contractors LTD HCMA No. 0085 OF 2019*).
- Party autonomy in arbitration refers to the **freedom of parties** involved in a dispute **to determine various aspects of the arbitration process** including the arbitrator(s), law applicable, nature of disputes, procedure, language, seat of arbitration, etc.
- Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them. The parties have autonomy in determining the procedure to govern their arbitration and may select the national rules of any country, agree to their own rules or refer to the rules of an arbitration institution, failure of which the law of the arbitral seat will apply (*TMA Architects & Anor vs. Prome Sonsultants LTD HCMC NO. 0080 OF 2021*).

# Party Autonomy under the ACA

- Parties are free to agree on the number of arbitrators (S.10(1)).
- Parties are free to agree on a procedure for appointing the arbitrator(s) (S.11(2)).
- Parties are free to agree on a procedure for challenging the arbitrator (S.13(1)).
- Parties are free to agree on the procedure to be followed by the rules of the arbitral tribunal in the conduct of the proceedings (S.19(1)).
- Parties are free to agree on the place of arbitration (S.20(1)).
- Whereas proceedings (conducted in accordance with the ACA) are to be conducted in English, parties can agree to have an interpreter (S.22(1)).
- Parties can have not to have an oral hearing (S.24(2)).
- Parties can agree on whether to engage or not to engage an expert (S.26(1)).
- Parties are free to agree on the substantive law to be applied by the tribunal (S.28(1)).
- Parties are free to settle their dispute during the conduct of arbitral proceedings (S.30).

# ☑ Equality

- The parties shall be **treated with equality**, and each party shall be given **a reasonable opportunity** to present his or her case (S.18 ACA).
- *“Whatever rules of procedure are adopted, the parties should be treated with equality and each party given **a full opportunity to present its case**. The **duty of the arbitrator** is to ensure that a party is given a reasonable opportunity to prepare and present his or her case” (Capt. Joseph Charles Roy v D&D International (U) Ltd HCMA No. 1396 of 2017).*
- *“Arbitrators must observe the **requirements of natural justice** and treat each party equally. As a minimum, each party must be given a full opportunity to present its case. Tribunals are empowered to **balance fair hearing rights against the expedient conduct of the arbitration**. On the one hand, arbitrators must give each party a reasonable opportunity to **present its case and to deal with the case of its opponent**. On the other hand, arbitrators must provide a **fair means** of resolving the dispute between the parties and avoiding delays and unnecessary costs. The purpose of this provision therefore is **to protect the parties from egregious and injudicious conduct by an arbitral tribunal and is not intended to protect a party from its own failures and strategic choices**” (Lakeside Dairy LTD v ICAMEK & Anor HCMC No. 0021 of 2021).*
- If under its rules the arbitral tribunal treats both parties equally and in doing so avoids violations of their procedural rights throughout the process, the court will not interfere with the resultant award

# ☑ **Arbitration Agreement**

An agreement by the parties to submit to arbitration **ALL** or **CERTAIN** disputes which **HAVE ARISEN** or which **MAY ARISE** between them in respect of a defined legal relationship, whether contractual or not (S.2(1)(c)).

An agreement by which the parties **CONSENT** to resolve **ONE** or **MORE** disputes by arbitration (*Black's Law Dictionary 10th Edition*).

## **Nature of the Agreement (S.3 ACA)**

An arbitration agreement may be in the form of;

- A **CLAUSE** in a contract; or
- A **SEPARATE AGREEMENT**.

The agreement must be in **WRITING**.

An arbitration agreement is in writing if it is contained in -

- A **document signed by the parties**; or,
- An exchange of letters, a telex, a telegram or other means of telecommunication which provides **a record of the agreement**.

The **reference in a contract to a document containing an arbitration clause** shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract (**Arbitration Agreement incorporated by Reference**)

**NB:** An arbitration agreement can be entered into either before a dispute has arisen between the parties (**pre-dispute arbitration agreement**) or after a dispute has arisen between the parties (**post-dispute or submission agreement**)

# ✓ Separability

The arbitral tribunal may rule on its own jurisdiction, including **ruling on any objections with respect to the existence or validity of the arbitration agreement**, and for that purpose—

- 1. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and**
- 2. A decision by the arbitral tribunal that the contract is null and void shall not itself invalidate the arbitration clause. (S.16(1) ACA)**

- The doctrine treats the arbitration clause and the contract which incorporates it as two distinct contracts.
- *“The validity or otherwise of an arbitration agreement will not necessarily depend on whether the broader agreement remains in force. This concept is referred to as the “separability” of the arbitration clause. It would be entirely self-defeating for an arbitration clause to lose its force concurrently with the wider agreement as the point when a contract breaks down is when arbitration is most needed” (Lakeside Dairy LTD v ICAMEK & Anor HCCM No. 0021 of 2021).*

# ✔ Arbitral Tribunal

- Means a sole arbitrator or a panel of arbitrators, and includes an umpire (S.2(1)(e) ACA).
- **Umpire** means a third arbitrator appointed by two arbitrators appointed by the parties (S.2(1)(j) ACA).
- An arbitrator is a **neutral third party appointed by agreement** by disputing **parties**, or by a **court**, whatever the case may be, to **give a binding decision** on the dispute.



