

ARBITRATION LAW IN ZAMBIA

THE EFFICACY OF THE LEGAL FRAMEWORK

KENNETH KAOMA MWENDA*

In 2001, the ICC (International Chamber of Commerce) International Court of Arbitration confirmed its position as a leading provider of international arbitration services. With 566 requests for arbitration, this was more than ever received in any previous year. Over 12,000 cases have now been submitted to ICC arbitration since its inception in the 1920s.¹

Introduction

This paper examines the efficacy of the legal framework for arbitration in Zambia. Areas of vulnerability in the legal framework are identified and proposals are spelt out to redress some of these shortcomings. The paper also spells out some of the advantages of using arbitration over traditional court processes. Pertinent international law issues applicable to arbitration in Zambia are examined as well. And, purposely, no attempt is made to delve into the intricacies of literature review of other scholars' work on arbitration law in their countries of origin or interest.²

Many countries around the world today are turning to alternative dispute resolution (hereinafter referred to as 'ADR') as one of the ways in which to promote social justice and good governance. Several approaches have been adopted to reform

and improve the judicial systems of these countries. For example, some training programmes for members of the judiciary have been introduced. Also, the computerisation of information technology at court houses in order to assist in the better keeping of court records and the introduction of commercial court divisions of the High Court to deal specifically with cases on commercial law, privatization law and insolvency law are other strategies. Added to this list is the introduction of ADRs to speed up the hearing of cases and the raising of salaries of judges in order for them not to be susceptible to corrupt practices. But, then, to what extent can we measure the effect (or success) of all these strategies on attempts to promote and improve social justice and good governance? Are there any international standards or yardsticks to measure the success of judicial reform programmes?

All over the world, ADRs are increasingly becoming a trend in many countries undergoing judicial reforms. Several arguments have been advanced in favour of and against ADR. For example, while ADR is thought of by many as a way in which to de-congest courts with the backlog of cases they face, especially com-

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mercial law cases, the rapid rate at which developing countries and transition economies are embracing ADR poses a threat on these countries having a system which ends up breeding kangaroo courts and kangaroo justice. Indeed, are there enough resources – that is, technical, financial, human capital, and so forth - to administer ADR in developing countries and transition economies? And what programmes are in place to promote training, capacity-building, institutional reform, and sustainable development of ADR?

The International Court of Arbitration observes that some of the advantages of using ADR, such as arbitration, include the following:

Among the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used internationally. The reasons for this are clear:

Final, binding decisions

While several mechanisms can help parties reach an amicable settlement - for example through conciliation under the ICC Rules of Conciliation - all of them depend, ultimately, on the goodwill and cooperation of the parties. A final and enforceable decision can generally be obtained only by recourse to the courts or by arbitration. Because arbitral awards are not subject to appeal, they are much more likely to be final than the judgements of courts of first instance. Although arbitral awards may be subject to being

challenged (usually in either the country where the arbitral award is rendered or where enforcement is sought), the grounds of challenge available against arbitral awards are limited.

International recognition of arbitral awards

Arbitral awards enjoy much greater international recognition than judgements of national courts. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention'. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement.

Neutrality

In arbitral proceedings, parties can place themselves on an equal footing in five key respects:

1.	Place of arbitration
2.	Language used
3.	Procedures or rules of law applied
4.	Nationality
5.	Legal representation

Arbitration may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally possible to structure a neutral procedure offering no undue advantage to any party.

Specialized competence of arbitrators

Judicial systems do not allow the parties to a dispute to choose their own judges. In contrast, arbitration offers the parties the unique opportunity to designate persons of their choice as arbitrators, provided they are independent. This enables the parties to have their disputes resolved by people who have specialized competence in the relevant field.

Speed and economy

Arbitration is faster and less expensive than litigation in the courts. Although a complex international dispute may sometimes take a great deal of time and money to resolve, even by arbitration, the limited scope for challenge against arbitral awards, as compared with court judgments, offers a clear advantage. Above all, it helps to ensure that the parties will not subsequently be entangled in a prolonged and costly series of appeals. Furthermore, arbitration offers the parties the flexibility to set up proceedings that can be conducted as quickly and economically as the circumstances allow. In this way, a multi-million dollar ICC arbitration was once completed in just over two months.

Confidentiality

Arbitration hearings are not public, and only the parties themselves receive copies of the awards.³

International efforts to provide for a global framework for arbitration

There are a number of international bodies and forums that deal with ADR. For example, one such body is the Interna-

tional Centre for the Settlement of Investment Disputes (hereinafter referred to as 'ICSID'). ICSID writes:

On a number of occasions in the past, the World Bank as an institution and the President of the Bank in his personal capacity have assisted in mediation or conciliation of investment disputes between governments and private foreign investors. The creation of the International Centre for Settlement of Investment Disputes (ICSID) in 1966 was in part intended to relieve the President and the staff of the burden of becoming involved in such disputes. But the Bank's overriding consideration in creating ICSID was the belief that an institution specially designed to facilitate the settlement of investment disputes between governments and foreign investors could help to promote increased flows of international investment.⁴

The ICSID note goes on to say:

ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention)⁵ which came into force on October 14, 1966. ICSID has an Administrative Council and a Secretariat. The Administrative Council is chaired by the World Bank's President and consists of one representative of each State which has ratified the Convention. Annual meetings of the Council are held in conjunction with the joint World Bank/International Monetary Fund annual meetings.

ICSID is an autonomous international organization. However, it has close links with the World Bank. All of ICSID's

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members are also members of the Bank. Unless a government makes a contrary designation, its Governor for the Bank sits *ex officio* on ICSID's Administrative Council. The expenses of the ICSID Secretariat are financed out of the Bank's budget, although the costs of individual proceedings are borne by the parties involved. Pursuant to the Convention, ICSID provides facilities for the conciliation and arbitration of disputes between member countries and investors who qualify as nationals of other member countries. Recourse to ICSID conciliation and arbitration is entirely voluntary. However, once the parties have consented to arbitration under the ICSID Convention, neither can unilaterally withdraw its consent. Moreover, all ICSID Contracting States, whether or not parties to the dispute, are required by the Convention to recognize and enforce ICSID arbitral awards.

