EXAMINING THE ROLE OF NATIONAL COURTS IN THE ARBITRAL PROCESS IN THE OIL AND GAS INDUSTRY:

A CASE STUDY OF UGANDA

BY

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DECLARATION

With the knowledge of the rules and regulations of the institute on plagiarism, I hereby state that the content of this dissertation is my own work.

Signed ……

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Date ……..…

APPROVAL

This research dissertation has been submitted under my supervision and approval.

Signed ……

DR. ANTHONY C.K KAKOOZA

Date ……..……

DEDICATION

I dedicate my dissertation to my son Karsten Musiime and my entire family for the love, support and encouragement that has enable me to complete this academic path. I thank the Almighty God for the gift of life, wisdom and above all the financial breakthrough that enabled me to accomplish this master's program.

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LAWS

The Arbitration and Conciliation Act Cap 4

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CADER	Center for Arbitration and Dispute Resolution
FIDIC	Defederation international Des Ingénieurs-Conseils
ICC	International Chamber of Commerce
ICAMEK	International Center of Arbitration and Mediation in Kampala
ICSID	International Centre for Settlement of Investment Disputes
IOC	International Oil Company
LCIA	London Court of International Arbitration
PCA	Permanent Court of Arbitration
ULS	Uganda Law Society

ABSTRACT

Merchants and investors have used International Arbitration (IA) for centuries in settling disputes. International Arbitration has become a benchmark for resolving disputes in certain industries such as energy, construction, commodities, shipping and insurance. Over the last five decades or so, the international community has adopted International Arbitration as an alternative dispute resolution mechanism. As of October 1, 2009, 142 of the 192 United Nations Member States had adopted the New York Convention. Currently, about 144 countries have ratified the New York Convention. International arbitration is one of the Alternative Dispute Resolution (ADR) mechanisms in settling contractual disputes and it is considered as a fair and efficient way of mitigating risk associated with international business transactions and investments. In 2007, the International Centre for Settlement of Investment Disputes (ICSID) indicated that out of 123 cases listed as pending, forty-six (representing 37%) of such cases were energy related disputes. This paper examines the role of national courts in the process of arbitrating disputes in the oil and gas industry using primary sources such as interviews and secondary sources such as books, articles, journals to do comparative and qualitative analysis. It also discusses arbitration generally, the types and forms of arbitration in international oil and gas contracts, dispute resolution involving oil and gas assets in Africa and limitations faced by national courts in the performance of their role in the arbitral process of disputes in the oil and gas industry. The paper recommends that, to improve on the role of national courts in arbitration of disputes in the oil and gas industry, there should be a deliberate move to have more training of lawyers, judges and other stakeholders for them to have a greater appreciation of the fundamental principles of international arbitration

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CHAPTER ONE: INTRODUCTION

1.0 ARBITRATION

How disputes are settled differ from society to society, and mankind throughout history has needed and used one or two methods in resolving disputes as and when they arise. An example could be the biblical story where Solomon proposed to cut the baby into two. Long before, and even today many societies still refer disputes to village councils, unit committees and opinion leaders for resolution. Roman Colonies referred their disputes to the Praetor Peregrinus[1].

This suggests a common pattern i.e. Dispute settlement between people by an impartial third party after the parties failed to reach an agreement dated back as early as Solomon's days. Society was able to unify itself through these traditional and informal modes of dispute settlement until we were ushered into the modern third party aided dispute settlement. Arbitration is perhaps one of the earliest modes of settling contractual disputes by mankind. Arbitration is a legal and a private alternative use in settlement of contractual disputes. Arbitration is a binding and enforceable form of dispute resolution[2].

Arbitration can be differentiated from the court systems base on its private nature and from ADR through its enforcement and binding element that is associated with the final decision of the arbitral tribunal, though some scholars doubt the binding effect of IA. The term 'international' in the concept of arbitration is used to distinguish between the arbitration that is national (domestic) and the one that transcends national frontiers. To ensure efficiency and effectiveness in arbitral processes, any contracts with an arbitration clause should be properly and unambiguously documented. Once this is carefully done, it does not only ensure smooth dispute resolution procedure, but it also prevents disputes from occurring in the first instance. IA can be conducted either under the auspices of an arbitral institution (ICC Rules) or on an ad hoc basis (UNCITRLA Rules)[3].

[1] Journal by Hunter, M, International Commercial Dispute Resolution: The Challenge of the Twenty-First Century, (Arbitration International: Vol. 16, No. 4, LCIA 2000)
[2] ibid
[3] Buhring-Uhle, C, (1996), Arbitration and mediation in international business: designing procedure for effective conflict management, Hague, Netherlands, Kluwer Academic Publishers, 1996.

Ad hoc /Un-administered Arbitration

These arbitrations are conducted by parties without the assistance or supervision of an arbitral institution. The parties are required to determine all aspects of the arbitration like the number of arbitrators, manner of their appointment, and procedure for conducting the arbitration, among others. Options available to parties wishing to proceed ad hoc that are not in need of rules drawn Specially for them, or of formal administration and oversight, include; (i) adaption of the rules of an arbitral institution, (ii) incorporating statutory procedures such as the Uganda Arbitration and Conciliation Act (iii) adopting rules crafted specifically for ad hoc arbitral proceedings such as the UNCITRAL Rules (U.N. Commission on International Trade Law) which may be used in both domestic and international disputes,8 or select another set of procedural rules. The UNCITRAL rules are not, for instance, as comprehensive as the arbitration rules of the ICC[4].

Institutional Arbitration

An institutional arbitration is one in which a specialized institution with a permanent character intervenes and assumes the functions of aiding and administering the arbitral process, as provided by the rules of that institution. It is pertinent to note that these institutions do not arbitrate the dispute, it is the arbitrators who arbitrate, and so the term arbitration institution is inappropriate and only the rules of the institution apply. Some of these institutions include; the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the American Arbitration Association (AAA). Each of these arbitral institutions, have enacted sets of procedural rules that apply where parties have agreed to arbitration pursuant to such rules[5].

The institutional rules set out the basic procedural framework for the arbitration process. Generally, the rules also authorize the arbitral institution to act as an "appointing authority" in the event the parties cannot agree; set a timetable for the proceedings; help resolve challenges to arbitrators; designates the place of arbitration; help set or influence the fees that can be charged by arbitrators; and in some situations review the arbitral award to reduce the risk of

[4] Collier, J et al (1999), The settlement of disputes in international law: institutions and procedures, New York, USA, Oxford University Press, 1999
[5] ibid

unenforceability. These institutions do not arbitrate the dispute, but merely facilitate and provide support and guidance to the arbitrators selected by the parties[6].

The nature of Oil and Gas Disputes

Though differences between the State and IOCs grab the most attention, disputes in the oil and gas industry take various forms and can involve other parties as noted below[7].

State versus IOCs disputes

These represent disagreements between the government and IOCs in relation to agreements for petroleum exploration, development and production ("PSAs"). They are also referred to as state investment disputes. Disputes between IOCs and host governments can arise from several issues but more often if there are regulatory revisions that threaten to dilute the value of the project as earlier evaluated, for example resulting from changes to the tax and fiscal regime. Another area of potential dispute relates to acquisitions and disposals of interests in projects (either via direct asset sales or disposals of subsidiaries). The avenues provided to resolve such disputes are usually complemented by other techniques such as stabilization clauses that embolden substantive rights relating to the allocation of resource wealth between the state and IOCs[8].

State versus State disputes

State to state disputes are rarer but may arise with respect to petroleum fields overlapping international borders both onshore and offshore. Offshore maritime disputes arise largely in respect of who can exercise sovereign rights in the Exclusive Economic Zone. Disputes between states can also emanate with respect to the transit fees charges on throughput in cross border oil and gas pipelines[9].

IOC versus Company disputes

These represent disagreements between the IOCs or with their subcontractors and are also referred to as international commercial disputes. IOCs enter various agreements during the commercialization of oil and gas discoveries that include though are not limited to joint operations, cost allocation, production and allocation, crude oil off-take and purchase, crude

[6] ibid
[7] Cristal Advocate(2019): Dispute resolution in the Oil and Gas Industry; The case of Uganda at pg 2
[8] ibid
[9] ibid

oil transportation and lifting among others. The implementation of these agreements can trigger disputes between the IOCs. Service agreements between the IOCs and their subcontractors can also elicit disputes[10].

