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A CRITICAL ANALYSIS OF THE ARBITRATION AND CONCILIATION ACT OF UGANDA

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Abstract

International arbitration is based upon the parties „consent[2] *and not surprisingly the arbitration agreement is considered by leading commentators to be the foundation stone of international arbitration. Arbitration is a consensual process based the doctrine of party autonomy. It"s a truism of arbitration law that arbitration is a creature of party choice.*[3] *This feature reinforces the contractual basis of arbitration and is reflected in the vasty majority of international conventions, national laws and institutional laws; therefore party autonomy is considered one of the most doctrines in international arbitration.*[4] *Since parties agree that all current "compromis" and future "clause compromissoire" disputes should be solved through arbitral proceedings, there is no reason as to why all provisional measures emanating from arbitration agreement should not be granted by a competent arbitration tribunal. It should however, be noted that this is not always the case. Although party autonomy is the bible in arbitral proceedings, ithas limitations.*[5] *This article examines the Arbitration and Conciliation Act of Uganda, in support of the role played by doctrine of party autonomy in granting arbitral measures with a view of providing recommendations and reform where there gaps in the Arbitration and Conciliation Act of Uganda.*[6] *The main focus of this article is that the jurisdiction of the tribunal in Uganda should be given*

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[2] See Civil Procedure Rules of Uganda Order XLVII. See Arbitration and Conciliation Act 2000 S.2 1 (c) on interpretation of the Act, provides that ― *arbitration means an agreement by the parties to submit to arbitration all or certain disputes which have risen or which may arise between them in respect of a defined legal relationship, whether contractual or not."* See S.2 (2) of the Same Act.

[3] Ibid S.17 (1), 15 (2), 11(2),8(1),10 (1), 6(1),18, 20,22 (2),23(3), 24 (2), 25, 26(1)-(3), 31(9) (a)-(b)

[4] See Jimy Muyanja, Compendium of ADR Laws, A practioner's Handbook in Uganda (CADER), on Arbitrationand Conciliation Act Cap 4 Laws of Uganda. The Act is of particular significance, because it incorporates UNCITRAL United Nations Commission on International Trade, Model Law, New York Convention and restricts court intervention under S.9.

[5] See Lord Diplock, in *Bremer Vulkan Schiffbau* and *Maschinenfabrik* v *South India Shipping Corporation Ltd* [1981] Ac 909, where the Court of Appeal held that the English Court has no general supervisory powers over the conduct of arbitration that are more extensive than the powers conferred by the Arbitration. See Gary Born International Commercial Arbitration (2nd edn, Kluwer Int 2009) 1170-1172. See Emmanuel Gaillard and John Savage (eds), Fourcahard Gaillard and Goldman on International Commercial Arbitration (5th edn, Oxford University Press, 2009) at 85.

[6] The Arbitration and Conciliation Act Cap 4 Laws of Uganda Revised Edition 2000, regulates the process of arbitration and Conciliation in Uganda. This Act repealed the Old Arbitration Act 1962 Revision Cap 55. It applies to both domestic and international, including enforcement of foreign awards.

unlimited jurisdiction in granting interim measures during arbitral proceedings, and that courts should not intervene unless called upon for support.

Introduction:

The article examines the current Uganda, Arbitration Act and Conciliation Act 1996, Cap 4,[7] and addresses areas of reform in order to make Uganda Arbitration and Conciliation Act, competitive globally, for example; the Hong Kong,[8] London,[9] Paris, Dubai, Nairobi, with international centers which attract a multi-billion arbitration injection in their economy. The Arbitration and Conciliation Act,[10] regulates the process of arbitration and conciliation in Uganda. This act repealed the old Arbitration Act.[11] It applies to both domestic arbitration and international commercial arbitration,[12] including enforcement of foreign awards, and for the first time incorporates the UNCITRAL Model Law,[13] and New York Convention that restricts court Intervention.[14]

The article restricts the researcher not to discuss Part IV, which addresses registration[15] and enforcement [16]of ICSID[17] Awards. In other words ICSID deals with bilateral investment treaties, commercial contracts and choice of arbitration. Part V addresses Conciliation.[18] The arbitral powers are derived from the doctrine of party autonomy or the arbitration agreement.[19] This article examines the current trends, success and challenges facing the arbitration industry in Uganda. The author analyses the current arbitration Act of Uganda with a view to highlight the government of Uganda‘s legal and institutional frame work for effective forum for commercial arbitration. With increased globalization of commerce, arbitration has become the preferred mechanism for settlement of international and domestic

[7] See Jimmy Muyanja, Center For Arbitration 7 Dispute Resolution (CADER) Compendium of ADR Laws, PR actioner‘s Handbook, 2009. at 13-25.