Besides providing facilities for conciliation and arbitration under the ICSID Convention, the Centre has since 1978 had a set of Additional Facility Rules authorizing the ICSID Secretariat to administer certain types of proceedings between States and foreign nationals which fall outside the scope of the Convention. These include conciliation and arbitration proceedings where either the State party or the home State of the foreign national is not a member of ICSID. Additional Facility conciliation and arbitration are also available for cases where the dispute is not an investment dispute provided it relates to a transaction which has 'features

that distinguishes it from an ordinary commercial transaction.' The Additional Facility Rules further allow ICSID to administer a type of proceedings not provided for in the Convention, namely fact-finding proceedings to which any State and foreign national may have recourse if they wish to institute an inquiry 'to examine and report on facts.'

A third activity of ICSID in the field of the settlement of disputes has consisted in the Secretary-General of ICSID accepting to act as the appointing authority of arbitrators for *ad hoc* (*i.e.*, non-institutional) arbitration proceedings. This is most commonly done in the context of arrangements for arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), which are specially designed for *ad hoc* proceedings."⁶

On sources of law governing the arbitration procedure under ICSID, ICSID observes:

Provisions on ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consents by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties. Arbitration under the auspices of ICSID is similarly one of the main mechanisms for the settlement of investment disputes under four recent multilateral trade and investment treaties (the North American Free Trade Agreement, the Energy

Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).

Under the ICSID Convention, ICSID proceedings need not be held at the Centre's headquarters in Washington D.C. The parties to an ICSID proceeding are free to agree to conduct their proceeding at any other place. The ICSID Convention contains provisions that facilitate advance stipulations for such other venues when the place chosen is the seat of an institution with which the Centre has an arrangement for this purpose. ICSID has to date entered in such arrangements with the Permanent Court of Arbitration at The Hague, the Regional Arbitration Centres of the Asian-African Legal Consultative Committee at Cairo and Kuala Lumpur, the Australian Centre for International Commercial Arbitration at Melbourne, the Australian Commercial Disputes Centre at Sydney, the Singapore International Arbitration Centre and the GCC Commercial Arbitration Centre at Bahrain. These arrangements have proved their usefulness in many ICSID cases and have helped to promote cooperation between ICSID and these institutions in several other respects.

The number of cases submitted to the Centre has increased significantly in recent years. These include cases brought under the ICSID Convention and cases brought under the ICSID Additional Facility Rules. In addition to its dispute settlement activities, ICSID carries out advisory and research activities relevant to

its objectives and has a number of publications. The Centre collaborates with other World Bank Group units in meeting requests by governments for advice on investment and arbitration law. The publications of the Centre include multi-volume collections of Investment Laws of the World and of Investment Treaties, which are periodically updated by ICSID staff. Since April 1986, the Centre has published a semi-annual law journal entitled *ICSID Review-Foreign Investment Law Journal*. The journal was recently rated as one of the top 20 international and comparative law journals in the United States.

Since 1983, the Centre has also co-sponsored, with the American Arbitration Association (AAA) and the International Chamber of Commerce (ICC) International Court of Arbitration, colloquia on topics of current interest in the area of international arbitration. Other conference activities involving the Centre are described in the ICSID Annual Report."⁷

Elsewhere, I have provided a detailed examination and analysis of the efficacy of the ADR process under ICSID.⁸ Here, suffice it to say, the ICC International Court of Arbitration is another institution that has been heralded as one of the world's foremost institutions dealing with ADR on business and commerce related matters.⁹ ICC observes:

While most arbitration institutions are regional or national in scope, the ICC Court is truly international. Composed

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of members from some 60 countries and every continent, the ICC Court is the world's most widely representative dispute resolution institution. The ICC Court is not a 'court' in the ordinary sense. As the ICC arbitration body, the Court ensures the application of the Rules of Arbitration of the International Chamber of Commerce. Although its members do not decide the matters submitted to ICC arbitration - this is the task of the arbitrators appointed under the ICC Rules - the Court oversees the ICC arbitration process and, among other things, is responsible for: appointing arbitrators; confirming, as the case may be, arbitrators nominated by the parties; deciding upon challenges of arbitrators; scrutinizing and approving all arbitral awards; and fixing the arbitrators' fees. In exercising its functions, the Court is able to draw upon the collective experience of distinguished jurists from a diversity of backgrounds and legal cultures as varied as that of the participants in the arbitral process.¹⁰

Under the legal framework provided by ICC, parties using arbitration have a choice between designating an institution, such as ICC, to administer the arbitration process, or to proceed on an ad hoc basis outside any formal institutional framework.¹¹ In the case of the latter, the process of arbitration is administered by arbitrators themselves.¹² ICC argues:

However, should problems arise in setting the arbitration in motion or in constituting the Arbitral Tribunal, the parties may have to require the assistance of a state court, or that of an independent appointing authority such as ICC. Although institutional arbitra-

tion requires payment of a fee to the administering institution, the functions performed by the institution can be critical in ensuring that the arbitration proceeds to a final award with a minimum of disruption and without the need for recourse to the local courts. The services an institution may offer are exemplified by the role of the ICC Court, which provides the most thoroughly supervised form of administered arbitration in the world. Among other things, the ICC Court will, as necessary: (i) determine whether there is a *prima facie* agreement to arbitrate; (ii) decide on the number of arbitrators; (iii) appoint arbitrators; (iv) decide challenges against arbitrators; (v) ensure that arbitrators are conducting the arbitration in accordance with the ICC Rules and replace them if necessary; (vi) determine the place of arbitration; (vii) fix and extend time-limits; (viii) determine the fees and expenses of the arbitrators; and (ix) scrutinize arbitral awards.¹³

The legal framework for arbitration in Zambia

The main building blocks of the legal framework for arbitration in Zambia include public policy, creative problem-solving, legislation, the common law, doctrines of equity, African customary law, and principles of public international law.