Individuals versus IOCs

The negative legacy issues of early oil and gas operations brought to the forefront of the industry agenda concerns of sustainable development and intergeneration equity. For example, under the provisions of the United States Alien Tort Statute, individuals outside of the US can institute judicial cases and claims against large corporations that engage in business activities that violate their human rights[11].

INTERNATIONAL COMMERCIAL ARBITRATION IN UGANDA

The Arbitration and Conciliation Act (Cap. 4) regulates the operation of arbitration and conciliation procedures, as well as the behavior of the arbitrator or conciliator in the conduct of such procedure. This Act is of significance because it incorporates the provisions in the 1985 United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration as well as the UNICITRAL Arbitration Rules 1976 and the UNCITRAL Conciliation Rules 1976. However, it should be noted that the Act does not provide for the immunity of an arbitrator which is covered under the UNCITRAL Model law[12].

The stated purpose of the Act is to empower the parties and to increase their autonomy. It has always been the case that if an arbitration agreement existed, the courts would not hear the case until the arbitration procedure had taken place. Disputing parties are thus obliged to submit to the provisions under the Act on the basis of an existence of an agreement to arbitrate in the event that a dispute arises. Section 2(1) (c) provides for the meaning of "Arbitration Agreement". It states – "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"[13].

The Act also provides for the Centre for Arbitration and Dispute Resolution (CADER) as a Statutory Institutional alternative dispute resolution provider. Until the coming into place of

[10] ibid
[11] ibid
[12] S. Sempasa: Centre for Arbitration and Dispute Resolution & the new legislative formulation on A.D.R; Uganda Living Law Journal, Vol. 1, No. 1, June 2003 p. 81 at p. 86
[13] ibid

the Arbitration and Conciliation Act, the use of arbitration, which has been in place since the 1930s, was rather limited with an absence of an appropriate control system as well as a general oversight over arbitrators especially with respect to the fees charged[14].

Energy investments are capital intensive ventures. Foreign investors often require assurances that their investments are safe and arbitration is always a preferred way of settling disputes. Uganda has previously been described by the World Bank as the hottest inland exploration frontier in the world and the country to watch in the oil and gas space, due to the commercial discovery of an estimated 6.5 billion barrels of oil, 1.4 billion of which are recoverable.

Against this backdrop, the major players in the Oil and Gas market are Total E & P Uganda, Tullow Uganda Operations Pty Limited and China National Offshore Oil Corporation (CNOOC) who are all holders of production licenses issued in respect of six (6) exploration blocks (the Blocks) in Albertine Graben (located in the western arm of the Great East African Rift, which they operate under the terms of a joint venture in accordance with a Joint Operating Agreement. While Uganda waits with bated breath for its first drop of oil in 2020, it is under scrutiny over how it will handle a natural resource that is both considered a blessing and a curse[15].

The question whether Uganda will use its" black gold" to propel her economy to a much desired middle income status by 2020 depends largely on Government of Uganda's commitment to among other things prioritize national participation, promote environmental sustainability especially in ecologically sensitive exploration areas and the strategies in place to avert the oil curses that has struck other oil rich nations[16].

It is important to note that today; the vast majority of international commercial oil and gas disputes are resolved through arbitration. Overall, the domestic and international oil and gas industry has become one of the leading players in the promotion of arbitration and the development of arbitration materials[17].

Arbitrations have previously been commenced in the London Court of International Arbitration by Heritage Oil and Gas Limited and Tullow Oil. The Heritage claim emanated from a decision by the Uganda Revenue Authority to charge a 30% Capital Gains Tax on the

[14] ibid
[15] ACODE(2019): Understanding the tax dispute; Heritage, Tullow and the Government of Uganda at pg 1
[16] ibid
[17] ibid

sale of Heritage's Production Sharing Agreement's interests in Uganda to Tullow, a transaction which was valued at United States Dollar 1.45 Billion. The dispute was also filed with the Kampala based Tax Appeals Tribunal. Both the London Court of International Arbitration and the Tax Appeals Tribunal ruled that the transaction was taxable under Ugandan law[18].

In 2013, Tullow also lodged a claim at the London Court of International Arbitration in London. In this matter, which in 2011 had been filed at the Tax Appeals Tribunal, Tullow disputed URA's assessment of Capital Gains Tax amounting to USD 467 Million on the farm down of its interests in Exploration Areas (EA) EA1, EA2 and EA3 to CNOOC and Total at USD 2.9 Billion. The Tax Appeals Tribunal dismissed Tullow's appeal holding that the tax was payable while the London Court of International Arbitration was eventually resolved by the parties when Tullow agreed to pay USD250m in full and final settlement[19].

This chapter therefore presents an introduction to the study, the background of the study, the statement of the problem, objectives of the study, research questions, the hypothesis, the scope, significance and justification of the study and the methodology used to collect data.

1.0 Background of the Study

While most economies encourage Foreign Investors, it is important to know that these companies (foreign investors) are privately owned entities and aim at profit maximization. Therefore, whenever investing, they seek to ensure that returns on their investment are secured. These investment guarantees are however sometimes too difficult to obtain due to the complex nature of the energy industry. Besides, rules of doing business and resolving disputes differ across the world. When for example, there is a coincidence of motives in a contract say when crude oil price changes dramatically, parties that are engaged in a long-term contract might have a reason to renegotiate for a better deal and when this renegotiation fails, contractual disputes arise. Therefore, there is the need to find a neutral ground to settling such contractual differences. However, different investment contracts provide different dispute resolution mechanisms. Disputes are unavoidable but unfortunate parts of business and investment life. Disputes as spelt out in Article 33 of the United Nations Charter can be resolved through mediation, conciliation, arbitration, inquiry, use of good offices, and judicial systems. Though some disputes are resolved amicably, others cannot be resolved without the support of an

[18] Cristal Advocate(2019): Dispute resolution in the Oil and Gas Industry; The case of Uganda at pg 4
[19] ibid

impartial third party. When a contract is negotiated, due diligence should therefore be given to the most appropriate mechanisms of resolving any future disputes.

Arbitration has been an efficient mechanism for settling disputes for centuries. The use of arbitration as a means for dispute resolution can be traced as far back as ancient Greece, Egypt and Rome. Ironically, the reasons that gave rise or in other words necessitated the existence of arbitration as a means of dispute resolution, which among others include the backlog and congestion of cases, unnecessary delays as well as the high cost of court litigation are still as evident today as they were back then.

National courts are important in the arbitral process in realizing the objectives of engaging an arbitration and dispute resolution[20]. For instance, the courts are needed to enforce the arbitration agreement when one of the parties is unwilling to commit to arbitration or when the validity of the arbitration agreement is in question." Parties may also need to obtain and enforce preserving orders before or after embarking on the process of arbitration. Additionally, the court's intervention may be called upon to help in the constitution and operationalization of the arbitral tribunal, for instance, in tackling procedural challenges and assisting in taking evidence. The courts also have a role in recognizing and enforcing arbitral awards and handling appeals on issues raised by parties against the award[21].

1.1 Statement of the Problem

The intervention of the national courts in arbitration in the oil and gas disputes, whether domestic or international, is almost inevitable. However, in the Ugandan case, the role of the court has in most cases served only to inhibit the effectiveness of arbitration in resolution of disputes in Uganda. In particular, the intrusive role of courts in arbitration results in delay of the arbitration process, increased costs of dispute resolution in both the courts and the arbitral tribunal, increased loss of judicial times, exposure to adverse publicity of business, and uncertainty in the enforcement of legal obligations. Furthermore, despite the fact that Arbitration is recognized as being a more expedient method of dispute resolution, the mechanism in place at the Ugandan High Court does not reflect such an understanding for arbitral matters. For starters, arbitral matters are usually not heard on a priority basis and follow

[20]KariukiMuigua, "The Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya" Available at: http://www.kmco.co.ke/attachments/080_role_of_court_in_arbitration_20l0.pdf (accessed on 24/03/2018).
[21] D.J Sutton, J. Kendall & J. Gill, Russell on Arbitration, (London: Sweet & Maxwell, 21st Edition, 1997)pg 50.

the usual channels of dispute resolution as other commercial matters[22].It is therefore important that arbitral matters be given a certain level of priority. This is because arbitration avoids hostility as the parties in arbitration are usually encouraged to participate fully and sometimes even help structure the resolution. They are often more likely to work together peaceably rather than escalate their anger against one another as is often the case with litigation.

