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REVIEW OF THE ARBITRATION ACT, No-2 OF 2020

The new Arbitration Act, No-2 of 2020 ("the Act") enacted in February has been assented to by the President and shall come into operation on such date as the Minister may, by notice publish in the Government Gazette. The Act introduces additional options for disputes resolution by way of adjudication and conciliation both in civil and certain criminal matters, previously not available under the repealed Arbitration Act Cap. 15 (R.E.2002) ("Repealed Act"). Selected salient features of the Act are discussed below:

1. Application of the Act in relation to Pending Proceedings:

Section 91(4) of the Act stipulates that any proceedings pending shall be proceeded in the light of the Act. It is not clear if this applies only to arbitrations brought pursuant to the Repealed Act or would apply to all pending arbitration proceedings whether brought under the Repealed Act or under International Arbitration Rules such as the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). This may become clear when the requisite regulations will be published and as well in what will happened in some of the pending arbitrations filed under UNCITRAL and other international rules of arbitration.

2. Choice of Seat of Arbitration and Applicable Law and Amendments to the Natural Wealth and Resources (Permanent Sovereignty) Act, Cap.449

The Act states *defines "seat of arbitration" as the "juridical seat of arbitration designated: (a) in accordance with the law applicable on matters that are subject of the arbitration* and the Act shall apply where the seat of arbitration is Tanzania. While parties may chose the seat of arbitration, the Act, however, restricts the right of the contracting parties in relation to matters under the Natural Wealth and Resources (Permanent Sovereignty) Act, Cap.449, ("the Sovereignty Act"). Section 11 of the Sovereignty Act requires disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources to be adjudicated by judicial bodies or other organs in the United Republic of Tanzania and in accordance with Tanzanian laws.

3. Category of Arbitration

3.1 The Act creates two categories of arbitration, "*domestic commercial arbitration"* defined as one involving individuals normally resident in Tanzania or body corporates incorporated in Mainland Tanzania or their central management and control are exercised in Mainland Tanzania. The other qualification for a domestic commercial arbitration introduced in the definition is *the place where a*

substantial part of the obligations of the commercial relationship is to be performed, or the place with which the subject matter of the dispute is Mainland Tanzania. The implication of this categorization would allow the argument that any award granted may not be enforced as a foreign award as defined under the Act, probably leading to further argument that the Award does not fall under the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and as such may not be enforced as such.[1]

3.2 The other category of arbitration is termed "*international commercial arbitration"* defined as an arbitration relating to disputes arising out of a legal relationship where at least one of the parties is an individual who is a national of or resident of a country other than Mainland Tanzania, or a corporate body which is incorporated in any country other than Mainland Tanzania, or *a corporate body whose central management and control is exercised in any country other than Tanzania*, or the Government of a foreign country. This category clearly relates to foreign entities not existing in Tanzania as subsidiary companies and accordingly foreign companies that have established branch offices by registration under the Companies Act Cap 212 of Tanzania, will not lose their foreign category within the meaning of this definition.

3.3 The Act defines *"a foreign award"* as one made outside the United Republic of Tanzania and will bind the United Republic of Tanzania *"only in so far as and to the extent which Mainland Tanzania has a reciprocal arrangement born out of an international agreement to which the United Republic is a party"*.

3.4 Enforcement of an award against the Government would be subject to the Government Proceedings Act, (Cap. 7.R.E. 2002) with its limitations, in that courts are prohibited from issuing any execution order against the Government.

4. Court Intervention

The Act provides for court intervention in several situations, some of which are necessary and available under other jurisdictions. However, there may be concern in relation to an overly bias in favor of the defaulting party in the process of appointing arbitrator. As stipulated under section 19

[1] Tanzania is a member of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards "the New York Convention". Tanzania signed the Convention on 13th October 1964 and ratified it on 11th January 1965 entering into force same day.

on the process of appointing a liquidator, a defaulting party is allowed to apply to court to set aside the appointment for no cause despite his refusal or failure to appoint or agree to the appointment of the arbitrator within the time specified under the said section 19. Given the slow process in the judicial process, there is room for abuse of the process by a party that is bent on frustrating the arbitration process. This is further complicated by the requirement of section 19(4) that an appeal against such court decision can only be made with leave of the court. In addition, where a court has removed a sole arbitrator parties are expected, pursuant to section 20(1), to agree on what next shall happen. It is unlikely that parties who have failed to constitute an arbitral tribunal will be in position to reach any agreement on the way forward after a court has removed an arbitrator appointed by the aggrieved party. Arbitration proceedings are intended to avoid long judicial processes but some of the provisions may take the parties right back in the thicket of a long judicial process thereby making the option for arbitral procedure untenable as it is intended to be.