In Zambia's Arbitration Act 1933, the extent to which the bulk of statute law under that Act applies to Zambia, is spelt out in the following manner:

23. This Part (*i.e.* Part II¹⁴) shall apply to arbitrations under any law applied to or any Act enacted in Zambia before or after the commencement of this

Act as if the arbitration were pursuant to a submission, except in so far as this Part is inconsistent with the applied law or Act regulating the arbitration or with any rules or procedure authorised or recognised by that law or Act.

24. Nothing in this Part shall affect any matter already referred to arbitrators at the commencement of this Act, but this Part shall apply to every arbitration commenced after the commencement of this Act under any agreement or order previously made.¹⁵

The Arbitration Act 1933 states clearly that provisions of Part II of the Act are binding on the State.¹⁶ Following below is an examination of the legal framework for arbitration in Zambia.

Office of arbitrator

Under the Arbitration Act 1933, parties to a dispute may agree that the dispute will be referred to an arbitrator or arbitrators for settlement.¹⁷ Furthermore, and in accordance with the intentions of the parties, an arbitrator or arbitrators may be appointed by a person designated by the disputing parties.¹⁸ Here, the designation must be contained in a document known as a submission.¹⁹ This document is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named in it or not.²⁰ A submission can, therefore, not be made orally.

Can disputing parties designate and give powers to appoint an arbitrator to a body corporate or an individual? The Arbitration Act 1933 is silent on this. Another begging question that comes to the fore

is that, can any body corporate or individual be granted powers to appoint an arbitrator? Again, the Arbitration Act 1933 is silent. The Act does not even spell out the qualifications of persons eligible to appoint an arbitrator.

Further, can an undischarged bankrupt appoint an arbitrator? Or, can a mentally unfit person appoint an arbitrator? The Arbitration Act 1933 is silent on such matters. Even section 5 of the Arbitration Act 1933, which elaborates a bit further that 'such a person may be designated either by name or as the holder for the time being of any office or appointment' is not helpful. The qualifications of the party appointing an arbitrator are still not clear.

Another major lacuna in the Arbitration Act 1933 is that the statute does not spell out qualifications of a person who is eligible to hold office of arbitrator. Can a body corporate be appointed as an arbitrator? If so, which officer(s) of the body corporate would represent this corporation as arbitrator? Although paragraph 2 of schedule 3 to the Arbitration Act 1933 provides that,

The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place...

The said Schedule 3, paragraph 2, does not resolve the conundrum. If the legal philosophy underpinning the above statu-

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tory provision is centred around the doctrines of freedom of contract and sanctity of contract, to what extent, then, can these doctrines be upheld where parties to a dispute agree to appoint an arbitrator who is an infant or a mentally deranged person? We are drawn into polemics precipitated mainly by less thoughtful consideration, on the part of the draftsman, in preparing the Arbitration Act 1933. The fact that some treaties or pieces of foreign legislation provide that the disputing parties themselves should spell out the procedure for arbitration is no excuse for the draftsman not to have taken proactive measures to spell out more clearly some of the fundamental guidelines of any arbitration procedure. Indeed, when adopting foreign laws it is helpful to remember that not all wisdom from a foreign vineyard makes good local wine. The draftsman should have endeavoured courageously to brew his own wine, with some adaptations, of course, from other jurisdictions. It is less helpful to retain the same old wine under a different label.

Although the provisions of paragraph 2 of Schedule 3 to the Arbitration Act 1933, referring to 'the law of the country in whose territory the arbitration takes place', imports the general law of Zambia, the general law says nothing specific about the legality of appointing a mentally ill person or an undischarged bankrupt as an arbitrator. Can a mad person be appointed, legally, as an arbitrator, and can such a person hold office as an arbitrator? Can a person with a criminal

record of convictions for fraudulent crimes and felonies serve as an arbitrator? What does public policy say? And, is public policy interwoven into the fabric of the common law and equity? Or, is this an area where the common law and doctrines of equity are still evolving? It would have made life much easier if the draftsman had included statutory provisions in the Arbitration Act 1933 to clarify these kinds of issues. Indeed, for the larger part, neither arbitrators nor persons appointing arbitrators are adequately trained in arbitration law to spot issues which run contrary to public policy or the common law.

Referring to the appointment of arbitrators, the Arbitration Act 1933 provides as follows:

7.(1) In any of the following cases:

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator, and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is re-

moved, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days after the service of the notice, the Court (*i.e.* the High Court of Zambia²¹) may, on application by the third party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference, and make an award, as if he had been appointed by consent of all parties.²²

Under the above statutory provision, the notice to concur in the appointment of an arbitrator, umpire or third arbitrator may be in writing. There is, however, no strict obligation to have the notice in writing. The parties can agree to provide such notice verbally.

In drafting section 7 of the Arbitration Act 1933 – which appears above – like in the case of other statutory provisions examined earlier, the draftsman did not give thoughtful consideration to the efficacy of the legal framework. This shortcoming raises a number of illogical difficulties. It is not clear, for example, what is meant in section 7(1)(b) by: ‘if an appointed arbitrator...is incapable of acting...’ When does an arbitrator become

incapable of acting? Is it when he is told by his appointer to stop acting? Does a person cease to have the capability to serve as an arbitrator because he has fallen ill, or because his appointer has acquired knowledge of his previous criminal convictions and has now communicated an order, barring him from serving as an arbitrator? The law is not clear. Yet, the Arbitration Act 1933 goes further to distinguish ‘incapable of acting’ from cases of death of an arbitrator and where an arbitrator is removed from office. However, the statute does not spell out grounds upon which an arbitrator can be removed from office. Who has statutory powers to remove an arbitrator from office? We are left to look at the ‘constructive ambiguity’ contained in paragraph 2 of Schedule 3 to the Arbitration Act 1933, which provides that the arbitral procedure, including the constitution of the arbitral tribunal, are to be governed by the will of the disputing parties themselves and by the law of the country in whose territory the arbitration takes place.