It is also important to note that much as arbitration is increasingly becoming costly as more entrenched and experienced lawyers take up the cause, resolving a dispute through arbitration is usually far less costly than proceeding through litigation because the process is quicker and generally less complicated than a court proceeding.

There is a need therefore to find out ways to enhance the role of the national court in arbitral processes in the oil and gas industry.

1.2 Objectives of the Study

1.2.1 General Objective

The general objective of the study is to investigate the role of national courts in arbitral process in the oil and gas industry, the limitations encountered and the proposed reforms to improve the arbitral process.

1.2.2 Specific objective

i. To investigate and analyze the role of national courts in arbitral process in the oil and gas industry.
ii. To examine the limitations faced by national courts in the arbitral process in the oil and gas industry.
iii. To propose reforms in the light of the best practices towards a more effective role of the national courts in the arbitral process in the oil and gas industry.

1.3 Research questions

The research will attempt to answer the following questions;

i. What are the roles of national courts in arbitral process in the oil and gas industry?

[22]Asouzu, A.A., 'Some Fundamental Concerns and Issues about International Arbitration in Africa,' African Development Bank Law Development Review, Vol. 1, p. 81, 2006, p.84.

ii. What are the limitations faced by the national courts in the arbitral process in the oil and gas industry?
iii. What reforms are necessary in order to realize more effective role of the national courts in arbitral processes in the oil and gas industry?

Conceptual framework

The main reason for the conflicts of law or the use of different theories is the autonomy of the contracting parties and the mechanisms they agree to use to control the international contract especially in relation to development contracts such as oil and gas contracts. These contracts are designed and controlled by new methods and traditions illustrating the reasons why it has been used in this way, away from the local jurisdiction and national courts.

The Environment

It has been observed that changes in the environment have an impact on an international arbitration body. Arbitration bodies are environment-dependent and changes in the environment shape the opportunities and challenges facing an international arbitration. There is therefore a linkage between the national courts and the Arbitration proceedings right from the pre arbitral proceedings, during the arbitral proceedings to the post arbitral award.

The macro and micro-environment for the National courts refers to all those conditions and forces that affect their strategic options and determine their competitive situation. At the same time, the national courts' success depends upon a relationship between business strategy and environment.

Macro Environmental Variables

Macro-Environmental or remote variables may be described as the economic, political/legal and physical variables. The factors affect the provision of arbitration services and the arbitration body and in this case we are looking at national courts. Thus identifying and evaluating external environmental opportunities and threats enable national courts to develop a clear mission, design strategies, and achieve long term objectives and to develop policies to achieve annual objectives in terms of their role in arbitral proceedings. Because the pace and uncertainty of such change may vary, what matters is the ability of the national courts to cope with the environmental constraints,

challenges and threats.

Political / Legal Variables

Political factors define the legal, administrative and regulatory framework within which an arbitration body operates and in this case we look at national courts. Political/legal variables are state oriented and at both national and international level can affect an arbitration body's activities on a day to day basis through its laws, policies and authority. An enabling legal and administrative environment is instrumental in helping national courts perform their roles efficiently. Despite significant achievements in reforming the legal and regulatory framework, there are factors that are hostile to the growth of the arbitration sector.

Micro Environmental Variables

The key micro environmental variables are client and qualified lawyers and judicial officers. Thus designing viable strategies for national courts to play an important role in international arbitration requires a thorough understanding of these variables.

A conceptual framework of the study has been developed from the reviewed literature and the relevant research objectives.

The hypothesis of this study is that: "The role of national courts in Uganda as provided for under Arbitration and Conciliation Act Cap 4 of 2000 hinders effective arbitral process in the oil and gas industry in Uganda".

1.5 Scope of the Study

The review of reports and documents will focus on a time range of nine years (2010 to 2019).The justification for this time period is that while Trade and investment lead a path to economic development and prosperity, there is also an inevitable path to disputes. There are pitfalls associated with the court system in most countries, including adjournments and delays. There is also an increasing sophistication of parties who seek neutrality and party autonomy in disputes.

It is therefore during this time period that International arbitration gained momentum as the preferred mode of dispute resolution in the East African Region States, Uganda inclusive. In international commercial arbitration, an increasing number of international contractual disputes are resolved in arbitration under the auspices of the International Chamber

of Commerce (ICC), the London Court of International Arbitration (LCIA) and Ad hoc arbitration under the UNCITRAL Rules. In investment arbitration, all the East African Community (EAC) countries are members of the International Centre for the Settlement of Investment Disputes (ICSID) and Kenya, Rwanda and Uganda are members to the Permanent Court of Arbitration (PCA). East Africa is already seeing an impact in investment arbitration, with Burundi having had 4 cases lodged against it at ICSID, Kenya with 3, Rwanda with 1, Tanzania with 5 and Uganda with 3[23].

The research will therefore cover the role of national courts in arbitral process in the oil and gas industry, the limitations encountered and the proposed reforms to improve the arbitral process in Uganda. The research will consider institutions where the phenomenon is prevalent like the High Court Commercial Court Division.

1.6 Significance of the Study

The increasing number of oil and gas disputes in Uganda has necessitated the use of arbitral process with the help of the national courts like the High Court, Commercial Division. Despite the various laws, regulations and policies like the Arbitration and Conciliation Act 2000; there is still a huge gap on the role of these national courts in the effectiveness of the arbitral process in the oil and gas industry. The present study hopes to contribute meaningful information on the reforms that can be adopted in light of the best practices towards a more effective role of the national courts in the arbitral process in the oil and gas industry in Uganda. The study is intended to inform policymakers and Arbitration practitioners on how effective the national courts can engage in the arbitral process in the oil and gas industry so as to reduce the increasing disputes in the sector.

1.7 Justification of the study

First and foremost, the researcher feels a need to avail information on the roles of national courts in arbitral process in the oil and gas industry in Uganda. Despite the various laws put in place to enhance the role of national courts in the arbitral process in the oil and gas industry like the Arbitration and Conciliation Act 2000, there are still limitations faced by the national courts in the arbitral process in the oil and gas industry. Under such circumstances, it remains very difficult for the national courts to effectively engage in the arbitral process which creates a huge backlog of oil and gas cases. This cannot be achieved if a critical analysis is not done

[23] A. Gitau(2016): The place of arbitration in East Africa's international investment disputes,(GBS Africa) pg 2

on how effective the law and practice can be improved to enhance the role of these national courts in the arbitral process in the oil and gas industry. Therefore, once the research is finalized, it will help in giving a clear insight on the reforms that can be adopted in the light of the best practices towards a more effective role of the national courts in the arbitral process in the oil and gas industry in Uganda.

1.8.1 Introduction

In this subsection, the researcher describes the methodology to be applied in conducting this study. The scientific study research methodology brings about the paradigms used. It entails the paradigms and design of the research, population to be sampled and studied, sampling methods used as well as the data collection methods and instruments used[24].

1.8.2 Research Methodology

In this study, the researcher used the qualitative method. Quantitative methodology was not used as we did not need to enumerate the problem through creating numerical data or data which can be converted into useable statistics. The rationale for using the qualitative research methodology is that it explores information in the form of quality, such as explanations, descriptions and narratives. The qualitative research method gave participants an opportunity to give their thoughts, interpretations and understanding by describing and explaining the situation in their environment. It concentrated much on the context of what was studied to provide an understanding of the political, social, psychological, economical and legal condition of the environment under study.

1.8.3 Research Design

A research design is an action plan for the research conducted. It covers the population or sample studied, design type – whether exploratory or co relational or experimental or descriptive, data collection duration and reliability and validity of threats. This study was a qualitative cross sectional study that used descriptive and exploratory design.