[8] See Hong Kong Arbitration Act S.2b, Swedish Arbitration Act S.25 (4). French Commercial Code Art 1494.

[9] LCIA Art.25

[10] Cap 4 Laws of Uganda Revised Edition 2000.

[11] Arbitration Act 1964 Revision Cap 55.

[12] See the views of Anthony Conrad Kakooza in his paper,‖ Arbitration, Conciliation and Mediation in Uganda‘ A paper delivered to the students of LDC in 2011.

[13] United Nations Commission on International Trade (UNCITRAL).

[14] See New York Convention, Art.II(3) applied in S.9 of the Arbitration Act 1996.

[15] See Arbitration Act and Conciliation Act Cap 4 S. 46

[16] Ibid S.47

[17] International Centre for the Settlement of Investment Disputes.

[18] Ibid S.48- 66.

[19] Channel *Tunnel* v Balfour Beaty Construction [1993] AC 334 at 263. See Rule 9 of the East African Court of Justice Arbitral Rules.

commercial disputes.[20] In other words arbitration in Uganda given the oil exploration, increased commerce, it should grow in tandem with globalization of commerce to be relevant in the twenty century.[21]

The article will address the limited scope of the arbitral tribunal to grant interim measures under the current Arbitration and Conciliation Act, and will seek for reform.[22] The article will examine the role of Uganda courts in support of arbitration but such intervention should be on host reasons.[23] The current arbitration Act and Conciliation Act only provides the power to grant interim measures by the court,[24] for example taking of evidence.[25] The English Arbitration Act provides wide scope of power to grant interim measures.[26] The Arbitral tribunal power to grant interim measures is limited under S.17 of the Arbitration and ConciliationAct, which provides

" Unless the parties" agree the appointing tribunal may, at the request of a party, order any party to take such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and the arbitral tribunal may require any party to provide appropriate security in *connection with the measure*.‖

The powers of the tribunal under the current Arbitration and Conciliation Act are ambiguous, as it does not provide expressly the orders the tribunal can grant to the claimant.[27] The power to order interim measures is only provided to the courts, [28]which has the jurisdiction to grant such measures[29] before commencement of proceedings, during and after the final award. [30] There is urgent need to amend the current Arbitration to accommodate all the interim measures that can be sought by

[20] See Franck, S.D, The Role of International Arbitrators,at 1, available at https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-IL-ILSA-Article.docsfranck2.pdf, accessed on 20/May 2017.

[21] See Cresswell- International Arbitration; Enhancing Standards,‖ The Resolver, Chartered Institute of Arbitrators, United Kingdom, February 2014 at 10-13.

[22] See East African Court of Justice Arbitral Rules S.

[23] *Arab African Energy Corp v Olieprodukten Nederland BV* 485 US 271 (1988).

[24] Ibid S.6.

[25] IbidS.27.

[26] See English Arbitration Act 1996 S.39, 34, 38., 48

[27] See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth* Inc 473 U.S 614 (1985).

[28] See The East African Court of Justice Arbitration Rules Art.9.

[29] see *Coppe –Lavalin SA v Ken –Ren Chemicals Fertilizers Ltd* [1994] 2 ALLER 465.