But, then, getting back to one of the issues raised above, what is meant by ‘incapable of acting’? When we say disputing parties will themselves provide for terms of the arbitration process, is it possible that these parties can have all the information necessary for the preparation of a fully-contingent contract that covers, among other things, definitions of terms such as ‘incapable of acting’? Such a contract, if it were possible, would, indeed, involve high transactions costs. The im-

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provement of the legal framework for arbitration in Zambia should focus on, among other things, redressing such lacunas in the law.

Furthermore, there are no penalties in the Arbitration Act 1933 on persons purporting to hold the office of arbitrator when they have not, in fact, been appointed to do so, or when their mandate, as arbitrators, has either expired or been withdrawn. And neither does the Arbitration Act 1933 provide a meaning of the phrase 'the vacancy should not be supplied', as contained in section 7(1)(b) and (d). To recapitulate, section 7(1)(b) and (d) of the Arbitration Act 1933 reads as follows:

7.(1) In any of the following cases:
... (b) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy; ... (d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

Does the phrase 'the vacancy should not be supplied' in section 7(1)(b) and (d), above, mean the same thing as 'the vacancy should not be filled'? Again, the

law is not clear. The presence of such lacunas serve only to perpetuate structural weakness in the legal framework.

Appointment of two arbitrators

Where a submission provides that the dispute will be settled by two arbitrators, one appointed by each disputing party, then, unless a different intention is expressed in that submission,

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, or is removed, the party who appointed him may appoint a new arbitrator in his place;

(b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.²³

Although the Arbitration Act 1933 provides that the High Court may set aside any appointment made in pursuance of paragraph (b) of the above statutory provision,²⁴ the statute does not spell out:

- (a) the grounds upon which the High Court can intervene; and
- (b) the party or parties that can petition the High Court to intervene.

Is the High Court seized with powers to intervene, on its own, in proceedings of

private parties? Such form of judicial activism has never been known to exist in Zambia. What is clear, however, is that where any party to a submission made under Part II of the Arbitration Act 1933, or where any person claiming under that party, commences legal proceedings against any other party to the submission or any person claiming under that party, in respect of any matter agreed to be referred, any party to such legal proceedings can, at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the High Court to stay the proceedings.²⁵ The High Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, can make an order staying the proceedings.²⁶ It is important, here, to stress that before an order to stay proceedings is made the court must satisfy itself that the aforesaid conditions are met.

Appointment of three arbitrators

Where a submission provides that the dispute will be settled by three arbitrators, one appointed by each disputing party and a third appointed by the two arbitrators, then, unless a different intention is expressed in that submission,

(a) if one party fails to appoint an arbitrator for seven clear days after the other party, having appointed his ar-

bitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and the award of the arbitrator so appointed shall be binding on both parties as if he had been appointed by consent;

(b) if after each party has appointed an arbitrator, the two arbitrators appointed fail to appoint a third arbitrator within seven clear days after the service by either party of a notice upon them to make the appointment, the Court may, on an application by the party who gave the notice, exercise in the place of the two arbitrators the power of appointing the third arbitrator;

(c) if an arbitrator, appointed either by one of the parties, by the arbitrators, or by the Court, refuses to act, or is incapable of acting, or dies, a new arbitrator may be appointed in his place by the party, arbitrators, or the Court, as the case may be.²⁷

Again phrases such as 'incapable of acting' are repeated and the Arbitration Act 1933 does not provide any helpful meaning. The statute simply says the High Court can set aside an appointment of any person to act as sole arbitrator made in pursuance of the above statutory provision. Although, unlike the case of appointing two arbitrators, the Arbitration Act 1933 points out the parties that can bring an action before the High Court to set aside the appointment of an arbitrator, the

statute is silent, first, on the grounds upon which an appointment can be set aside and, secondly, on the qualifications of arbitrators and umpires. Is it expected that the disputing parties can, and will themselves, provide for such matters in the submission? Again, this brings us back to the issue of illusory prospects for a fully-contingent contract. What is clear, however is that unless a submission provides otherwise, Schedule 1 to the Arbitration Act 1933 applies as part of the terms in the submission.²⁸ The said Schedule 1 provides as follows:

“FIRST SCHEDULE

Section 4

Provisions to be implied submissions

1. If no other mode of reference is provided, the reference shall be to a single arbitrator.
2. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.
3. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them may, from time to time, enlarge the time for making the award.
4. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.
5. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, by any writing signed by him, may, from time to time, enlarge the time for making his award.
6. The parties to the reference, and all persons claiming through them, respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power, respectively, which may be required or called for and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.
7. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.
8. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

9. The cost of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between solicitor and client."

As a general rule, a submission, unless a different intention is expressed therein, is irrevocable.²⁹ A submission can only be revoked by leave of the High Court.³⁰

Statutory powers of arbitrators and umpires

Under the Arbitration Act 1933, both arbitrators and umpires have statutory powers, unless a different intention is expressed in the submission, to administer oaths to disputing parties and witnesses before them.³¹ The exception here is that arbitrators and umpires assume non-statutory powers if the submission contains different intentions from what is contained in the relevant statutory provisions. And, for such an exception to prevail, the intention contained in the submission must be express and not implied.