1.8.4 Population and Sample Size

The population is a group of elements sharing the same sentiment. The population of this study was 15 individuals from different public and private institutions including; Geofrey

[24] . Best, John, W.& Kahn, James. (1986).Research in Education, 5th Ed.,Pg 275 Prentice–Hall of India Pvt Ltd: New Delhi.

Kiryabwire, Christopher Madrama, David K Wangutusi, Elizabeth J Alvidza(Justices and Judges of the Court of Appeal and High Court Uganda, Commercial Division)and officials from CADER, ICAMEK, UNOC,URA Uganda Law Reform Commission, Solicitor General's Chambers and Uganda Investment Authority . The choice of the above mentioned officers was informed by their immense experience in resolution of commercial disputes of both a national and international nature including the use of Arbitration as an alternative dispute resolution mechanism.

While the researcher had the desire to interview the whole population size, due to some challenges beyond his control, he was able to interview a sample of only 6 out of a population of 15 as discussed below.

Mr. Peter Muliisa the Manager Legal and Corporate affairs at the Uganda National Oil Company (UNOC) was the other person interviewed. This was because the researcher wanted to understand how arbitration has been instrumental in resolution of disputes in the oil and gas industry more so in Uganda which is an emerging oil economy. Before joining UNOC, Peter was the Manager of the URA litigation department and was also part of the Government team that participated in the resolution of the tax dispute between URA and Heritage Oil a dispute that was resolved through arbitration in addition to being part of other arbitral proceedings between the Government of Uganda and other international oil companies.

The researcher interviewed Mr. Martin Mwambutsya the Commissioner Civil Litigation in the Chambers of the Attorney General. The decision to choose him as a respondent was based on the fact that he was part of the government legal team that participated in the resolution of the oil tax dispute between Uganda Revenue Authority and Heritage oil Limited in London. Important to note is that this dispute was resolved at arbitration. His experience from this dispute was fundamental to this study as he helped the researcher appreciate the advantages of arbitration in the oil and gas sector, some of the challenges faced mainly by the host country and also made some recommendations towards solving some of those challenges[25].

The researcher interviewed m/s Annet Koote the former head of department Law Reform at Uganda Law Reform Commission. The Uganda Law Reform Commission is mandated to advise government on areas of the law that require reform in addition to developing areas of

[25] /www.monitor.co.ug/SpecialReports/Solicitor-General-defends-his-Shs200m-bounty/688342-3819698-format-xhtml-3umkbs/index.html

the law. It was therefore important to interview her in a bid to have her opinion on areas of the law on arbitration in terms of the current weaknesses and areas that require reform. It was also important to interview them regarding the impact of international commercial arbitration on Uganda's emerging oil and gas sector.

Counsel John Fisher Kanyemeibwa a partner at Kateera, Kagumiire and Co Advocates was interviewed. John Fisher is a senior advocate specializing in commercial law. He has participated as a legal representative in a number of arbitral proceedings and as an arbitrator in a number of local commercial disputes. He was instrumental in giving an insight of the role of national courts during arbitral proceedings from a practitioner's perspective. As a member of ICAMEK, he helped the researcher appreciate the role that ICAMEK will play in delivering world class ADR to businesses.

The researcher also interviewed Senior Advocate and Former President ULS Francis Gimara. He is a founding member and Director member of the International Center for Arbitration and Mediation in Kampala (ICAMEK). This is a private sector led institution focused on delivering the benefits of world class alternative dispute resolution to business, professionals, governments and communities alike. This center was championed by the Uganda Law Society under his leadership and the Uganda Bankers' Association that identified the need to compliment the current judicial system with a fair, expeditious, efficient and flexible alternative dispute resolution mechanism to settle both domestic and international commercial disputes. Therefore, benefitting from his opinions regarding the topic under investigation was a great addition to the research[26].

Justice David Wangutusi a Judge of the High Court was also interviewed. Before being transferred to the International Crimes Division, he had been the head of the Commercial Division of the High Court handling commercial disputes. He was very instrumental in helping the researcher have an insight into the facilitative role that national courts play during arbitral proceedings given the fact that he has adjudicated a number matters under arbitration.

1.8.5 Sampling Procedures

The sampling procedure was the foundation of the study on which the population characteristic was analyzed. The researcher applied the non-probability sampling method known as the purposive sampling method for qualitative data collection. Purposive sampling assists to

[26] https://www.icamek.org/

identify and involve key participants out of the entire population who have better knowledge, understanding and information about the matter being studied**.** In this study the researcher identified 17 respondents as the key participants to take part in the interview and observation data collection process.

1.8.6 Data Collection Methods

The data collection method is all about the procedures, techniques and tools used when collecting data from the sampled participants. The qualitative approach is in reference to a deep study of individuals and small groups of the population.

The qualitative research methodology was used as it assisted the researcher to collect data related to quality, such as the explanatory, descriptive and narrative information.

1.8.7 An Interview

An interview is a method of data collection, which is explained as a dialogue between two or more people[27]. It is also a special case of social interaction. It involves direct contact with a participant who is asked to answer questions relating to the research problem. Key semi-structured questions in interviews were asked in the same way for all participants followed by some limited follow-up questions for further information or clarity depending on the response[28]. This methodology was helpful in obtaining detailed information and for purposes of clarity where necessary.

1.8.8 Validity and Reliability

In order to reduce the possibility of getting incorrect answers, attention was paid to the validity and reliability of the results. Validity is concerned with whether the findings are really about what they appear to be about. Validity is defined as the extent to which data collection method or methods accurately measure what they were intended to measure whereas reliability refers to the degree to which data collection method or methods will yield consistent findings, similar observations would be made or conclusions reached by other researchers or there is transparency in how sense was made from the raw data[29]. This is because, when aligned with the study objectives, the information from the various categories of the respondents provided

[27]Gubrium, J.F & Holstein, J.A. (2001). Handbook of interview research: context and method. Thousand Oaks, California: Sage,(vol 8, pg 7 of 13)
[28] ibid
[29] . Ackoff, Russell L. (1961). The Design of Social Research, University of Chicago Press: Chicago.

a clear picture of the situation on the ground and thus the findings being congruent with the study objectives.

1.8.9 Data Analysis

It was used to arrange the information in the study in a logical manner by means of categorizing data; examining data bits according to their relevancy in the study; synthesizing the results and eventually generalizing the findings. The knowledge of data analysis helped the researcher to better interpret, conclude and make recommendations regarding the study.

The qualitative method was used to identify ideas or arguments about the problem under investigation. Qualitative data analysis involves the construction of analytical narratives, explanations and descriptions. Analyzing data in a tabular form made it easier for the researcher to interpret the data. The researcher was thereafter able to give meaning to the tables and the graphs used for data analysis[30].

1.8.10 Ethical Consideration

The researcher ensured that the names of respondents appeared on the report. However, for respondents who were not comfortable with their names appearing on the report; the researcher ensured confidentiality of the respondents, as it is part of the ethical procedure to ensure they are protected. It is part of the ethical principles of research that respondents are protected so that they feel secure and have no fear from other actors within the study. It was important for the researcher to maintain the safety of the respondents[31].

1.8.11 Methodological Constraints Faced

Sample size: the number of the units of analysis the researcher used in the study were dictated by the type of research problem. Since the sample size is too small, it was difficult to find significant relationships from the data, as statistical tests normally require a larger sample size to ensure a representative distribution of the population and to be considered representative of groups of people to whom results were generalized or transferred. The respondents were found to have great experience in the area of study and thus provided the relevant information.

Inadequate prior research studies on the topic: Citing prior research studies forms the basis of any literature review and helps lay a foundation for understanding the research problem the

[30] Allen, T. Harrell, (1978). New Methods in Social Research, Praeger Publication: New York, pg 61.
[31]Barzun, Jacques & Graff. F. (1990).The Modern Researcher, Harcourt, Brace Publication: New York,Pg 45.

researcher is investigating[32]. Because there is little research that has been done on the topic, little information is available for use. As a mitigating factor, the information received from professional respondents formed the basis for further research.