# Powers of the Arbitrator under the ACA

- Power to rule on own jurisdiction -*Kompetenz-Kompetenz* (S.16(1)).
- Power to grant interim measures of protection & security (S.17(1)).
- Power to determine procedure where parties don't agree on one (S.19(2)).
- Power to determine the admissibility, relevance, materiality & weight of any evidence (S.19(3)).
- Power to determine the place of arbitration where parties do not agree on one (S.20(2)).
- Power to determine the languages(s) of arbitration where parties do not agree on one (S.22(2)).
- Power to order parties to provide translation of documentary evidence into languages(s) agreed upon (S.24(2)).
- Power to administer oaths to the parties and witnesses appearing (S.24(3)).
- Power to correct errors in the arbitral award. (S.33(3)).

## ☑ **Law Applicable**

The law governing the arbitration agreement will often decide matters of formal and substantive validity, formation, termination, interpretation, assignment and waiver of the arbitration agreement.

- The arbitral tribunal must decide the dispute in accordance with the rules of law **chosen by the parties** as applicable to the substance of the dispute (S.28(1) ACA).
- If there is no choice of the law by the parties, the arbitral tribunal shall apply the rules of law it considers appropriate given all the circumstances of the dispute (S.28(3) ACA).
- In addition, the arbitral tribunal must decide on the substance of the dispute according to considerations of justice and fairness **without being bound by the rules of law**, EXCEPT if the parties have expressly authorised it to do so (S.28(4) ACA).
- Furthermore, in all cases, the arbitral tribunal must decide in accordance with **the terms of the particular contract** and must take into account **the usages of the trade applicable to the particular transaction** (S.28(5) ACA).

**“Choice-of-Law Rule”** - where the parties omit to choose the law applicable, the law of the country most proximate to the agreement will be applied.

# ✔ **Seat of Arbitration & Place of Arbitration**

- Means the juridical seat of the arbitration designated by the parties to the arbitration agreement, or by an arbitral or other institution or person vested by the parties with powers in that regard, or by the arbitral tribunal if so authorised by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances (**S.3 Arbitration Act, 1996 (England)**)
- The seat of arbitration is the home of the arbitration, and will generally **determine the procedural law governing the arbitration** (*lex arbitri*). The procedural law mostly provides a “*gap-filling*” mechanism, absent parties' agreement or specific provisions in the applicable arbitration rules.
- It also determines which court has **supervisory jurisdiction** over the arbitration.

**Place of Arbitration** - means the place where the hearings take place.

# ✔ Court Intervention

No court shall intervene in the conduct of arbitral proceedings, before or during the subsistence of the arbitration, except where provided for in the ACA (S.9 ACA).

## Instances where Court will intervene

- The appointment of an arbitrator where the parties so agreed (S.11(2) ACA);
- Grant an order of stay of a suit (S.5 ACA);
- Review of a preliminary ruling on the jurisdiction of arbitrators (S.16(6) ACA);
- Assistance in taking evidence for use in arbitration (S.27 ACA);
- Consider applications for interim measures of protection (S.6 ACA);
- Where the parties have agreed that an application by any party may be made to a court to determine any question of law arising in the course of the arbitration (S.38(1)(a) ACA).

# ✔ Confidentiality and Privacy

Arbitration is a highly confidential process and all parties concerned have a duty to keep the arbitration confidential from the outside world. This duty extends to;

- (a) the existence of the arbitration; and
- (b) the decision of the tribunal.

The persons who are entitled to know about the arbitration (and all its aspects) are;

- the parties;
- their counsel;
- the tribunal; and,
- the administering institution (if any).

“a) The obligation of confidentiality in arbitration is implied by law and arises out of the nature of arbitration; (b) This obligation is a substantive rule of law masquerading as an implied term; (c) It imposes an obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration; (d) The content of the obligation may depend on the context in which it arises and on the nature of the information or documents in question; the limits of the obligation are still in the process of development on a case-by-case basis.”\*

## **EXCEPTIONS**

where:

- (i) there is consent (express or implied) of the parties;
- (ii) there is an order or leave of the court;
- (iii) it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; and
- (iv) the public interest or the interests of justice require disclosure.