Arbitrators and umpires also have statutory powers to state a special case for the opinion of the High Court on any question of law involved in the arbitration process.³² And,

(1)The Court shall issue the same processes to the parties and any wit-

ness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.³³

Although the Arbitration Act 1933 is silent on whether a question of fact can also be referred to the High Court for determination, it seems perfectly logical to argue that the High Court cannot be moved to address questions of fact, for so doing would serve only to preempt the role of the arbitrator or umpire.

Where Schedule 1 to the Arbitration Act 1933 has not been waived by the disputing parties, and no contrary intention has been expressed by them, the award of the arbitrator or umpire is final and binding on the disputing parties and the persons claiming under them, respectively.³⁴ However, it is important to add that where the arbitrators or umpire state a special case, the High Court has to deliver its opinion thereon; and such opinion should be added to, and forms part of, the award.³⁵

Under the Arbitration Act 1933, the time for an arbitrator or umpire to make an

arbitral award can, from time to time, be extended by the High Court, whether or not the time for making such an award has expired or not.³⁶ The Arbitration Act 1933 does not, however, spell out the grounds upon which such an extension can be granted. The statute merely adds that the High Court can, from time to time, remit an arbitral award to the reconsideration of the arbitrators or umpire.³⁷

Where an award is remitted, the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award.³⁸

Again, like in the case of extension of time for the pronouncement of an arbitral award, no grounds are provided in the Arbitration Act 1933 upon which remittance of an award can be made. Could it be that the grounds upon which an award is remitted, and the grounds upon which the High Court grants an extension of time, are all expected to be provided by the disputing parties?

Generally, arbitrators and umpires have, in addition, statutory powers to correct in an award any clerical mistake or error arising from any accidental slip or omission.³⁹ But, what is the standard of care required of arbitrators and umpires in carrying out such duties? Are arbitrators and umpires immune from law suits for negligence, arising mainly out of their acts or omissions in the course of business? The paradox is that there are no statutory provisions in the Arbitration Act 1933 to address such matters.

Arbitration procedure under Zambia's legal framework

As a general rule, parties submitting to the arbitration procedure under the Arbitration Act 1933 are expected to provide for their own terms to govern the arbitration procedure.⁴⁰ Schedule 1 to the Arbitration Act 1933 applies, if not excluded expressly in the submission by intentions of the disputing parties, as part of the terms governing the arbitration procedure.⁴¹ The principle behind the idea of having disputing parties provide for their own terms appears to be predicated on the Coase theorem. This theorem postulates as follows:

... in the hypothetical world in which there are no transaction costs to impede bargaining between the parties, where they have full information and are willing to co-operate to their mutual advantage, it would not matter what the court decided, or even if it found that D (defendant) was not liable at all.⁴²

Harris argues that the reason for the above formulation is that the parties would proceed to negotiate an agreement whenever that would produce an efficient outcome.⁴³ But, is efficiency always the preoccupation of disputing parties? What about equity and justice?

The problem with the Coase theorem is that it assumes a number of ideal situations. It assumes an ideal world where parties have full information and there are no transaction costs or tax implications. Parties are assumed to be rational too. But, that is not what the real world is all about.

First, full information is not always present to disputing parties. Secondly, the disputing parties, by mere fact that they are in a dispute, may not be that rational to get to an easy agreement. Third, we have already pointed out that preparing a fully-contingent contract entails high transaction costs. Indeed, the gathering of information is costly, and so is the idea of finding a contracting party. It is almost Utopian to think of a situation where there are no transaction costs. And taxation costs may also shift the burden of agreeing from one party to the other, and thus impeding progress on prospects for agreement.

Under the Arbitration Act 1933, when arbitrators or an umpire have made their award, they are required to sign it and then give notice to the disputing parties of the decision.⁴⁴ The Arbitration Act 1933 also permits arbitrators and umpires to determine their fees for rendering the arbitration services and making the award.⁴⁵ However, there are some problems associated with this view. First, the statute reads:

“When the arbitrators or umpire have made their award, they shall sign it, and shall give notice to the parties of the making and signing thereof, and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.”⁴⁶

Are there any fiduciary obligations on the arbitrator or umpire not to slap extortionate or arbitrary fees on their clients? Or, does Zambia have an established scale of

arbitrators’ and umpires’ fees, designated, say, by statutory instrument or by a professional body regulating arbitrators and umpires? And, is there any incentive structure built into the above statutory provision, such that ADR under the Arbitration Act 1933 remains beneficial to the largely risk-averse Zambian public? What would happen in the future where amounts expected to be paid to arbitrators or umpires outweigh the benefits accruing to disputing parties? A cost-benefit analysis could help to pitch arbitration incentives for both the arbitrators/umpires and the Zambian public at the right level. This development should then be reflected in the legal framework.

Filing of arbitral awards in the High Court

Once an arbitral award has been pronounced by the arbitrator or the umpire, as the case maybe, and the disputing parties have paid the arbitrator’s or umpire’s fees, the arbitrator or umpire is required to cause the award or a signed copy of it to be filed in the High Court.⁴⁷ Notice of the filing should be given to the disputing parties by the arbitrator or umpire.⁴⁸

As a general rule, once an arbitral award has been filed in the High Court it can be enforced as if it were a decree of the High Court.⁴⁹ The exception to this rule is where the High Court remits an arbitral award to the reconsideration of the arbitrators or umpire, or where the arbitral award is set aside.⁵⁰ Also, arbitral awards are sometimes conditional. But, it is not clear what is meant by ‘or in the alterna-

Arbitration Law in Zambia

tive' in section 16(2) of the Arbitration Act 1933:

An award may be conditional or *in the alternative*.

Does the word 'alternative' here mean the same thing as 'unconditional' or does it have a different meaning? It is not readily clear what is meant by the words 'or in the alternative'. Could it be that the alternative to a conditional award is a 'final' award? An award can be unconditional, yet not final. And not all conditional awards are interim awards. So, which of the two, unconditional or final, is the draftsman referring to when he says 'an award may be conditional or [in the alternative]'? Such lacunas in the law affect the efficacy of the legal framework for arbitration.