Measures used to collect the data: sometimes it is the case that, after completing your interpretation of the findings, you discover that the way in which you gathered data inhibited your ability to conduct a thorough analysis of the results[33]. This was mitigated by testing all the questions to ensure that they cover the subject matter.

Access: the study depended on having access to people, organizations, or documents and, for whatever reason. If access is denied or limited in some way, this hinders the process of data gathering. However, this challenge was mitigated through the use of the convenience method that allowed the researcher to interview experienced individuals that were easily accessible to him.

The university provided an introduction letter as a mitigating factor. In addition, for institutions that require confidentiality, the researcher signed confidentiality agreements.

1.8.12 Conclusion

In conclusion, this subsection discussed the research methodology that was applied in conducting this study. The discussion covered the plan on the method that was used when conducting this study. The research plan discussed entailed the design of the research, population sampled and studied, sampling methods as well as the data collection methods and instruments. This is because the research procedure is all about the population, sampling method, instrumentations, data processing and treatment of statistics because without all these there is no research.

1.9Chapter Synopsis

Chapter one presents the background of the study, the statement of the problem, objectives of the study, research questions, the conceptual framework, the hypothesis, the scope, significance and justification of the study.

Chapter two presents a review of related scholarly work on the role of national courts in the

[32] . Berelson, Conard& Colton, Raymond. (1978). Research and Report Writing for Business and Economics, Random House: New York, pg 75.
[33] ibid

arbitral process more so in the oil and gas sector, dispute resolution involving oil and gas assets in Africa and an overview of the role of national courts in the arbitral process in Uganda.

Chapter three presents' limitations or challenges faced by national courts in the arbitral processes involving international commercial disputes including but not limited to inadequate technology, capacity challenges within the judiciary among others.

Chapter four presents possible reforms or recommendations in light of the best practices towards a more effective role of the national courts in the arbitral process which include but not limited to increased investment in technology and legal training of lawyers and judges in the field of international commercial arbitration. This chapter concludes with the assertion that while arbitration has increasingly become accepted as a means of resolving international commercial disputes, it has also become inevitable to use national courts before, during and after the arbitral processes.

CHAPTER TWO: LITERATURE REVIEW

2.0 Introduction

This chapter presents a review of related literature on the role of national courts in the arbitral process in the oil and gas industry. It is organized under the following key sections: The role of national courts in the arbitral process in the oil and gas industry, an analysis of the court's roles, limitations faced by the national courts and proposed reforms in the light of the best practices towards a more effective role.

2.1 Arbitration in International Oil and Gas Contracts

The oil and gas industry has long been a leader in promoting the resolution of industry disputes through the use of binding arbitration. In the international sphere, the often mentioned Abu Dhabi, ARAMCO, AMINOIL and Libya cases played a critical role in promoting the acceptance of investor-state arbitration and the applicability of international law to oil and gas industry disputes involving host nations.[34] Today, the vast majority of international commercial oil and gas disputes are resolved through arbitration. Overall, the domestic and international oil and gas industry has become one of the leading players in the promotion of arbitration and the development of arbitration materials. While the author acknowledges the fact that arbitration ensures a prompt, rational and final resolution of these disputes, he does not acknowledge the facilitative role that national courts play in the process.[35]

Important discussions arise in disputes arising from oil contracts such as: the issue of expropriation, the termination of the foreign investment contract and consequently, the issue of compensation to be paid to the foreign company. Although it must be acknowledged, the differences that may arise in oil and gas contracts are very diverse due to the connection of the contract with numerous agents outside the contract. International dispute resolution mechanisms now available to resolve disputes in the case of oil and gas claims are: judicial procedure and quasi-judicial methods. The judicial method includes referral to courts, both local and international. Courts have certain characteristics and responsibilities which the author does not handle in the article. It is also important to note that whereas the author notes the importance of arbitration in the oil and gas industry, he does not show the relevance of national

[34]Amazu A (2004) International Commercial Arbitration and African States: Cambridge University(vol.12 No. 2 of 2000, pg 3)
[35]ibid

courts in the resolution of such disputes.[36]

Disputes in the oil and gas industry are commonly resolved by arbitration, particularly where there is a cross-border element. The global nature of energy exploration and the terms and structure of many back-to-back energy supply contracts mean that there is sometimes a need for urgent interim measures, before an arbitral tribunal is constituted, in order to deal with certain emergency situations (e.g. the interruption of oil or gas supplies necessary for energy generation or the withdrawal or seizure of a concession by a state).Until recently, the primary option open to a party seeking such urgent interim measures was to apply to the court at the seat of the arbitration for an interim order. It is important to note that while the author makes a good case for arbitration in international oil and gas contracts, he does not help the reader understand how national courts intervene more so when it comes to interim measures.[37]

The concept of emergency arbitrator procedure offers a potentially useful alternative for obtaining urgent interim measures in some jurisdictions, however, there remain significant concerns regarding the status of the emergency arbitrator as well as the enforceability of his or her decisions, as the case may be which the author in this case does not discuss substantially.[38]

Given that the emergency arbitrator procedure is still relatively new and untested in many jurisdictions, it is critical that international oil and gas/energy companies are aware of the risks and uncertainties involved before embarking on this route in preference to seeking court assistance. It should also be noted that there is limited scholarship on this field of arbitration.**[39]**

Before entering into an international arbitration agreement, a contracting party is advised to check whether the states of the other contracting party and, if appropriate, of the place of arbitration, have ratified the New York Convention or have signed other multilateral or bilateral treaties offering the same guarantees[40].

The ICC is particularly favored in Oil and Gas contracts because of the international cross border nature of the contracts. The contracts alone may not imply the actual performance of the works but also with sub suppliers of plant, equipment EPC contractors and professional service

[36]Malhorta O.P (2014) The Law & Practice of Arbitration and Conciliation, Thomson, Sweet & Maxwell(3rd Ed, pg 1000)
[37] Margaret L.M (2017) The Principle of International Commercial Arbitration, Cambridge University Press(3rd Ed at pg 110)
[38] ibid
[39] ibid
[40]Op cit

providers who can all have their place of business remote to the works. These providers should be governed by differing jurisdictions but requiring a binding international mechanism for the resolution of disputes that is timely, cost effective and above all for many parties, discrete[41].Much as the author makes a good case, he does not point out the alternatives that he suggests should be timely and cost effective as opposed to the ICC.

There are major perceived advantages of international arbitration over court litigation for international disputes. The first and perhaps the most important in terms of fairness is the neutral nature of the dispute and arbitration hearing as this skips the home courts of the parties or party ensuring as far as is reasonably possible a fair hearing.[42] The author creates the impression that national courts are not in position to ensure a fair hearing to both parties which is not necessarily true. A key concept in arbitration law as previously alluded to is arbitrability.

It is generally accepted, for example, that certain matters that may have public interest elements cannot be arbitrated. This would include matters relating to family law, the validity of trademarks or patents, and the administration of wills and estates, clearly these areas, with the exception of family law one would assume, may cross over in to oil and gas contracts[43]. It is however pertinent to note that there is little literature on this concept more so in the oil and gas sector.

2.2 Dispute resolution involving oil and gas assets in Africa

Arbitration has been often misunderstood and poorly supported in much of Africa. This is especially the case with disputes in the oil and gas sector, where high financial stakes combine with national interest and a mix of nationalities. Distrust has resulted from the lack of insight into arbitration proceedings conducted by non-African, private tribunals outside of the continent. This distrust has manifested itself in domestic court interference in arbitration, which can significantly prolong or even derail the resolution of disputes.[44]

As with the majority of countries involved in energy disputes, the first choice of many participants in the African oil and gas sector (and in particular for non-African origin investors) is arbitration[45]. Due however to a combination of restrictive hydrocarbon laws reserving certain

[41]Mark ,Beeley Vinson & Elkins ; Dispute resolution involving oil and gas assets in Africa, TDM4(2016) www.transnational-dispute-management.com
[42]Op cit
[43]Op cit
[44] Mauro R.S (2014) International Arbitration: Law and Practice, Juris Publishing Inc(3rd Ed, pg 61)
[45]Mark ,Beeley Vinson & Elkins ; TDM4(2016)

matters to the courts, frequent skepticism that arbitration gives an advantage to the 'foreign' party, a greater willingness on the part of courts to interfere with the arbitration process and a penchant for associated disputes, a considerable body of African oil and gas disputes are also resolved through the domestic courts[46]. This is done either directly or indirectly via the 'backdoor', where, despite a clear agreement to arbitrate, the process is either disrupted by local court interference or the real battleground becomes the domestic enforcement of any resulting arbitral award[47]. This however, is not well documented thus the inadequate literature on the matter.