## Types of Arbitration Agreements

1. Arbitration Clause (S.3(1) ACA)
2. Submission Agreements/Arbitration Deeds (S.3(1) ACA)
3. Arbitration Agreement incorporated by Reference (S.3(4) ACA)

## Characteristics of an Effective Agreement

- **SCOPE** - sets out the types of disputes that can be referred to arbitration.
- **SEAT OF ARBITRATION** - determines the procedural law; determines the availability of interim remedies & rights relating to enforcement.
- **GOVERNING LAW**
- **CHOICE OF RULES**
- **LANGUAGE**
- **NUMBER AND APPOINTMENT OF ARBITRATORS**

# Pitfalls of Defective Arbitration Clauses

- Increased time to resolve a dispute.
- Increased costs.
- Complexity
- Risk of depriving arbitrator of jurisdiction.
- Risk of making a dispute inadmissible for arbitration.
- Enforcement challenges

# Tips for Drafting Effective Arbitration Agreements

- Don't overcomplicate it.
- Keep it short and simple.
- Leave it as broad as possible/Avoid curving out certain disputes.
- MULTI-TIERED CLAUSES - ensure a clear timetable and trigger points which can be progressed without the active participation of both parties

# Courts' Approach to Pathological Clauses

## Insignia Technology Co Ltd v Alstom Technology Ltd [2009]

### SGCA 24

“... where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars... so long as the arbitration can be carried out without prejudice to the rights of either party and so long as giving effect to such intention does not result in an arbitration that is not within the contemplation of either party”.



# ARBITRAL PROCEEDINGS

## ✔ Disputes, Differences & Claims

- The scope of the agreement must outline which disputes/differences/claims/controversies to refer to arbitration. It may be broad covering “any dispute” or narrow relating to specific aspects of an agreement. (S.2(1)(c) ACA - it can be ALL disputes or CERTAIN disputes”)
- Specifying exactly what is and is not covered by the arbitration agreement is essential and requires careful attention and precise wording.
- Only matters in issue can be referred to arbitration.

**DISPUTE:** arises when one party to a contract claims something from the other party under the terms of the contract & the other party denies or repudiates the claim.

**CLAIM:** the demand or assertion of a right which may arise out of a contract or tort.

**DIFFERENCE:** a contention over a question of truth of fact or law.

# ☑ **ARBITRABILITY/ARBITRABLE DISPUTE**

Arbitrable Dispute: a dispute that can properly be resolved by arbitration (Black's Law Dictionary 10th Ed)

*“Where there is a valid agreement to arbitrate, all matters that fall within the scope of that agreement are to be arbitrated. It is a well-known principle though that arbitration is not legally permissible if the subject matter of the dispute is not arbitrable or if the dispute in question is not covered by a valid arbitration agreement.”* Smile Communications Uganda Ltd v. ATC Uganda Ltd & Anor HCAC No. 0004/2022.

# Examples of Arbitrable Disputes

- Whether there has been a repudiation of a contract by one party.
- Whether the contract has been frustrated.
- Misrepresentation.
- Voidability of a contract.
- Whether a contract is binding on the parties.
- Breach of Contract.
- A claim in tort (Claim must have close proximity to the contract) e.g., negligence, defamation.
- Tortious disputes in construction.
- Variation of a contract.
- Enforceability of contract, etc.

# Non-Arbitrable Disputes

Non-arbitrable disputes either constitute;

- Those disputes whose resolution is reserved by the legislature to exclusive public fora; or,
- Matters which are excluded by necessary implication by virtue of their public nature.

*“A claim may be considered non-arbitrable if it falls outside the scope of the parties’ arbitration agreement, i.e. if the parties did not agree to submit it to arbitration. It is also non-arbitrable if no arbitration agreement as such was ever formed or, if formed, is nevertheless invalid under the applicable law.”*

## Examples of Non-Arbitrable Disputes

- Labour disputes (S.9 LADASA excludes applicability of the ACA)
- Criminal offences
- Child custody and Guardianship
- Insolvency & Winding-up
- Constitutional Law matters.

# ✔ COMMENCEMENT OF PROCEEDINGS

How arbitral proceedings commence depends on the wording of the arbitration agreement/what the parties have agreed. It can be by;

- A notice of a dispute to the Respondent;
- A request for a dispute to be referred for arbitration; or,
- A reference of the dispute to arbitration by either party.

Generally, arbitral proceedings commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent ([S.21 ACA](#)).

# Contents of a Request for Arbitration

1. The names, addresses, telephone numbers and e-mail addresses of the parties and their counsel;
2. A summary of the dispute;
3. A preliminary statement of the relief sought by the Claimant, including an estimate of the monetary value of the claims;
4. A copy or description of the arbitration agreement or clause under which the dispute is to be settled;
5. Where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
6. Comments on the number of arbitrators and the seat of arbitration; and
7. If applicable, the name, address, telephone number and e-mail address of the arbitrator appointed by the Claimant.

