The First Year of Tanzania's 2020 Arbitration Act

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With the coming into force of the 2020 Arbitration Act, Tanzania certainly has the potential to become a go-to place for international arbitration, at least in Eastern Africa. In addition to its favourable geographical location, now the country also has modern arbitration legislation largely based on the well-established and often tested English model.

Section 1 of this post describes the legislative history of the 2020 Arbitration Act, and Section 2 turns to a controversy about its coming into operation, which has been solved in the meantime. Then, Section 3 analyses the possible impact of the creation of the Tanzania Arbitration Centre, followed by Section 4, which discusses the somewhat confusing regulation of the situation where a party brings a substantive claim in an ordinary court despite an agreement to arbitrate. Finally, Section 5 concludes with a brief look into the future.

1. **The Legislative History**

A little more than a year ago, on 7 February 2020, the National Assembly of Tanzania passed a new Arbitration Act, and it then took a little less than a year for it to come into operation on 18 January 2021. The 2020 Arbitration Act now applies to Mainland Tanzania – and thus not to Zanzibar, the second entity of the United Republic of Tanzania. On 5 January 2021, four supplementary regulations were

approved: (i) the 2021 Arbitration (Rules of Procedure) Regulations, (ii) the 2021 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, (iii) the 2021 Code of Conduct for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, and (iv) the 2021 Arbitration Centre (Management and Operations) Regulations.

The structure and content of the 2020 Arbitration Act are largely based on the 1996 Arbitration Act currently applicable in England, Wales, and, for the most part, Northern Ireland. Commentators have therefore labelled the 2020 Arbitration Act "a copy-paste-search-replace of the English Arbitration Act" or at least stated that it "appears to be similar in many respects to the English Arbitration Act". Yet – as will be illustrated below by two examples – the two acts are by no means the same, the 2020 Arbitration Act also had other sources of inspiration, and it additionally contains genuine Tanzanian provisions. The 2020 Arbitration Act replaces the former Tanzanian Arbitration Act of 22 May 1931, which traces its origins back to the English Arbitration Act of 1889 and was amended several times, for the last time on 30 November 2019.

2. **In Operation or Not in Operation?**

After the legislative steps taken in February 2020, there was some confusion even within Tanzania as to whether the 2020 Arbitration Act would already apply or not, as evidenced by five decisions of the Commercial Division of the High Court of Tanzania at Dar es Salaam, handed down by the same judge:

- In *Petrolube Tanzania Limited v. Fuchs Oil Middle East Limited* (unpublished), the court had stated out of misapprehension (as the court would admit itself later on) that by being published, the 2020 Arbitration Act had come into operation.
- The court corrected this position in its decision of 12 June 2020 in *High Hope International Group Jiangsu Native Produce Import and Export Corp. Ltd v. Joc Textile (Tanzania) Co. Limited*, which handled the recognition and enforcement of a CIETAC arbitral award.
- The court confirmed the corrected position in *Nextgen Solawazi Limited v. Voltalia Portugal S.A.*, which was decided on 19 August 2020 and concerned the registration of an ICC arbitral award.

- In *North Mara Gold Mine Limited and Barrick Gold Corporation v. Josephat Edward Marwa*, which was decided on 6 October 2020, the court stayed its proceedings so that the dispute could be referred to the Arbitration Foundation of Southern Africa, without discussing whether the 2020 Arbitration Act would apply.
- Finally, in *Ramani Consultants Limited v. Swissport Tanzania plc*, the court, on 20 November 2020, set aside an arbitral award made by a sole arbitrator on 20 March 2020 and – just like in the *North Mara Gold Mine* case – did not discuss whether the 2020 Arbitration Act would apply.

In other decisions rendered after February 2020, other judges did not discuss the question of whether the old or the new arbitration acts would apply, but routinely referred to the 1931 Arbitration Act, as amended, in the following decisions:

- *Vodacom International Limited (Mauritius), Vodacom Group Limited (South Africa), and Vodacom Congo DRC S.P.R.L. (Dem. Rep. of Congo) v. Namemco Energy (P.T.Y.) Limited (Cyprus) and Mr. Moto Matiko Mabanga (South Africa)*, 29 July 2020 (registration of a final ICC award by consent);
- *Dominion Oil & Gas Ltd v. Heritage Tanzania Kisingire Ltd and Heritage Oil Limited*, 25 August 2020 (registration of an arbitral award); and
- *Medical Store Department v. Cool Care Services*, 15 September 2020 (setting aside of an arbitral award made by a sole arbitrator).