[30] Arbitration Act and Conciliation Act Cap 4 S. 6.

the tribunal.[31] This is based on the definition of the arbitration, which refers to a mechanism to refer current and future disputes to the arbitral tribunal.[32]

The English subsidiary model provides novelty power to the tribunal to grant interim measures.[33] The power of the tribunal is widely recognized by all international arbitral rules[34] and conventions.[35] The question of whether or not an arbitral tribunal has the authority to grant provisional measures must be determined under the Lex arbitri (the law governing arbitration). The types of interim measures that may be granted in a specific case is different question which is governed by either the relevant procedure rules or the *Lex causae*, depending on which interim measure are involved.[36]

Definition of Interim Measure:

It is any temporary measure, whether in the form of an award or in any form, by which, any time prior to the issuance of the ward by which, at any time prior to issuance of the award by which the dispute is finally decided, the tribunal orders toa party.[37]

International commercial arbitration is primary based upon the parties' [38]and not surprisingly the arbitration agreement is considered by leading commentators to be the foundation stone of international arbitration.[39] Party autonomy rule is based on the assumption that parties'[40] to an arbitration agreement are knowledgeable[41] and informed, and they use the doctrine responsibly.[42] Lord Diplock in *Bremer Vulkan schiffbau and Mashinenfabrik v South India Shipping Corporation Ltd*,[43] held that

[31] See Kariuk Muigua, Effectiveness of Arbitration Institutions in East Africa February 2016 at 2.

[32] Ibid S.2 (e) .

[33] see Sutton Kendal and Grill (1997) at 257.

[34] See Art.28 of the Arbitration Rules of 1993 of the Bulgarian Chamber of Commerce, UNCITRAL Model Law Article 26, ICC Arbitral Rules Art.20(5), LCIA Art.25.

[35] See The Republic of Lithuanian Law on Commerce Arbitration, Official Gazette, 1996 No.39-961 (2001).

[36] See Brussels Regulation Art.33.

[37] UNCITRAL Model Law Art.17 (2).

[38] see Julian Lew, Loukas Mistelis and Stefan Kroll, Cooperative International Commercial Arbitration (Kluwer International 2003) at 18.

[39] See Born, International Commercial Arbitration-Commentary and Materials (3rd edition, Kluwer Law International 2001) at 1170-1172.

[40] The expression ─ *unless otherwise agreed by the parties*‖ is a frequent occurrence in Uganda , Arbitration and Conciliation Act under S.8,11,17,20,21,24,25,26.

[41] See Tweddale & Tweddale, who refers to party autonomy of the arbitration agreement as being the cornerstone of the UNCITRAL Model Law.

[42] See *Channel Tunnel v Balfour Beatty Construction* [1993] Ac 334 at 263.

[43] [1981] AC 909.

the English courts had no general supervisory power over the conduct of arbitration more extensively than the power conferred by the parties. The tribunal derives their power to grant all interim measures from party autonomy –*voluntapartiumfacit."*[44] This principle derives from the concept that the intent of the parties shall be respected and enforceable, all arbitration, party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.[45] It is incumbent to note that those who chose arbitration should use it a mechanism to order interim measures, and any departure should show very good reason from departing from it.[46]

There is urgent need to widen the scope or the powers of the tribunal to grant all interim measures in order to attract investors and other users of arbitration as the best forum for arbitral proceedings. The research, examines all the types of arbitral provisional measures [47]in order to identify some of the problems that the tribunal may face in granting some interim measures. [48]

The research will provide solutions to identified problems in order to enhance the effectiveness of interim measures or making Uganda a competitive forum for arbitral proceedings. The American Arbitration Rules; provide that the arbitraltribunal has the power grant all interim measures.[49] It was held in the American Court, in the case of Mitsubishi Motors, that ― *expansion of (American) business and industry will hardly be encouraged if, notwithstanding solemn contracts, (we) insist on a parochial concept that all disputes must be resolved under our laws* and *in our courts…. we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our courts, and resolved in our courts."* [50] The analysis of the American Court was that all commercial disputes should be resolved by arbitration mechanism.

[44] See Chatterjee, The Reality of the Party Autonomy Rules in International Arbitration (2003), Journal of International Arbitration 20 (6) 539-560.

[45] See ICC Rules Art.23 (1), ICICA Rules Art.81.

[46] see Lady Justice A.E.N Mpagi-Bahigeine J.A, applying Order 47 of the Uganda Civil Procedure Rules in the caseof *Uganda National Social Security Fund and Other v Alcon International Ltd Civil Appeal* No o2 of 2008.