## ☑ **APPOINTING THE ARBITRAL TRIBUNAL**

Generally, parties are free to agree on a procedure for appointing the arbitrator(s) (**S.11(2) ACA**).

Where there is no agreement;

- In an arbitration of 3 arbitrators - each party shall appoint one arbitrator & the two shall appoint the third (**S.11(2)(a) ACA**).
- In an arbitration of one arbitrator - the parties shall agree on the person to be appointed (**S.11(2)(b) ACA**).

**Time frame:** Appointment must be done within **30 days** after receipt of the request for arbitration (**S.11(2)(b) ACA**).

# Where Parties fail to agree on the appointment of an arbitrator (Where they have not agreed on a procedure for appointing the arbitrator(s))

- In an arbitration of 3 arbitrators - where a party fails to appoint an arbitrator within **30 days** of receipt of notice or where the 2 arbitrators fail to agree on a 3rd arbitrator within **30 days** after appointment, the appointment shall be done, on the application of a party, by the Appointing Authority (**S.11(3)(a) ACA**).
- In an arbitration of one arbitrator - where the parties fail to agree on an arbitrator, the appointment shall be done, on the application of a party, by the Appointing Authority (**S.11(3)(b) ACA**).

**NB: The decision of the appointing authority is final and not subject to appeal (S.11(5) ACA)**



# Where Parties fail to agree on the appointment of an arbitrator (Where they have agreed on a procedure for appointing the arbitrator(s))

In circumstances where (S.11(4) ACA);

- A party fails to act as required under that procedure.
- The Parties or 2 arbitrators fail to reach an agreement.
- A 3rd party (including an institution) fails to perform any function entrusted to it under the procedure.

**Remedy:** Any party may apply to the Appointing Authority to take necessary measures for securing compliance with the agreed procedure (EXCEPT where the agreement provides otherwise)

**NB: The decision of the appointing authority is final and not subject to appeal (S.11(5) ACA)**

# What to Consider when Appointing an Arbitrator

Parties are free to appoint any arbitrator of their choice.

No person is precluded because of his/her nationality from acting as an arbitrator (UNLESS the parties agree otherwise) (S.11(1) ACA).

## **HOWEVER**

“If the arbitrator whom you choose makes a mistake in law, that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar, you take Caesar’s judgment.” *Scrutton, LJ in African and Eastern (Malaya) Ltd vs. White, Palmer & Co. Ltd (1930) 36 LIL Rep 113 at 114*

“Save for specified circumstances, parties take their arbitrator for better or worse both as to the decision of law or decision of fact.” *Great Lakes Energy Company NV vs. MSS XSABO Power Ltd & 4 Ors HCAC No. 0002 & 0005 of 2023*

## **CONSIDERATIONS**

- Expertise
- Experience in dispute resolution/arbitration
- Experience in the subject matter
- Impartiality/Absence or any conflict of interest.
- Availability

# SCOPE OF THE ARBITRATOR'S JURISDICTION

- Arbitrators generally have authority over **only those parties who have agreed to arbitrate** and **those disputes that fall within the terms** of the parties' written arbitration agreement.
- The Arbitrator also has the power to make orders for interim remedies including requesting any party to provide appropriate security in connection with such measures (S.17(1) ACA).

“The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. There is no inherent jurisdiction in an arbitral tribunal. An arbitral tribunal does not get its jurisdiction from any legislation. The scope of the tribunal's jurisdiction will be determined by the scope of the arbitration agreement, subject only to any mandatory legislative enactments governing the arbitration agreement. The arbitrator's jurisdiction is based on the will of the parties, whether expressed in a contract in general terms covering a future dispute or in a separate agreement covering an existing dispute. The authority to hear the parties and make an award exists only through the agreement of the parties. An arbitrator cannot claim to have power to decide if he or she has not been properly appointed (TMA Architects & Anor vs. Prome S Consultants LTD HCMC NO. 0080 OF 2021).

# DUTIES OF THE ARBITRATOR

- Duty to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence (**S.12(1) ACA**).
- Duty to be impartial.
- Duty to treat parties equally (**S. 18 ACA**).
- Duty to give each party a reasonable opportunity to present its case.
- Duty to act fairly.
- Duty to decide the dispute according to considerations of justice and fairness (**S.28(4) ACA**)
- Duty to keep the arbitration and every document confidential.
- Punctuality
- Duty to communicate with parties effectively throughout the arbitration, ETC.