Setting aside an arbitral award

Where an arbitrator or umpire has 'misconducted' himself, or an arbitration or arbitral award has been 'improperly procured', the High Court can set aside the award.⁵¹ Some of the problems associated with the power of the court to set aside an award are that the Arbitration Act 1933 does not define the terms 'misconducted himself' and 'improperly procured.' For example, when could it be said that an arbitrator or umpire misconducted himself? And, when can it be said that an arbitral award was improperly procured? Does misconduct of the arbitrator or umpire occur, for example, when the arbitrator or umpire has not

heard evidence from all the disputing parties and from all the witnesses? Or, does misconduct refer to the personal behaviour of the arbitrator, say, where he decides to take a bribe from one of the parties to the dispute? And, if so, how different is a case of 'misconduct of the arbitrator' from that of an 'improperly procured' award?

The Arbitration Act 1933 goes on to say:

Where an arbitrator or umpire has misconducted himself, the Court may remove him.⁵²

Again, this begs some fundamental questions:

- (a) What is the standard of care expected of arbitrators and umpires in Zambia?
- (b) Are arbitrators and umpires professionals such that they can be held to a professional standard of care?
- (c) Can arbitrators and umpires be held to a professional standard of care simply because they are paid for what they do?
- (d) And, just, what is the meaning of the phrase 'misconducted himself'?
- (e) And are there any fiduciary duties on arbitrators and umpires in the conduct of their business?
- (f) To whom, if any, are fiduciary duties owed?

Other statutory powers of the High Court in dealing with arbitration procedures

Generally, the High Court can include any term as to costs or otherwise in a court

“THIRD SCHEDULE
(Section 25)

**Protocol on Arbitration
Clauses**

order.⁵³ The High Court also has powers to make rules on (a) the filing of awards and all proceedings consequent thereon or incidental thereto; (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto; (c) the staying of any suit or proceeding in contravention of a submission to arbitration; and (d) the general conduct of all proceedings in court under the Arbitration Act 1933.⁵⁴

Applicability of the Arbitration Act 1889 of the United Kingdom to Zambia

In Zambia, if a contract provides that any arbitration under that contract will be governed by provisions of the Arbitration Act 1889 of the United Kingdom, then such contract will be read as if Part II of the Zambian Arbitration Act 1933,⁵⁵ whose provisions have already been examined above, were substituted for the said English statute.⁵⁶

Applicability of international legal instruments to Zambia

Part III of Zambia's Arbitration Act 1933 deals mainly with the staying of court proceedings in respect of matters that are to be referred to arbitration. Also, the applicability to Zambia of the Protocol on Arbitration Clauses, signed on behalf of His Britannic Majesty at a meeting of the Assembly of the League of Nations on September 24, 1923, is discussed. The full text of the Protocol reads as follows:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject. Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the United Nations, in order that the other Contracting States may be so informed.
2. The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place. The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own

Arbitration Law in Zambia

- territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.
3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.
 4. The tribunals of the Contracting Parties on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators. Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or become inoperative.
 5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the United Nations, who shall notify such deposit to all signatory States.
 6. The present Protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratifications.
 7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.
 8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate. The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the United Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States. The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.⁵⁷
- Against the backdrop of the above Protocol, notwithstanding provisions of Part II

of the Arbitration Act 1933, if any party to a submission made in pursuance of an agreement to which the Protocol applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings can at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that court to stay the proceedings.⁵⁸ The court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, can make an order staying the proceedings.⁵⁹

Part IV of the Arbitration Act 1933 of Zambia proceeds:

"26. The provisions of this Part apply to any award made after the 28th July, 1924-
(a) in pursuance of an agreement for arbitration to which the Protocol set out in the Third Schedule⁶⁰ applies; and
(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as His Britannic Majesty, being satisfied that reciprocal provisions have been made, may have declared to be parties to the Convention on the Execution of Foreign Arbitral Awards signed at Geneva on behalf of His Britannic Majesty on the 26th September, 1927, which Convention is set forth in the Fourth Schedule,⁶¹ and of whom the other is subject to

the jurisdiction of some other of the Powers aforesaid; and

(c) in one of such territories as His Britannic Majesty, being satisfied that reciprocal provisions have been made, may have declared to be territories to which the said Convention applies;

and an award to which the provisions of this Part apply is in this Part referred to as 'a foreign award.' (As amended by S.I. No. 152 of 1965)

27. (1) A foreign award shall, subject to the provisions of this Part, be enforceable in the Court either by action or under the provisions of section sixteen⁶² of Part II.

(2) Any foreign award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings, and any references in this Part to enforcing a foreign award shall be construed as including references to relying on an award."⁶³

It is not, however, clear if provisions of Parts III and IV of the Zambian Arbitration Act 1933 are as binding on the Zambian State as provisions of Part II of that Act. The Arbitration Act 1933, however, proceeds to deal with the enforcement and recognition of foreign arbitral awards in the manner discussed below.

In order for a foreign arbitral award to be enforceable in Zambia, the award must have (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;

Arbitration Law in Zambia

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties; (c) been made in conformity with the law governing the arbitration procedure; (d) become final in the country in which it was made; (e) been in respect of a matter which could lawfully be referred to arbitration under the law of Zambia; and the enforcement thereof must not be contrary to the public policy or the law of Zambia.⁶⁴ Following below is the full text of the Convention on the Execution of Foreign Arbitral Awards 1927. This treaty, as noted above, constitutes Schedule 4 to the Arbitration Act 1933.