[47] ICC Rules (2012 version) Art. 28 of the ICC Rules.

[48] American Arbitration Act Art.21 (1) and 27 (7).

[49] See First Options of *Chicago Inc* v *Kaplan* 514 US 938 (US Cir 1995).

[50] See *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth* 473 US Cir 614 (1985) at par 10.

2 Types of Arbitral Interim Measures in Support of Arbitral Proceedingsunder The Current Arbitration and Conciliation Act:

2.1 Orders of Preservation of Status Quo:

One of the interim measures that could be ordered by the tribunals in Uganda underthe Arbitration and Conciliation Act, is an order for preservation of the status quo,[51] between the parties[52] or alternatively, preserving specified contractual or legal relations.[53] This form of interim measure is referred to in the UNCITRAL Model Law, [54] for example; a party may be ordered not to take certain steps terminating an agreement,[55] disclosing trade secrets,[56] calling a letter of credit or using disputed intellectual property pending a decision on the merits. [57]Such a measure ensures thatthe effective enforcement of the award,[58] including measures to preserve the goods such as their deposit with third person, sale of perishable goods, opening up a bank's credit, the use of machinery, the positing of a security deposit for any foreseeable damages. [59] The main objective of such an order is to preserve the status quo until the final decision is rendered.[60]

It may be argued that appropriate analysis is not to attach decisive importance to the state of affairs at the time of the request for interim measure,[61] but to take into account the relative injury that is likely to be suffered by both the parties'[62] respectively during arbitral proceedings,[63] as well as the prima facie claims and defenses of each party. Where one party has a strong prima facie case on the merits and faces serious injury, the tribunal should be prepared to order restoration of the status quo,[64] as doing so accomplishes justice between the parties, an important

[51] See *Emilio Augustin Maffezin v Kingdom of Spain*, Procedural Order No.2 ICSID Case No. ARB/97/7.

[52] UNCITRAL 2006 Revision Art.17 (2) (a).

[53] See Young M Duperym C, Interim Measures to Prevent harm: what can be done by The Arbitral Tribunal/ Swiss Arbitration Association, available at http://www.arbitration-ch.org/below-40/pdf/interim-measures-mycd.pdf, accessed 6 August 2017, see Branson, Interim Measures of Protection in Changing International Commercial Arbitration world Croatian Arbitration Yearbook 2002 at 9-12.

[54] See UNCITRAL Model Law Art.17 (2) (a).

[55] See *Wicketts* v *Brine Builders* [2001] CILL 1805.

[56] see Patricia Shaughnessy, Arbitrator Power to Preserve Status Quo early, Presentation for the Vienna Arbitration(25 Jan 2013), Stockholm University.

[57] See UNCITRAL Model Law (2006) Art. 17 (2) (1).

[58] French Commercial Code Art 1494, Swedish Arbitration Act S.25 (4).

[59] See Procedural Order in ICC Arbitration No.12 (1989) 12, *Consrtium Ltd v Republic of Bulgaria* Order ICSID Case No. ARB/03/24 at 38.

[60] See Swartz in Conservatory and Provisional Measures in International Arbitration Ninth Joint Colloquium on International Arbitration No.6 of 1992, Paris ICCHQ.

[61] *Prima Paint Corp v Flood & Conklin Manufacturing Co* 388 US 395 (1967).

[62] See Rules 2012 version Art.6 (1).

[63] *Vimar Serurors S.A v MV Sky Reefer* 115 S. ct 2322.

[64] See Mustill and Boyd Commercial Arbitration (2nd edn 1989) at 223.

section that needs to be provided in arbitration Act.[65] This also supported by the UNCITRAL, under Art.17 (2) (a). There is a need to amend the current arbitration Act to meet the demands of commerce. Since arbitration is the heart of modern trade.[66] In order to prevent imminent harm or prejudice to arbitral process, of a means of preserving assets out of which a subsequent award may be satisfied or preserve evidence that may be relevant and material to the resolution of the dispute.