# CHALLENGING THE ARBITRATOR'S APPOINTMENT

## Grounds (S.12(2) ACA)

- Where circumstances exist that give rise to justifiable doubts as to his or her impartiality and independence.
- Where he/she does not possess qualifications agreed to by the parties.

**NB:** A party is not precluded from challenging an arbitrator he/she has appointed **BUT** only for reasons of which he or she becomes aware after the appointment (S.12(3) ACA).

## PROCEDURE:

Parties are free to agree on a procedure for challenging an arbitrator (S.13(1) ACA).

Where they have no agreed procedure, a party must within **15 days** after becoming aware of any of the above grounds send a Written Statement of the reasons to the **Appointing Authority** (S.13(2) ACA).

The arbitrator being challenged may withdraw voluntarily or, if the opposite party agrees to the challenge, the parties may terminate the arbitrator's mandate.

Where neither of the foregoing happens, the Appointing Authority has **30 days** to make a decision on the challenge from the date of receipt of the written statement.

# PARTIES' TERMINATION OF ARBITRATOR'S MANDATE

## Circumstances (S.14(1) ACA)

- Where the arbitrator is unable to perform the functions of his or her office or for any reason fails to act without undue delay.
- Where he/she withdraws from his or her office.
- Where he/she dies.

## SUBSTITUTION OF ARBITRATOR (Applies to S.13 on prev. slide & S.14 ACA)

Where the mandate is terminated, a substitute arbitrator shall be appointed following the procedure that applied to the appointment of the arbitrator being replaced (S.15(1) ACA).

## EFFECT OF SUBSTITUTION (S.15(2) ACA)

- In an arbitration with a sole arbitrator - any hearing previously held shall be held afresh.
- In an arbitration with 3 arbitrators - where an arbitrator other than a presiding arbitrator is replaced, any hearings previously held may be held afresh at the discretion of the arbitral tribunal.

**NB:** UNLESS the parties agree otherwise, an order or ruling of the arbitral tribunal made before the replacement of an arbitrator shall not be invalidated solely because there has been a change in the composition of the arbitral tribunal (S.15(3) ACA).

# CHALLENGING THE ARBITRATOR'S JURISDICTION

The Arbitrator's jurisdiction is only restricted to matters arising from or in connection to the contract. The scope of the arbitration agreement determines the extent of his/her jurisdiction.

A party is not precluded from raising such a plea because he or she has appointed or participated in the appointment of an arbitrator (S. 16(2) ACA).

## *Nature of Challenges;*

- A plea that the arbitrator does not have jurisdiction.
- A plea that the arbitrator is exceeding the scope of his/her authority.
- A plea that the arbitration agreement is not valid.

## *What happens when their jurisdiction is challenged?*

**Kompetenz-Kompetenz** - where the arbitrator rules on his/her own authority to arbitrate in a matter. The arbitrator may rule on his/her own jurisdiction, including ruling on any objections concerning the existence or validity of the arbitration agreement (S.16(1) ACA).

**When to Challenge:** the plea must be raised not later than the submission of the statement of defence (S.16(2) ACA).

# DEALING WITH JURISDICTIONAL CHALLENGES

## When to Challenge

### A Challenge on the Jurisdiction

The plea must be raised not later than the submission of the statement of defence (S.16(2) ACA), BUT the arbitrator may admit a later plea if it considers the delay justified (S.16(4) ACA).

### A Challenge that the Arbitrator is exceeding the Scope of his/her authority

The plea must be raised as soon as the matter alleged to be beyond the scope of the arbitrator's authority is raised during the arbitral proceedings (S.16(3) ACA), BUT the arbitrator may admit a later plea if it considers the delay justified (S.16(4) ACA).

## The Arbitrator's Role

The Arbitrator must rule on a plea as a **preliminary question** and give an interim/preliminary award to that effect.



# DECISIONS FROM JURISDICTIONAL CHALLENGES

## Where the Arbitrator rules that he/she has jurisdiction

The aggrieved party may **APPLY** to the High Court within **30 days** after having received notice of that ruling, to decide the matter (**S.16(6) ACA**).

### **NB:**

- The decision of the High Court is FINAL and cannot be appealed (**S.16(7) ACA**).
- While the application in the High Court is pending, the arbitrator may continue the arbitral proceedings and make an arbitral award.

## Where the Arbitrator rules that he/she does not have jurisdiction

The arbitral proceedings shall be terminated (**S.32(2)(c) ACA**).

## ☑ **PRELIMINARY MEETING**

Upon receipt of an appointment letter, the arbitrator will either accept to arbitrate or reject the appointment. In any case, he or she ought to respond to the parties within a reasonable time and notify them of his or her decision.

If he/she accepts to arbitrate, he/she will then invite the parties for a Preliminary Meeting. It should be convened as soon as practicable after the arbitrator has been appointed while affording the parties adequate time to prepare.