“FOURTH SCHEDULE (section 26)

Convention on the Execution of Foreign Arbitral Awards

Article 1

In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called ‘a submission to arbitration’) covered by the Protocol on Arbitration Clauses opened at Geneva on 24th September, 1923,⁶⁵ shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present

Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties. To obtain such recognition or enforcement, it shall, further, be necessary-

(a) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) that the award has been made by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied-

(a) that the award has been annulled in the country in which it was made;

(b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that being under a legal incapacity, he was not properly represented;

(c) that the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the [award] is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of Law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4

The party relying upon an award or claiming its enforcement must supply, in particular-

(a) the original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(b) documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(c) when necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5

The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Arbitration Law in Zambia

Article 6

The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923.

Article 7

The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified. It may be ratified only on behalf of those Members of the United Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified. Ratifications shall be deposited as soon as possible with the Secretary-General of the United Nations, who will notify such deposit to all the signatories.

Article 8

The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9

The present Convention may be denounced on behalf of any Member of the United Nations or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the United Nations, who will immediately send a copy thereof certified to be in conformity with

the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it. The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the United Nations. The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10

The present Convention does not apply to the colonies, protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned. The application of this Convention to one or more of such colonies, protectorates or territories in which the Protocol on Arbitration Clauses, opened at Geneva on 24th September, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the United Nations by one of the High Contracting Parties. Such declaration shall take effect three months after the deposit thereof. The High Contracting Parties may at any time denounce the Convention in all or any of the colonies, protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11

A certified copy of the present Convention shall be transmitted by the Secretary-General of the United Nations to every

Member of the United Nations and to every non-Member State which signs the same.”

In Zambia, by and large, Part IV of the Arbitration Act 1933 mirrors provisions of the Convention on the Execution of Foreign Arbitral Awards 1927. Under Zambia's Arbitration Act 1933, a foreign arbitral award will not be enforceable if the High Court of Zambia is satisfied that:⁶⁶ (a) the award has been annulled in the country in which it was made; or (b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity⁶⁷ and was not properly represented; or (c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration. This position is qualified by the Arbitration Act 1933 as follows:

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement, subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b), and (c) of subsection (1), or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2), entitling him to contest the validity of the award,

the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.⁶⁸

The party seeking to enforce a foreign arbitral award must produce before the High Court the original award or a copy thereof duly authenticated in the manner required by the law of the country in which it was made, plus evidence proving that the award has become final, and such other evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b) and (c) of subsection (1) of section 28 of the Arbitration Act 1933 are satisfied.⁶⁹ The conditions mentioned in section 28(1)(a),(b) and (c) of the Arbitration Act 1933 are as follows:

In order that a foreign award may be enforceable... it must have (a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed; (b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties; (c) been made in conformity with the law governing the arbitration procedure...

Where a document that is required to be produced in support of an application to enforce a foreign arbitral award is in a foreign language, the onus is on the party seeking to enforce that award to produce a translation certified as correct by a dip-

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lomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of Zambia.⁷⁰

As a general rule, the High Court of Zambia has powers to make rules with respect to the evidence which should be furnished by a party seeking to enforce a foreign arbitral award.⁷¹ Foreign arbitral awards will not be considered final if any proceedings for the purpose of contesting the validity of such awards are pending in the country in which the award was made.⁷² But, nothing in the Arbitration Act 1933 will prejudice any rights which a person would have had of enforcing in Zambia a foreign arbitral award or of availing himself in Zambia of a foreign award if the Arbitration Act 1933 had not been enacted.⁷³ Also, where a foreign arbitral award is based on an arbitration agreement governed by the law of Zambia, then that award is enforceable in Zambia without even invoking provisions of the Zambian Arbitration Act 1933 on foreign awards.⁷⁴

Conclusion

This paper has examined the efficacy of the legal framework for arbitration in Zambia. Areas of vulnerability in the legal framework were identified and proposals were spelt out to redress some of these shortcomings. Also, the paper examined some of the advantages of using arbitration over traditional court processes. Pertinent international law issues

applicable to arbitration in Zambia were examined. Although ADR is thought of by many as a way in which to de-congest court systems that experience a backlog of cases, especially commercial law cases, a fear was expressed that the rapid rate at which developing countries and transition economies are embracing ADR poses a threat on these countries having ADR systems which only breed kangaroo courts and kangaroo justice.

It was observed further that developing countries and transition economies have adopted other means too, and in line with technical assistance from donor countries and multilateral financial institutions, improve their judicial systems. Examples of such strategies include the introduction of training programmes for members of the judiciary, the computerisation of information technology at court houses, the introduction of commercial court divisions of the High Court, and the raising of salaries of judges in order for them not to be susceptible to corrupt practices. There is, however, a lack of consensus on how to measure the success of all these strategies.

* LLB (Zambia), BCL/MPhil (Oxford), MBA (Harvard), PhD (Warwick), FCI, FRSA, Advocate of the High Court for Zambia, Rhodes Scholar, formerly Lecturer in Law in the University of Warwick, UK; presently with the World Bank, Washington DC, USA. The interpretations and conclusions expressed in this paper are entirely those of the author. They do not necessarily represent the views of the World Bank, its executive directors or the countries they represent.