All that being said, there is evidence that the use of arbitration is growing and with it, a greater sense of reliability of the process[48]. It is now the starting point in most African model form production sharing contracts to offer to resolve disputes with operating companies by arbitration, typically under either the United Nations Commission on International Trade Law (UNCITRAL) or the International Centre for Settlement of Investment Disputes (ICSID) regimes.

Whereas the battle may originally have been concerned with going to arbitration at all, the negotiating 'hot spots' nowadays are more often concerned with seeking to agree a neutral (and typically offshore) 'seat' or juridical place of arbitration, and on obtaining a valid sovereign immunity waiver (a matter which remains all too often a point of disagreement, and which is not meaningfully assisted by bilateral investment treaty (BIT) provisions or by bringing claims under the ICSID Convention)[49].

Similarly, as foreign investors have brought the Association of International Petroleum Negotiators (AIPN) and other standard form operating agreements and like instruments into their African projects, and with the increased focus on local partnering (including many domestic companies now buying out external partners), the idea of commercial arbitration in the African oil and gas sector has increasingly become the norm, irrespective of whom the dispute will involve. Whereas I do agree with the author as regards the fact that Arbitration is steadily growing in many African countries as an alternative means of resolving commercial disputes, he does not acknowledge the role played by national courts during arbitral

[46]Op cit
[47] Ibid
[48] Ibid
[49] Ibid

proceedings.

In a survey of 54 African countries as at 1 September 2014, despite all of those countries having some form of arbitration laws (whether on a 'stand-alone' basis or as part of a civil code), only 18.5%[2] of those countries had adopted the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which might be considered surprising given that this law was developed in particular for emerging markets[50]. Those countries not adopting the Model Law appear to have two preferences. 'The first preference is to retain 'inherited' arbitration laws from former colonial powers. These laws are now often grossly behind the times in terms of modern practice, however; for example, in some countries the English Arbitration Act of 1889remains the model form. The second preference is to have effectively 'unique' combinations of arbitration laws, which create traps for the unwary with contradictory results and/or ambiguities, but which also contribute to the growth of individual arbitration centres'[51]. Bodies of case law and precedent are developing in each jurisdiction, but remain a long way short of forming a reliable corpus with sufficient depth to promote certainty of outcome[52].

With regard to commercial arbitrations themselves, there is also a slowly growing trend towards the use of international arbitration institutions by domestic African participants. For example, in 2012 the Paris-based International Chamber of Commerce (ICC) received 759 new filings for arbitration, which included 127 parties from Africa[53].Despite this significant level of usage, only five of these arbitrations were seated in Africa, which demonstrates the degree of uncertainty, even among African parties, as to the domestic legal frameworks that support arbitration[54].

Consistent with the global trend towards regionalization in arbitration, an increasing number of arbitration centers have opened across the continent[55]. One of oldest and most well-established of these is the Cairo Regional Centre for International Commercial Arbitration (CRCICA), which celebrated its 35th anniversary in 2014[56]. Further centers may now be found

[50]Blackaby, N, Partasides, C, Redfern, A and Hunter, M 2009:8, Redfern and Hunter on International Arbitration-Student Version, (Fifth edition), (New York USA, Oxford University Press, 2009)
[51]Ibid fn 17
[52] Ibid
[53]Buhring-Uhle, C 1996, Arbitration and mediation in international business: designing procedure for effective conflict management, (Hague, Netherlands, Kluwer Academic Publishers, 1996).
[54]Mark ,Beeley Vinson &Elkins,supra
[55] Ibid
[56] Ibid

in Rwanda (the Kigali International Arbitration Centre), Nigeria (the Lagos Regional Centre for International Commercial Arbitration) and Kenya (the Nairobi Centre for International Arbitration), as well as in Algeria, Benin, Burkina Faso, Cameroon, the Democratic Republic of the Congo, Ethiopia, Ghana, Ivory Coast, Lesotho, Libya, Madagascar, Mali, Morocco, Senegal, South Africa, Swaziland, Tunisia and Zimbabwe[57]. These centers do not merely provide hearing room facilities, but also seek to promote arbitration locally, including by way of educating local practitioners, the judiciary and lawmakers in international arbitration practice with a view to increasing the reliability and usability of arbitration in their countries[58]. This is, of course, a good thing both for arbitration users and host governments. While the author gives an insight into the creation of arbitration centers in Africa, he does not show the impact on local and international dispute resolution.

2.3 Overview of the Role of National Courts in the Arbitral process in Uganda

An essential part of businesses is that they seek to establish and maintain long term relationships with other concerns[59]. However, when it comes to solving court disputes among business concerns, court cases tend to terminally rapture such business relationships. In contemporary business practice, it is standard practice for commercial contracts to contain express clauses referring any future disputes to arbitration. This practice is well established and its legal effectiveness has long been recognized by the law. Any person acceptable to the parties may act as their arbitrator. In practice they will tend to choose someone with skill and experience in the relevant field.[60] It is pertinent to note that while the author makes a good case for Arbitration in commercial dispute resolution, he does not point out the role that national courts play in the arbitral process in Uganda.

Court based ADR can be defined a process by which parties who have filed their dispute in court are given an opportunity at an early stage before the hearing of the dispute by the Judge to have the said dispute referred to ADR first with a view to finalizing it or narrowing the issues involved.[61] The challenge with this understanding of ADR is that the author limits its scope to disputes within Uganda yet the current legal regime extends to international commercial

[57] Ibid
[58] Ibid
[59] A. Kakooza ;Arbitration, Conciliation And Mediation In Uganda: A Focus on The Practical Aspects; The Uganda Living Law Journal, Vol 7, NO.2,December 2009, Uganda Law Reform Commission.
[60] Ibid
[61] Justice Geoffrey W.M. Kiryabwire(1st April 2005) ; Alternative Dispute Resolution; A Ugandan Judicial Perspective(a paper delivered at a seminar for magistrates)

disputes, the oil and gas industry being one of the beneficiaries.

In contemporary business practice, it is standard practice for commercial contracts to contain express clauses referring any future disputes to arbitration. This practice is well established and its legal effectiveness has long been recognized by the law. Any person acceptable to the parties may act as their arbitrator. In practice they will tend to choose someone with skill and experience in the relevant field. Whereas the author points out the recognition that arbitration has received locally and internationally, he does not clearly outline the role that national courts play during arbitral proceedings for both local and international disputes.

Uganda's Arbitration and Conciliation Act establishes the Centre for Arbitration and Dispute Resolution (CADER). The Centre is charged with inter alia: to make appropriate rules, administrative procedure and forms for effective performance of arbitration, conciliation or Alternative Dispute Resolution processes; to establish and enforce a code of ethics for arbitrators, conciliators, neutrals and experts; to qualify and accredit arbitrators, conciliators and experts; to provide administrative services and other technical services in aid of arbitration, conciliation and alternative dispute resolution; to facilitate certification, registration and authentication of arbitration awards and conciliation settlements; to avail skills, training and promote the use of alternative dispute resolution methods for stakeholders; and to do all other acts as are required, necessary or conducive to the proper implementation of the objectives of the Act. It should be noted that while the author offers a good discussion as regards the creation of CADER and its powers, he does not show how the center operates without duplicating the facilitative role that courts play during arbitral proceedings.

The Arbitration and Conciliation Act (as amended) further goes out to create equilibrium between legal practitioners and fosters a positive judicial attitude towards arbitration[62]. Increased powers are granted to the arbitral tribunal and there is an open window within which the jurisdiction of courts can be exercised as an intervention in assisting and supporting the arbitral process with the aim of enhancing the development of ADR generally[63].