2.2 Order requiring Specific Performance of Contractual Obligations:

Arbitral tribunal sometimes order what common law practitioners refer to as specific performance, requiring a party to perform his contractual obligations.[67] A party may be ordered to continue to perform his contractual obligation; for example, shipping products, for providing intellectual property in order to ensure the claimant's enjoinment of his rights.[68] Indeed, such measures stabilize the legal relations between the parties' throughout the proceedings, including requiring continued observance of contractual obligations, protecting of trade secrets and proprietary information. It should be noted that given the private nature of arbitration, the arbitral tribunal may not be able to effect such measure, on the grounds that the rules of civil procedure or law of obligation does not always apply in arbitral proceedings. If a party refuses to comply with such an order granted by the tribunal. The Uganda Arbitration and Conciliation Act, should specifically provide a clause that provisional measures have the same effect as any other civil or commercial contract, [69]whereby a party which breaches an essential term of the contract can be ordered to pay damages or to comply with an order for specific performance of the contract.[70] In addition, the agreement should also entail contractual obligation (infringement clauses), where parties' can agree in the contract that the courts will grant interim measures. Such measures should only be submitted to exequatur of a national judge, where the tribunal lacks power.

2.3 order to make an interim Payment on Account of Costs:

This sort of order is designed to ensure that a party's claim is well founded and not rendered nugatory because of the deterioration in the financial condition of its counter-party or the deliberate diversion of assets. So long as there are reasonable for believing that party's financial condition will deteriorate during the course of the

[65] Uganda Arbitration & Conciliation Act 1996.

[66] UNCITRAL Art.17 (1)-(2).

[67] See LCIA Rules Art.25 (1) (c).

[68] see English Arbitration Act 1996 S.48 (5) (b).

[69] see Report of the United Nations Secretary General Settlement of Commercial Disputes, A/CN.9?WG.IIWP.108.

[70] see Mark Appel, Emergency and Interim Relief in International Arbitration ADR Currents Vol.7 No. 1 (March May 2002) at 1.

arbitral proceedings, thereby putting its ability to satisfy the final award into jeopardy,[71] a tribunal is justified in ordering security. The Uganda Arbitration Act, S. 64 provides, that conciliator may direct each party to deposit an equal amount as advance for the costs referred in S. 63. This section is some how ambiguousbecause of the usage of the word conciliator instead of an arbitrator or tribunal. Indeed the enactment of the arbitration act with conciliation confuses those who would want to come to Uganda for arbitral dispute settlement. The is a need to separate arbitration from any other alternative dispute resolution mechanism of its international nature.[72] There is a need in the Act to provide for interim payment on account of the costs of the arbitration.[73] The English Arbitration Act, under S.39 provides for an interim payment on account in a clear expressed language. It should be noted that the phrase‖ costs of arbitration‖ must be taken to include legal costs. The wording of costs in Uganda Arbitration Act and Conciliation does not explicitly provide costs and expenses, to include legal and other expenses of the parties' fees and expenses of the tribunal determined and approved by the tribunal.[74] The tribunal has such power due its competence to rule on its jurisdiction.[75] Courts should only support the intentions of the parties in arbitral proceedings,[76] where any case brought to judicial courts,[77] should be referred to arbitration.

2.4 Ex Parte Orders:

Ex parte orders are orders granted without notification of the respondent by the tribunal in order to avoid damage or dissipation of the property or assets, crucial to the arbitral proceedings.[78] The Uganda Arbitration Act does provide any authority for the tribunal to grant ex parte order, or even the courts. The question that rises is whether arbitrators should be able to grant interim measures on ex parte basis without notice or hearing from the party against whom the order is sought. This is a contentious issue and has led to vigorous debate among the UNCITRAL drafter.[79]

[71] see English Arbitration Act 1996 S. 39 (2).

[72] Kenyan Arbitration Act 1996 S.32 B.

[73] *Emmottv Michael Maritime & Partners Ltd No. 2* [2009] 1 Lloyds Rep 233, see *Pacific Maritime* Ltd v *Hlystone Overseas Ltd* [2008] 1 Lloyd's Rep 371.

[74] See Kenyan Arbitration Act 32 B.