The arbitrator must give the parties sufficient **advance notice** of the meeting (S.24(5) ACA).

### **Purpose of the Meeting**

- To agree on the procedural timelines.
- To agree on the addresses for the service of documents.
- To agree on the arbitration fees.
- To agree on the law applicable.
- To agree on the seat of arbitration.
- To agree on pleadings.
- To brief the arbitrator on the arbitrationn agreement.
- To brief the arbitrator about the dispute.
- To agree on the language of arbitration, etc.

# ✔ STATEMENTS

## STATEMENT OF CLAIM (S.23(1) ACA)

The Claimant shall within the time agreed at the pre-arbitration meeting file a Statement of Claim with the arbitrator(s) and serve the same to the Respondent.

### Contents

- The facts supporting the claim;
- The points at issue; and,
- The relief(s) sought.

## STATEMENT OF DEFENCE (S.23(1) ACA)

The Respondent shall within the time agreed at the pre-arbitration meeting file a Statement of Defence with the arbitrator(s) and serve the same to the Claimant.

### Contents

- The defence to the particulars of the claim;
- The relief(s) sought.

## REJOINDER/REPLY TO THE DEFENCE

The Claimant shall have a right to file a reply to the defence (S.23(2) ACA).

## ACCOMPANYING DOCUMENTS

The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit to provide for a reply to the defence as a cardinal rule of law for a person to be heard (S.23(3) ACA).

**NB: The Respondent is not precluded from raising a Counterclaim.**

# AMENDMENT OF STATEMENTS

A party may AMEND or SUPPLEMENT his/her claim/defence during the course of the arbitral proceedings UNLESS the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it .

# DEALING WITH DEFAULT IN FILING STATEMENTS

## Where the Claimant fails to file a Statement of Claim

The arbitrator shall terminate the proceedings (S.25(a) ACA).

## Where the Respondent fails to file a Statement of Defence

The arbitrator shall continue the proceedings without treating the failure by itself as an admission of the claimant's allegations (S.25(b) ACA).

### **NB:**

- The Arbitrator can excuse the default where the parties agree to it or where a party shows sufficient cause for the default (S.25(c) ACA).
- Before the arbitrator takes any of the foregoing measures, he or she should issue a warning that he or she intends to take the particular action, the failure of which may result in new delays and grounds for setting aside or refusing to enforce the award.

## ☑ **SCHEDULING MEETING**

When the last of the Statements has been filed, the Arbitrator should convene a Scheduling Meeting as soon as practicable while affording the parties adequate time to prepare.

The arbitrator must give the parties sufficient advance notice of the meeting (**S.24(5) ACA**).

### **Purpose of the Meeting**

- To agree on the issues for determination.
- To agree on the procedural timelines (if they have been altered).
- To agree on the number of witnesses for each side and whether to file witness statements or affidavits.

## ☑ HEARING

UNLESS the parties have agreed that no hearing shall be held, the arbitrator must hold an oral hearing at an appropriate stage of the proceedings (S.24(2) ACA).

The arbitrator must give the parties **sufficient advance notice** of the hearing (S.24(5) ACA).

The Arbitrator shall have the power to administer oaths to the parties and witnesses appearing (S.24(3) ACA).

## WHERE A PARTY FAILS TO APPEAR AT THE HEARING

The arbitrator may continue the proceedings and make the award on the evidence before it (S.25(c) ACA).

## ✔ **SUBMISSIONS**

UNLESS the parties have agreed otherwise, the arbitrator shall decide whether to have oral arguments or written submissions (**S.24(1) ACA**).

### **WHERE A PARTY FAILS TO FILE SUBMISSIONS**

The arbitrator may continue the proceedings and make the award on the evidence before it (**S.25(c) ACA**).



## ☑ **THE ARBITRAL AWARD**

- “Arbitral Award” means any award of an arbitral tribunal and includes an interim arbitral award (S.2(1)(d) ACA)
- It is a decision about the rights and obligations of the parties in the relationship, normally contractual, that gave rise to the dispute and the arbitration.
- It is a decision made by an arbitrator on a controversy submitted to him/her. As the award must be on the controversy submitted for arbitration, the decision must be one that decides on all the issues involved in the controversy.
- It includes the writing or document embodying the decision of the arbitral tribunal on the substance of the dispute.

# TYPES OF ARBITRAL AWARDS

## PROVISIONAL AWARDS

An award that is subject to the final determination of the arbitration. Normally used in industries where cash flow is an issue. A provisional award can only be made if the parties have agreed that the arbitrator has the power to order any provisional reliefs.