The Arbitration and Conciliation Act therefore, with precision, provides for the particular instances and limitations under which Court intervention and assistance is necessary. This is

[62]Anthony Conrad K. Kakooza; Arbitration, Conciliation And Mediation In Uganda: A Focus on The Practical Aspects The Uganda Living Law Journal, Vol 7, NO.2,December 2009pg 5, Uganda Law Reform Commission.

[63]ibid

through: staying of legal proceedings; effecting interim measures; taking evidence; setting aside the arbitration award and enforcement of an arbitral award[64].

Significantly, the Court does not come in to impose its authority upon the parties but continues to give due respect to the autonomy of the parties and assists in the successful attainment of their interests[65]. It should be noted that there is very limited scholarship in this field of the law in Uganda more so examining the role that national courts play during arbitral proceedings.

By way of conclusion, I wish to state that a review of literature on the topic in question reveals the following gaps that this thesis seeks to address:

While authors on arbitration in international commercial transactions argue that reforms supportive of international commercial arbitration have delayed, they have not gone ahead to identify the reasons why they delayed.

There is inadequate scholarship examining the role that national courts play during arbitral proceedings more so in Uganda.

[64] Ibid
[65] Ibid

CHAPTER THREE:

3.0 Limitations faced by the National Courts in the Arbitral Process

This chapter presents limitations or challenges faced by national courts in the arbitral processes involving international commercial disputes including but not limited to inadequate technology, capacity challenges within the judiciary among others.

There are several challenges that have affected the effectiveness of the national courts in performing their roles in the arbitral process especially in African countries like Uganda.

With the increase in commercial transactions both within and outside Africa, it has become apparent that most of the legal framework for arbitration across the continent requires reform. Accordingly, in recent years as this first in-depth treatment of arbitration in Africa shows jurisprudence from national courts of various African jurisdictions demonstrates that the courts are becoming more pro arbitration and judges increasingly understand their role of supporting or complementing the arbitral process.[66]

The principle of permanent sovereignty over natural resources is yet another of the limitations. This principle essentially advances the argument that resource rich nations should have control over their natural resources. That control entails: the right to freely dispose of natural resources, the right to explore and exploit natural resources for development, the right to regulate foreign investment, the right to settle disputes on the basis of national laws. Such control is contingent upon the state utilizing the resources for national development. In addition to this, in exercising the rights attached to this principle, the state must act within the parameters of international law.[67]

Arbitrations are meant to ensure fast and speedy resolution of disputes which is a big challenge in the Ugandan Courts. Accordingly, matters which are meant to be handled with expedience when Court assistance is sought are slowed down.

Effectiveness and efficiency of the process of arbitration: Sometimes arbitration matters will be litigated all the way to the highest court of the law of the land in search of setting aside of awards. This may create an impression that courts are entertaining litigation at the expense of arbitration, thus, scaring away any potential users of arbitration. Parties who are keen on having

[66]Justice Geoffrey W.M. Kiryabwire, supra
[67] Reuben C.R: Democracy &Dispute Resolution; The Problem of Arbitration, Law and Contemporary Problems(Vol. 67, No.1 of 2004 at pg 284)

their disputes settled faster may avoid jurisdictions where they feel that they may be dragged in courts for longer than necessary. This has the effect of denying the local institutions a chance to handle international arbitration matters.

Institutional capacity: It has also been observed that there exists a challenge on the capacity of existing institutions to meet the growing demand for matters to be concluded using arbitral mechanisms[68]. Much more needs to be done to enhance their capacity in terms of the number and quality of arbitrators, adequate staff and finances to ensure that they are up to the task in facilitation of international arbitration.

Despite there being individuals with the relevant knowledge, skill and experience in national courts and competent institutions, which specialize in, or are devoted to facilitating arbitration, there has been a general tendency by parties to a dispute doing business in Africa to go back to their home turfs to appoint arbitrators. This has denied the local arbitrators the fora to put their skills and expertise in arbitration to use since disputants shun the local arbitral institutions, if any, in favor of foreign institutions[69].

Most disputants prefer to appoint their non-nationals as arbitrators in international disputes, thus resulting in instances where even some Africans go for non-Africans to be arbitrators. Indeed, it has been observed that the near absence of African arbitrators in ICSID arbitration proceedings can in part be explained by the fact that African states predominantly appoint international lawyers to represent their interests. A good example is the Kigali International Arbitration Centre (KIAC) (and probably many others across Africa) where the panel of international arbitrators mainly consist of Non-Africans[70].

Although it is important to borrow from the established institutions outside Africa, the fact that more than half of the international arbitrators in KIAC are non-African may portray Africa to the outside world as a place where there are no qualified arbitrators (real or perceived) to be appointed as international commercial arbitrators. To the users of international arbitration in Africa, it is therefore possible to argue that it makes more sense to hold their arbitration proceedings outside Africa where the Non-African arbitrators will not only handle the matter but there is also (perceived or real) added benefit of non-interference from national courts as

[68]L.Gabagambi: Critical Analysis on The Challenges Facing Legal and Institutional Frameworks on Recognition and Enforcement of Arbitral Awards in Africa:Journal of Law, Policy and Globalisation, Vol 39, 2015
[69] supra
[70]J.Swithin(2018): Arbitration in Africa, Practical Law Arbitration, www.practicallawarbitration.com

well as ease of enforcement of awards[71].

Limitation of the Arbitration Clause: It has been argued that an arbitration clause should take into consideration the applicable law, state and attitude of concerned countries towards arbitration as well as the effect of host domestic law on arbitration proceedings and outcome so as to ensure that the parties' intentions are not defeated by technicalities. This is because it is the arbitration clause that dictates where the proceedings will be held and the applicable law. As such, it is important to a have a clear non-ambiguous clause as this will not only save time but will also save resources for the parties by way of minimized challenges to the whole process.

Corruption as a limiting factor: Corruption in international business is rife and growing worse. On a scale from 0 (highly corrupt) to 10 (very clean), nearly three quarters of the 178 countries assessed in Transparency International's Corruption Perceptions Index 2010 scored below five. Corruption levels around the world are perceived to have increased over the years. The scale of bribery in business today is described as staggering, and its consequences dramatic.

It should therefore come as little surprise to anyone that corruption is internationally abhorred and vigorously denounced. There is a global convergence of legal rules, authorities, and opinions condemning corruption, supporting the claim that there exists an international public policy, even a transnational public policy, against corruption. For this reason, issues of corruption may appear to be deceptively simple for tribunals and national courts to dispose of. However, the truth of the matter is quite the opposite. Arbitrations involving allegations of corruption throw up difficult factual and legal issues at practically every stage of the arbitral process. It is imperative that international arbitration practitioners have a firm grasp of how to approach these issues, especially since sectors of major importance for international arbitration such as the construction, oil and gas, and mining industries suffer from endemic corruption.

Since World Duty Free v. Kenya of 2006, it is generally admitted though that corruption and money laundering – whether proven or not – are relevant in arbitration.

The availability of competent trained mediators to carry out the ADR.ADR being a relatively new method of dispute resolution requires a push to ensure its success[72]. In The case of Uganda and Canada' a pilot project (both 2 years) were put in place to make it mandatory. The projects

[71]McLaughlin, J.T, "Arbitration and Developing Countries," 13 INT'L L211(1979)
[72] Ibid

also make provision to avail the said mediators In the case of Uganda, 4 staff mediators were provided under the pilot project free of charge (as the project pays them). However, there have been complaints that the mediators are young and some of them are not even lawyers[73]. Many of these complaints go to form rather than substance as it is not clear whether there should not be a minimum age for a mediator nor indeed is it the practice that all mediators should be lawyers[74].

Lack of adequate Information Communication Technology (ICT) infrastructure and other relevant physical infrastructure in the existing arbitral centers is another concern for national courts in the arbitral process. It is debatable whether the existing institutions/ national courts have modern ICT equipment that facilitates efficiency in arbitral proceedings. Potential users are also concerned with the issue of institutional capacity in Africa's institutions. Institutional capacity touches on both physical infrastructure as well as arbitrators' expertise in handling diverse matters arising mainly in commercial world[75].