[75] Ibid S.17, Uganda Arbitration and Conciliation Act Cap4 S.16.

[76] *East African Development Bank v Ziwa Horticultural Exporters Ltd* ,HIGH COURT Miscellaneous ProvisionNo. 1048 of 2000 arising from Company's Cause No.11 of 2000.

[77] See *Shell (U) Ltd v Agip (U)Ltd* Supreme Court Civil Appeal No. 49 of 1995 (Unreported), where Justice Tsekooko held that its now trite law that where the parties have voluntary chosen by agreement, the forum…. Should show good reason to depart from.

[78] See Croatian Law on Arbitration Art17 (2), which provides that the parties have the right to respond to claimsand allegations of their adversary, see Zagreb Rules 2002 Art.26.

[79] see Van Houtte, Ten Reasons Against The proposal for Ex parte Interim Measures of Protection in Arbitration International (2004) N.2 at 85.

The proponents argue that interim measures become worthless if not ordered ex parte because otherwise the indispensable requirements to ensure their effectiveness. The elements of surprise and rapidly are lost.[80] On the other hand, the main argument against giving the arbitral tribunal the power to grant ex parte orders is the risk of inadmissibility, and that they should be ordered after hearing the parties.[81] It is important to note that UNCITRAL Model Law states that the tribunal may at party's request grant interim measures.[82] Its incompatible with arbitration agreement for a party to seek such interim measures from the court[83] under Kenyan Arbitration Act,[84] for a party to seek for interim measures from High Court, before or during the proceeding. The decision of the tribunal in regards to the interim measures should be final, as evidenced in Kenyan Arbitration Act.[85] The Uganda Arbitration Act and Conciliation Act regulate operation of both arbitration and conciliation (arbitrator or conciliator). Although the Act provides incorporates UNCITRAL Model Law, it does not provide immunity of the arbitrator in granting such orders as provided in Kenya.[86] ICDR Rules 2006, provides for exparte application for relief where the application for emergency relief includes a statement certifying that all parties have been notified in writing or explaining the steps that were taken to notify the parties' of the application for such a relief.[87] The McCreay[88] doctrine holds that an arbitration agreement pre-empts the court's jurisdiction even to grant interim measures.

2.5 Orders For Prohibition Aggravation of Parties' Dispute:

The main objective of such orders is to prevent or prohibit or any action that would aggravate or exacerbate the parties' disputes.[89] Such orders may be directed towards forbidding public statements obstructing or interfering with contractual obligations.[90] Such orders may be directed towards forbidding public statements obstructing or interfering with contractual obligations.[91] There is a tendency by the

[80] See Merkin, Arbitration Law Monthly December 2008/ Jan 2009 Vol.9 No.1.

[81] See Australian Law 2005 S. 593 CPC.

[82] See UNCITRAL Model Law Art.26.

[83] *Farmland Industries Ltd* v *Global Exports Ltd* [1991] HCB 72.

[84] Kenya Arbitration Act S. 7 (1) –(2).

[85] see Kenya Arbitration Act S.7 (2).

[86] Ibid S.16B (1)-(2) which provides an arbitrator shall not be liable for any thing done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator.

[87] Rule 37, see Working group Revised UNCITRAL Arbitration Rules: Comparison to Model Law Reflects Greater Flexibility and Remaining Uncertainty, International Commercial Arbitration Brief Vol.1 No.1 (2011) at 15-13.

[88] *McCreaty Tire and Rubber Co v CEAT SPA, 501 F.2d 1038* ((3rd Cir 1974) .

[89] UNCITRAL Model Law Art.17 (2) (b) of 2006 Revision.

[90] Ibid. Art.26 (3) (b).