## INTERIM/PARTIAL/INTERLOCUTORY AWARDS

This is an award that does not end the arbitrator's mandate. It does not dispose of all issues in dispute but finally decides on those issues.

## CONSENT AWARD/AWARD ON AGREED TERMS

Parties can agree at any time to terminate the arbitral proceedings.

If, during arbitral proceedings, the parties settle the dispute, the arbitrator shall terminate the proceedings and, if requested by the parties, record the settlement in the form of an arbitral award on agreed terms (S.30(1) ACA).

An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute (S.30(1) ACA).

NB: A Consent Award must take the form of a final and must state that it is an arbitral award (S.30(1) ACA).

## DEFAULT/EX PARTE AWARDS

An award that is made following the non-appearance or non-participation by one or more parties (S.25(b), (c), (d) ACA).

**NB:** Before issuing such an award, arbitrators should make sure that the dispute is within the scope of the arbitration agreement and that they have jurisdiction.

Unlike summary judgment procedure in courts, the participating party still needs to prosecute and prove its case to the satisfaction of the arbitral tribunal.

## CORRECTIVE & INTERPRETATIVE AWARDS

- A party may within **14 days** after receipt of an arbitral award either request the arbitrator to correct in the award any computational errors, any clerical or typographical errors or any other errors of a similar nature; or a party may (if agreed by the parties, request the arbitrator to give an interpretation of a specific point or part of the arbitral award (S.33(1) ACA).
- If the arbitrator considers the request to be justified, he/she shall make the correction or give the interpretation within **14 days** after receipt of the request, and the interpretation shall form part of the arbitral award (S.33(2) ACA).
- The arbitrator may also correct any error above on his/her own initiative within **30 days** after the date of the award (S.33(2) ACA).
- Any corrective/Interpretative award must conform to S.31 ACA regarding the form & contents of an award (S.33(7) ACA).

## ADDITIONAL AWARDS

**S.33(4)&(5) ACA** empower the arbitrator, at the request of a party within **30 days** after receipt of the award, if it considers the request justified, to make an additional award within **30 days** to deal with claims omitted from the award.

An Additional award must conform to **S.31 ACA** regarding the form & contents of an award (**S.33(7) ACA**).

## FINAL AWARDS

- This is an award which brings the arbitration to an end by deciding and disposing of all or the outstanding issues in dispute between the parties. It is the final award that renders the tribunal 'functus officio' - *The arbitral proceedings shall be terminated by the final arbitral award (S.32(1) ACA)*.
- In certain situations, a final award can put an end to the proceedings without a ruling on the merits, e.g., where the arbitrator decides that he/she does not have jurisdiction or where the subject matter of the proceedings has ceased to exist.

# WRITING THE ARBITRAL AWARD

## RULES APPLICABLE TO THE SUBSTANCE OF THE DISPUTE (S.28 ACA)

The arbitrator must decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.

If there is no choice of law, the arbitrator shall apply the rules of law he/she considers to be appropriate given all the circumstances of the dispute.

In all cases, the arbitrator must decide following the **terms of the particular contract** and shall take into account the **usages of the trade applicable to the particular transaction**.

The arbitrator must decide on the substance of the dispute according to considerations of **justice** and **fairness** without being bound by the rules of law, EXCEPT if the parties have expressly authorised him/her to do so.

# FORM & CONTENTS OF THE ARBITRAL AWARD

- An arbitral award must be in **WRITING** (S.31(4) ACA).
- It must be **SIGNED** by the arbitrator/arbitrators (S.31(4) ACA). **NB:** In proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reason for any omitted signature is stated.
- The arbitral award must state the **REASONS** upon which it is based (S.31(6) ACA). **EXCEPTIONS** - where the parties have agreed that no reason should be given; or in Consent Award.
- The award must state the **DATE** of the award (S.31(7) ACA).
- The award must state the **PLACE** of arbitration (S.31(7) ACA).
- It must indicate the **TYPE OF AWARD** (Final, Interim, Provisional, etc)

# FORM & CONTENTS OF THE ARBITRAL AWARD

The award should also contain the following essential requirements:

- The **names and addresses** of the arbitrators, the parties and their legal representatives.
- The **terms of the arbitration agreement** between the parties.
- A summary of the **facts and procedure** including how the dispute arose.
- A **summary of the issues** and the **respective positions** of the parties.
- An analysis of the **arbitrators' findings** as to the facts and application of the law to these facts.
- The **operative part** containing the decisions.