5. THE TANZANIA ARBITRATION CENTRE

This Act provides for the establishment of the Tanzania Arbitration Centre ("TAC") and its functions shall be the conduct and management of arbitration; registration and maintenance of list of accredited arbitrators; enforcement of the code of conduct and practice for arbitrators; management and provision of continuing education for arbitrators; and to perform any other functions as the minister may direct. There is provision for professional associations to register with the TAC. It means that parties may only chose arbitrators registered by TAC.

5. Recognition and Enforcement of Arbitral Award

5.1 The Act provides under section 78 that upon application to the court in writing, an arbitral award may be recognized as binding and enforceable if it satisfies the conditions detailed under subsection 1(a) of section 78 which permits the party against whom the award is made to petition the court to decline recognition of the award, if he can furnish to the court proof regarding a number of issues listed.

5.2 An award if recognized for enforcement may, in terms of section 68(1) by the leave of the court be enforced in the same manner as a judgement or order of the court. And in terms of subsection (3) of section 68, leave to enforce shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

5.3 The Act is mute as regards enforcement of awards against the Government. It may be noted, however, that the Government Proceedings Act, (Cap. 5 R.E. 2002) prohibits any execution against the Government. Further, the Civil Procedure Act (Cap 33, R.E. 2002), under Order XXXV11 Rule 1(b), restricts powers of the Tanzania Courts to grant injunctive relief against the Government, even as an interim measure. And vide Written Laws (Miscellaneous Amendments) Act, No- 1 of 2020, local governments, all government agencies and public entities where Government has interest have been made immune from injunctive orders or execution in the same way as the Government, making all of them sovereign entities in terms of the amendments to the Government Proceedings Act, (Cap. 5 R.E. 2002). The courts may only issue 'mandamus' or 'prerogative' orders against the Government or any of the other "*sovereign entities*". In practice, however, such orders will only grant declaratory relief, if successful, setting out rights and obligations under relevant laws and regulations[2].

6. Amendments

6.1 The Act amends the Criminal Procedure Act, (Cap. 20 R.E. 2002) providing in a new section 163(1) allowing a court, with the consent of the complainant, to proceed by way of reconciliation by seeking the services of a reconciliatory, and the matter shall be considered to have been reconciled; "b*y giving of an apology; promising not to reoffend the victim; attendance at any counselling services for rehabilitation; a promise to change any habits or conduct, such as the consumption of alcohol or use of any other prohibited substance; a promise not to associate people with bad influence.*

6.2 In an apparent countian regarding possible abuse and/or victimization of the complainant, the Act provides that the *court shall only accept the matter is reconciled where it is satisfied that it is in the best interests of the complainant, and in any case involving domestic violence, the court shall ensure that the victim of the violence do not submit to reconciliation by reason of pressure from the accused person[3]. (Section 92,93,94 of the Act).*

6.3 The Civil Procedure Code (Cap 33 R.E. 2002) has been amended by the introduction of new section 64B empowering the Minister to establish and maintain a system of

[2] Subsection (3) of section 16 of Cap. 5 R.E. 2002 provides that save as is provided in this section, no execution, attachment or similar process shall be issued out of any court for enforcing payment of any money ….and in the case of an award requiring the Government to take any action or to desist from doing anything, the courts are equally restricted under the Civil Procedure Code.
[3] Sections 92, 93 & 94 of the Act

accreditation for reconciliatory, negotiators, mediators and arbitrators, to appoint a registrar to maintain such register of the persons who will be involved in facilitation of reconciliations, negotiations, mediation and arbitration for a fee and to make it an offence for such people practicing without accreditation and the penalty thereof.

6.4 The other amendment relates to the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017. *Section 11 of the Sovereignty Act requires disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources to be adjudicated by judicial bodies or other organs in the United Republic of Tanzania and in accordance with Tanzanian laws.* The amendments removed the word *"established"* in subsections (2) and (3) of section 11, such that the judicial bodies or other organs are in Tanzania but not necessarily established in Tanzania. It is not clear what is the intention of this amendment, but it may become clearer in the regulations to be promulgated by the Minister.