3. **The Tanzania Arbitration Centre**

One example of a genuine Tanzanian provision is Section 77 of the 2020 Arbitration Act, which sets forth that "[t]here shall be a centre to be known as the Tanzania Arbitration Centre", which will perform the tasks of an arbitration institution. The creation of the Tanzania Arbitration Centre could be a positive or a negative sign – which one it will be depends on how the institution will operate in practice. On the one hand, the fact that the Centre would have the legislator's support could show the potential users of arbitration that the institution is legitimate, since it is based on a law and not mere private "justice behind closed doors", to quote Lord Thomas of Cwmgiedd, the former Lord Chief Justice of England and Wales. On the other hand, any link between the state and the institution could lead to debates on the independence and impartiality of the institution, in particular in arbitral proceedings involving both Tanzanian and

foreign parties. In this context, it is noteworthy that "[t]he funds of the Centre shall consist of … allocation from government, where available" (Section 13(1)(c) of the 2021 Arbitration Centre (Management and Operations) Regulations).

The creation of the Tanzania Arbitration Centre raises yet another question: what will be the new institution's relationship to the Tanzania Institute of Arbitrators (TIArb), which has been operating officially in Tanzania since its launch in 1999? Only time will tell whether the Tanzania Arbitration Centre and the TIArb will coexist, cooperate, compete – or perhaps even converge. On the one hand, the 2020 Arbitration Act appears to assume that the Tanzania Arbitration Centre and the TIArb may coexist while, however, granting the Tanzania Arbitration Centre a certain superiority. This is evidenced by Section 26(2) of the 2020 Arbitration Act, which provides that "[w]here there is an arbitral tribunal or other institution or person vested by the parties with power to remove an arbitrator, the Centre shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person." On the other hand, the legal basis for the Tanzania Arbitration Centre to enter into cooperation agreements in Section 16 of the 2021 Arbitration Centre (Management and Operations) Regulations only extends to "arbitration Centres and associations in other countries or jurisdictions", which, by implication, might not include the TIArb. As a general observation, the 2020 Arbitration Act entrusts the Tanzania Arbitration Centre with tasks which the ordinary courts would exercise in other jurisdictions, notably the function of appointing authority (Section 19 et seq. of the 2020 Arbitration Act).

4. **Arbitration Agreement and Substantive Claim before Court**

One example of a regulation which took inspiration from various sources can be found in the provisions covering the situation of a substantive claim before an ordinary court despite an arbitration agreement.

Section 13 of the 2020 Arbitration Act, which – according to its title – is dedicated to the "Stay of legal proceedings" appears to have taken inspiration from Section 9 of the English 1996 Arbitration Act, which contains the following subsection (3):

> *"An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or*

after he has taken any step in those proceedings to answer the substantive claim."

The corresponding provision of Section 13(3) of the 2020 Arbitration Act reads as follows:

"A person shall not make an application under this section unless he has taken appropriate procedural step to acknowledge the legal proceedings against him or he has taken any step in those proceedings to answer the substantive claim."

Thus, while the English provision does not allow an application to stay legal proceedings after a party has taken any step to answer the substantive claim, the Tanzanian provision seemingly requires the contrary: It would appear that a party must first take any step to answer the substantive claim before being entitled to apply for a stay of the proceedings in court.

In addition to this difference, Section 13(3) of the 2020 Arbitration Act appears to be at odds with Section 12(1) of the 2020 Arbitration Act, which reads as follows:

"A court, before which an action is brought in a matter which is the subject of an arbitration agreement shall, where a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement of claim on the substance of the dispute, and notwithstanding any judgment, decree or order of the superior court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

This Section 12(1) appears to be inspired by Section 8 of the 1996 Indian Arbitration and Conciliation Act, which, in turn, appears to be an adaptation of Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, a provision based on Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Tanzanian arbitration scholar *Madeline Kimei* thus rightly noted the confusion created by including both Section 12 and 13 in the 2020 Arbitration Act. Ultimately, it will be for the Tanzanian courts to determine the interplay of these provisions.

5. **The Potential Future**

No one can predict with certainty what the future will hold in store for arbitration in Tanzania. As of today, there appears to be no published court decision interpreting the provisions of the 2020 Arbitration Act (with the exception of the decisions quoted above in the cases of *Petrolube Tanzania*, *High Hope International*, and *Nextgen Solawazi*). However, given that the 2020 Arbitration Act has now come into operation, we will be looking forward to the next developments.