# TIPS ON WRITING THE AWARD

- Use short sentences.
- Use numbered paragraphs.
- Include informative headings & subheadings.
- Include a table of contents for lengthy awards.
- Use plain & simple language.
- Consider the wider audience (Judges).
- Give sufficient information.
- Completeness - no issue should be left unresolved.
- Thoroughness

**NB:** The award must conform with the arbitration agreement



# OUTLINE/STRUCTURE OF THE ARBITRAL AWARD

1. The Arbitration (*The parties, Arbitral Tribunal, Seat of Arbitration, Language of Arbitration, Arbitration Agreement & the Arbitral procedure*).
2. Nature of the dispute (Claim, Defence, Rejoinder, Counterclaim(if any))
3. The agreed issues for determination.
4. The Parties' arguments/submissions.
5. Determination of each issue.
6. Operative part (summary of decisions)

# NATURE OF REMEDIES

The arbitrator may award any of the following remedies:

- Payment of money.
- Damages (general or special)
- Specific performance
- Injunctions
- Declaratory reliefs
- Indemnification
- Interest
- Dissolution of a partnership
- Costs (S.31(9) ACA)

# POST-AWARD

## ✔ **SETTING ASIDE AN AWARD**

- Recourse to court against an award may be made **ONLY** by an **APPLICATION** for setting aside the award (**S.34(1) ACA**). The application must be made within **One Month** from the date of receipt of the award (**S.34(3) ACA**).

### **GROUND(S) (S.34(2) ACA):**

The award can be set aside if the party making the application proves that—

1. He or she was under some **incapacity**;
2. The arbitration agreement is **not valid under the law** to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;
3. He or she was **not given proper notice of the appointment of an arbitrator** or **the arbitral proceedings** or was **unable to present his or her case**;
4. The arbitral award deals with **a dispute not contemplated by or not falling within the terms of the reference to arbitration** or **contains decisions on matters beyond the scope of the reference to arbitration**; EXCEPT that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;

## Grounds (Cont'd)

6. The **composition of the arbitral tribunal** or the **arbitral procedure** was **not in accordance with the agreement** of the parties UNLESS that agreement was in conflict with a provision of the Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with the Act;
  7. The arbitral award was procured by **corruption, fraud** or **undue** means or there was **evident partiality or corruption** in one or more of the arbitrators;
  8. The **arbitral award is not in accordance with the Act.**
- The award may also be set aside if the court finds that—
9. The **subject matter of the dispute is not capable of settlement** by arbitration under the law of Uganda; or
  10. The award is in conflict with the **public policy of Uganda.**

## **IMPORTANT TO NOTE:**

The existence of a violation of the Arbitration and Conciliation Act is not enough to set aside an award and NOT EVERY VIOLATION will lead to a refusal of enforcement or setting aside the award.

In addition to showing that a violation has taken place, a party seeking to set aside an award must also establish;

- That the violation occurred in connection with the making of the award (there is a causal nexus between the violation and the aspect of the award with which the party is aggrieved); and,
- That the violation caused actual or real prejudice to the party (though a violation need not show that the prejudice is substantial, the violation must have substance and not be de minimis)

## **READ:**

*Roko Construction Ltd vs. Kobusingye Janet High Court Miscellaneous Cause No. 0022 of 2021*

*Great Lakes Energy Company NV vs. MSS XSABO Power Ltd & 4 Ors HCAC No. 0002 & 0005 of 2023*

# ✓ APPEALS

## First Appeals (S.38(1) ACA)

For a party to have a right of Appeal (or right to apply to determine a point of law);

- The parties MUST have agreed in their arbitration agreement that such a right exists.
- The appeal/application must be on a question of law arising out of the award.

## Court may (S.38(2) ACA);

- Determine the question of law arising.
- Confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

**NB:** When an arbitral award has been varied on appeal, the award as varied shall have effect as if it were the award of the arbitral tribunal concerned.

## Second Appeals (S.38(3) ACA)

A right of Appeal exists where;

- The parties AGREED in their arbitration agreement that such a right exists; **AND**
- The High Court grants leave to appeal, or where the High Court fails to grant leave, the Court of Appeal grants special leave to appeal.

### **Court of Appeal may (S.38(3) ACA);**

- Determine the question of law arising.
- Confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

**NB:** When an arbitral award has been varied on appeal, the award as varied shall have effect as if it were the award of the arbitral tribunal concerned.



## ✔ Recognition & Enforcement

- An award shall be RECOGNIZED as binding and upon application to the High Court shall be ENFORCED (S.35(1) ACA).
- Where the time for making an application to set aside the arbitral award has expired, or that application having been made, it has been refused, the award shall be enforced in the same manner as if it were a decree of the High Court (S.36 ACA).

### PROCEDURE (S.35(2) ACA)

The party seeking to enforce shall furnish;

- The duly authenticated original arbitral award or a duly certified copy of it.
- The original arbitration agreement or a duly certified copy of it.

**NB:** If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language (S.35(3) ACA).

# QUESTIONS???

**Thank You**

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