Notes

1. ICC International Court of Arbitration, "International Dispute Resolution Services".

- ices: ICC Arbitration in 2001," at: <<http://www.iccwbo.org/index_court.asp>>, visited on March 29, 2002.
2. See for example Campbell, D., and Meek, S., *The Arbitration Process*, (The Hague; Boston: Kluwer Law International, 2002); Smit, H., and Pechota, V., *Arbitration Rules – National Institutions*, (New York: Juris, 1999); Finn, P., *Mediation and Arbitration*, (St. Paul, Minn.: West Group, 2002); Fellas, J., *International business and litigation and arbitration*, (New York, N.Y.: Practising Law Institute, 2002); Lowenfeld, A.F., *International litigation and Arbitration*, (St. Paul, Minn.: West Group, 2002); Greenberg, R.M. *Enforceability of Arbitration Agreements in Contracts of Employment*, (Washington, DC: World Jurist Association, 2001); Ye, M.H., *International Commercial Arbitration in China: Law and Practice*, unpublished LLM thesis, (Arizona: University of Arizona, 1998); Rau, A.S., Murray, J.S., Sherman, E.F., and others, *Arbitration*, (Westbury, N.Y.: Foundation Press, 2002).
 3. See ICC International Court of Arbitration, "International Dispute Resolution Services: Introduction to Arbitration," at: <<<http://www.iccwbo.org/court/english/arbitration/introduction.asp>>>, visited on March 29, 2002.
 4. See ICSID web-site at: <<<http://www.worldbank.org/icsid/about/about.htm>>>, visited on March 31, 2002.
 5. This treaty is available Online at: <<<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>>>, visited on March 31, 2002.
 6. See ICSID web-site at: <<<http://www.worldbank.org/icsid/about/about.htm>>>, visited on March 31, 2002.
 7. See *Ibid.*
 8. See generally Mwenda, K.K., and Gobir, N.G., *International Commercial Arbitration and the International Centre for the Settlement of Investment Disputes*, 30 *Zambia Law Journal*, 1998; this article can also be seen Online at the following web site: <<<http://zamlil.zamnet.zm/comment/zlj/artsfull/30z91.htm>>>, visited on March 31, 2002.
 9. See ICC International Court of Arbitration, "International Dispute Resolution Services: Introduction to Arbitration," at: <<<http://www.iccwbo.org/court/english/arbitration/introduction.asp>>>, visited on March 29, 2002.
 10. See *Ibid.*
 11. See *Ibid.*
 12. *Ibid.*
 13. *Ibid.*
 14. Part I of the Arbitration Act 1933 contains only two short statutory provisions which, firstly, state the short title of the statute, and secondly, define the words 'the Court' and 'submission'. The bulk of statute law on arbitration in Zambia is found in Part II and other parts of the Arbitration Act 1933.
 15. Arbitration Act 1933, secs. 23 and 24.
 16. *Ibid.*, sec. 21.
 17. *Ibid.*, sec. 5.
 18. *Ibid.*, sec. 5.
 19. *Ibid.*, sec. 5.
 20. *Ibid.*, sec. 2.
 21. See Arbitration Act 1933, sec. 2, which reads in part as follows: "In this Act, unless the context otherwise requires – 'the Court' mean the High Court."
 22. Arbitration Act 1933, sec. 7.
 23. *Ibid.*, sec. 8.
 24. *Ibid.*, sec. 8.
 25. *Ibid.*, sec. 6.
 26. *Ibid.*, sec. 6.
 27. *Ibid.*, sec. 9.
 28. *Ibid.*, sec. 4.
 29. *Ibid.*, sec. 3.
 30. *Ibid.*, sec. 3.
 31. *Ibid.*, sec. 10(a).
 32. *Ibid.*, sec. 10(b).
 33. *Ibid.*, sec. 12(1),(2).

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34. See paragraph 8 of Schedule 1 to the Arbitration Act 1933.
35. Arbitration Act 1933, sec. 11(3).
36. *Ibid.*, sec. 13.
37. *Ibid.*, sec. 14(1).
38. *Ibid.*, sec. 14(2).
39. *Ibid.*, sec. 10(c).
40. See above. See also paragraph 2 of Schedule 3 to the Arbitration Act 1933.
41. See above. See also Arbitration Act 1933, sec. 4.
42. See Harris, D., Remedies in Contract and Tort, (London: Weidenfeld and Nicolson, 1988), p. 335.
43. *Ibid.*, p. 335.
44. Arbitration Act 1933, sec. 11(1).
45. *Ibid.*, sec. 11(1).
46. *Ibid.*, sec. 11(1).
47. *Ibid.*, sec. 11(2).
48. *Ibid.*, sec. 11(2).
49. *Ibid.*, sec. 16(1).
50. See below for a fuller discussion on remittances of arbitral awards to the reconsideration of arbitrators and umpires, and on the setting aside of arbitral awards.
51. Arbitration Act 1933, sec. 15.
52. *Ibid.*, sec. 17.
53. *Ibid.*, sec. 18.
54. *Ibid.*, sec. 20.
55. As noted earlier, Part I of the Arbitration Act 1933 contains only two short statutory provisions which, firstly, state the short title of the statute, and secondly, define the words 'the Court' and 'submission'. The bulk of statute law on arbitration in Zambia is found in Part II and other parts of the Arbitration Act 1933.
56. Arbitration Act 1933, sec. 22. See also Statutory Instrument No. 152 of 1965 of Zambia.
57. See Schedule 3 to the Arbitration Act 1933 of Zambia.
58. Arbitration Act 1933 of Zambia, sec. 25. See also Statutory Instrument No. 152 of 1965 of Zambia.
59. See Arbitration Act 1933 of Zambia, sec. 25.
60. See above.
61. The full text of the Convention is provided below.
62. Section 16 of the Arbitration Act 1933, which has already been examined above, reads as follows: "(1) An award on a submission on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court. (2) An award may be conditional or in the alternative."
63. Arbitration Act 1933, secs. 26 and 27.
64. *Ibid.*, sec. 28(1).
65. The full text of the Protocol has already been provided above.
66. Arbitration Act 1933, sec. 28(2).
67. It is not clear what constitutes legal incapacity. Does legal incapacity refer, for example, to age or mental state?
68. Arbitration Act 1933, sec. 28(2),(3).
69. *Ibid.*, sec. 29(1).
70. *Ibid.*, sec. 29(2).
71. *Ibid.*, sec. 29(3).
72. *Ibid.*, sec. 30.
73. *Ibid.*, sec. 31(a).
74. *Ibid.*, sec. 31(b).