Another limitation has been that of cultural, economic, religious, and political differences: It has been observed that diversity of a cultural, economic, religious, and political kind - exists not only among nation-states and in the sources and interpretation of international law, but also among the group of commentators who study the interactions of trans-border actors and institutions. It is noteworthy that an arbitration matter may have different interested parties and many players who include the arbitral panel as well as the parties. Each of the interested parties has expectations which they expect to be met in the process and they may differ based on cultural background of parties or arbitrators[76].

Perhaps the biggest challenge to court assisted ADR is training[77]. It is important to change the attitude that ADR is a second best option that should be used purely as an exercise of good faith"[78]. ADR should be taught as a first line dispute resolution mechanism[79]. There is no reason why a new pretrial protocol cannot emerge where the right from a letter of Demand/notice of Intention to sue a paragraph is added stating the plaintiff is willing to enter into mediation or

[73] Ibid
[74] Ibid
[75] Muigua, k., 'Promoting International Commercial Arbitration in Africa', The International Arbitration Review(7th Ed pg 329)
[76] Ibid
[77] Justice Geoffrey W.M. Kiryabwire; supra pg18

[78] ibid
[79] Ibid

another alternative method of dispute resolution[80].

Arbitrability is yet another challenge in international commercial arbitration. Arbitrability relates to the issues in disputes and whether they are capable of settlement by arbitration. For example, a dispute relating to matrimonial proceedings may not be arbitrable in England but may be arbitrable in another country. This is also dependent on public policy of states. The New York convention is applicable to only disputes that are capable of settlement by arbitration

The courts' role is to decide whether a dispute is arbitrable or not. This means that there is always need to have recourse to the courts on whether agreements are arbitrable or not. Some courts have expanded the scope of arbitration to cover subjects like securities and antitrust law, which traditionally are regarded as public policy issues. It is obvious that the courts' attitude have been influenced by the need to promote international trade as well as attaining some uniformity in international arbitration. Therefore, refusing to enforce an award because it is against public policy is not encouraging for international commercial arbitration seeing that a lawyer should know all the law, so if the parties are unfortunate to choose a country where their agreement is not arbitrable, it will be unfair for their agreement to not be arbitrated upon because it does not pass the test of arbitrability.[81]

[80] Ibid

[81] A. Mord;An analysis of national courts' involvement in international commercial arbitration; Can international commercial arbitration be effective without national courts?,(open journal of political science,6,95-104)

CHAPTER FOUR: RECOMMENDATIONS AND CONCLUSION

4.0 Recommendations in light of the Best Practices towards a more effective Role of National Courts in the Arbitral Process

This chapter presents recommendations in light of the best practices towards a more effective role of the national courts in the arbitral process which include but not limited to increased investment in technology and legal training of lawyers and judges in the field of international commercial arbitration.

In the field of oil and gas, scientific literature has been able to rule the legislature of the host country in many cases. Legislation related to the oil and gas industry, in the absence of attention to the scientific literature of the opposing party and the international procedures for settling disputes, can lead to the result of the image of what they are thinking. Undoubtedly, it is not possible to win and succeed politics in this area without the backing of scientific literature. And the element of persuasion of thoughts, which is the main and fundamental power in political and economic contexts, has rooted in its scientific literature and methodology in dealing with and analyzing issues relating to the legal aspects of oil and gas.[82]

It is clear that hydrocarbon resources are considered as vital and important resources of many countries. In fact, the issue of oil and gas has been around for over 150 years which has dominated the minds of governments and raised the issue of tension between countries. Subsequently, lawyers have focused on solving these challenges, and they have always focused on how to resolve the issue of oil disputes, as well as the best legal mechanism to investigate the differences between parties to oil and gas contracts. It is therefore worth noting that Arbitration, a privately led settlement of disputes has been widely accepted by foreign investors and in fact with this development, two fundamental goals have been realized. Firstly, investment in the field of oil and gas has been developed and improved, leading to economic prosperity. Secondly, investors in the oil and gas sector choose arbitration agreements with the perfect mind hoping that at least the referees will refrain from bias. .[83]

The first reform to the emerging challenges lies in the training 'of arbitration methods to judicial officers, lawyers and non-lawyers alike.[84] This would lead to a greater appreciation of the

[82] Mark H.J : International Commercial Arbitration; Kluwer Law International(1999,) Pg19
[83]Shanur Y (2003) Alternative Dispute Resolution Approaches and their Application; Global Arbitration Review, 22(1)
[84] Ibid

subject matter as lengthy and complicated proceedings are not always the best solution[85]

Court assisted arbitration emphasizes the need for a new breed of pro-active judicial officers who are willing to intervene in a case as opposed to being a referee, without people raising the flag of bias.[86] The Judicial officer should manage his case (as is required under Section 33 of The Judicature Act) in the manner that best meets the interests of justice[87]. This in Uganda, means facilitating an agreement to use arbitration if it is the best interest of the dispute.

It is also noteworthy that legal training in Uganda is progressing away from the adversarial system to moderate training involving ADR and exposure to ADR practical techniques.[88] Law Students and advocates alike should be encouraged further in this awareness so as to appreciate ADR more, rather than ridicule it and thus embrace it in the practice of pursuit of justice in Uganda.[89]

4.1 Conclusion

By way of conclusion, I wish to state that globalization has prompted the world to seek effective and efficient methods of dispute resolution which has led to the importance and widespread acceptance of arbitration as a preferred means of dispute resolution without the involvement of the national courts. Although many conventions and laws have tried to establish how agreements should be recognized and the awards enforced, it has become increasingly evident that national courts have a huge role to play in the process of arbitration from commencement to recognition and enforcement of the arbitral awards.

[85] Ibid
[86] Ibid
[87] Ibid
[88] Ibid
[89] Anthony Conrad K. Kakooza Arbitration, Conciliation And Mediation In Uganda: A Focus on The Practical Aspects at pg 21

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APPENDIX A

INTERVIEW GUIDE

PART I - Where the interviewee is or was an arbitrator or has knowledge of what happens during arbitral proceedings.

(a) Name of the Interviewee (optional):
(b) Designation:
(c) Profession:
(d) Professional body/Industry (if any):
(e) What is your experience in arbitration?
(f) What kind of disputes have you arbitrated?
(g) Have you received any support from national courts during arbitral proceedings?
(h) What kind of support do you receive from national courts during arbitral proceedings?
(i) What is your view on the role of national courts during arbitral proceedings?
(j) As an arbitrator, what challenges do you face during arbitral proceedings?
(k) Any recommendations for improvement?

PART II- Where the interviewee is a beneficiary/user of arbitration services (this could be an individual or a corporate entity).

(a) Name of the person/corporate entity(optional):
(b) Professional body/Industry (if any):
(c) What is your experience with arbitration?
(d) Have you had any disputes resolved through arbitration?
(e) If so what kind of disputes were they?
(f) What is your view on the role of national courts during arbitral proceedings?
(g) As someone who has used the services of an arbitrator, what challenges have you faced during arbitral proceedings?
(h) Any recommendations for improvement?

PART III -Where the interviewee is a judicial officer

(a) Name (optional):

(b) Do you have any experience with arbitration?

(c) What role do national courts play during arbitral proceedings?

(d) What challenges do courts face when carrying out their roles during arbitral proceedings?

(e) What recommendations would you suggest if any?

APPENDIX B

SAMPLE OF THE STUDY

NAME	DESIGNATION
Mr. DAVID .K. WANGUTUSI	JUDGE OF THE HIGH COURT OF UGANDA
Mr. FRANCIS GIMARA	DIRECTOR ICAMEK
Mr. PETER MULIISA	MANAGER LEGAL AND CORPORATE AFFAIRS UNOC AND FORMER MANAGER LITIGATION AT URA
Mr. MARTIN MWAMBUTSYA	COMMISSIONER CIVIL LITIGATION AT THE ATTORNEY GENERAL'S CHAMBERS
Mr. JOHN FISHER KANYEMEIBWA	PARTNER AT KATEERA, KAGUMIIRE & Co ADVOCATES AND MEMBER ICAMEK
M/s ANNET KOOTE	FORMER HEAD OF DEPARTMENT LAW REFORM ,UGANDA LAW REFORM COMMISSION