[91] Ibid.

tribunal to construe the aggravation order as urgent order to prevent irreparableharm to avoid aggravation of the dispute that is the subject matter of the arbitration. The principle that the arbitral tribunal may take steps to prohibit aggravation of a dispute is well established, from the order of one arbitral tribunal, where it was decided that:
" Interim measures may be ordered not only in order to prevent irreparable damage but also to avoid aggravation of the dispute submitted to arbitration."[92] In practice, the tribunal has not frequently granted orders forbidding aggravation of the parties' dispute.[93]

2.6 Orders for Disposition of Property:

The arbitral tribunal under English Arbitration Act has the power to make such orders, firstly in S.38 (4), which provides directions in relation to any property and the detention of property. The first question that arises is whether this section is drawn in wide enough terms to allow the arbitral tribunal to make directions ordering a party A to dispose of property to party B. indeed looking at the wording of S.38 (2), it is clear that the tribunal can grant such orders in arbitral proceedings, even in the absence of a specific agreement by the parties. The tribunal has the authority to order A to make property to B, an order attractive to B, where A's assets raise doubts as to enforcement. It may be argued that if such section is added as a clause in the arbitration Act of Uganda, will attract foreign investment. This further means tribunals can easily keep evidence, in support of arbitral proceedings. The main objective of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; the parties' should be free to agree how their disputes are resolved, subject only to such safe guards necessary in the public interest.[94] This notion supports the view that courts should not intervene[95] in granting of interim measures[96] unless in such emergency measures where they are invited for host reasons.[97]

[92] see Amco Asia Corporation v Republic of Indonesia, Decision on Request of Provisional Measures, ICSID CaseNo. ARB/81/1 (9 Dec 1983) XI YB 159, 161 ((1986).

[93] See AMCO Asia Corporation v Republic of Indonesia, Decision on Request of Interim Measures,ICSID Case NO. ARB/81 /1 (December 1983), XI YB 159, 161 ((1986).

[94] See Kenya Arbitration Act 1996 S.1

[95] see Competence of the tribunal to rule on their jurisdiction S.16 of Uganda Arbitration and 17 of Kenyan Arbitration 1996.

[96] See Kenya Justice *Deverree in Espo Builders Ltd v Adams Marjan Arbitrator* and Another Civil Appeal No.248of 2005.

[97] Ibid S.10.

2.7 Freezing orders:

The question that arises is do arbitrators have the power to grant freezing orders? This interim measure developed [98]as a form of recourse against foreign-based defendants with assets within UK and consequently the early authorities assumed that the order was not available against English based defendants. The power of the tribunal to grant freezing order as an interim measure, has been debatable and many jurisdictions in favour of the courts,[99] on the grounds that tribunal has no coercive powers to grant them or that they do not bind third parties. It should however, be noted that the tribunal has implied authority to grant such measures.[100] The question of arbitral power to grant freezing orders was brought to attention in the case of *Kastener v Jason*,[101] where the arbitral tribunal granted freezing orders against Jason, refraining him from selling his house in Helmsdale Gardens until he received permission from Beth Din. There is no any explicit or implied section that provides authority in Uganda Arbitration and Conciliation to grant such orders. Uganda needs to adopt WIPO Draft Emergency,[102] Pre- Arbitration Referee Procedure Measures,[103]the Germany Model that provides all exclusive powers to the tribunal,[104] since parties' do give such powers to the tribunal as the case above.[105]

2.8 Orders of Confidentiality:

The question is to what extent is confidentiality order enforced in arbitral proceedings? As opposed to litigation, arbitration proceedings have always been considered to be private in nature.[106] Indeed this has always been touted as one of the advantages. However, does the nature of arbitration translate into an obligation of confidentiality that binds the parties' to the arbitration agreement? The answer to this has a significant impact, only on whether documents used in one of arbitration can later be disclosed in subsequent proceedings whether arbitral or litigious on nature, but also on the attractiveness of arbitration to potential disputants.[107] Under the English case law, courts have taken positive views on the matter in the leading

[98] see *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.

[99] see Model Law 2006 Art.17 J.

[100] see English Arbitration Act S.48.

[101] [2005] 1 Lloyd' s Rep 397 at par 14-19.

[102] Article X.

[103] Art.5(3).

[104] see Germany _s Code Civil Procedure (CCP) 1998 S.1033.,916.1945, 104 and Art.103 of Germany Constitution.

[105] UNCITRAL Model Law 2010 Art.26 (9).

[106] See Electric and Gas Insurance Co of Zurich Ltd v European Reinsurance Co of Zurich [2003] UKPC II. Insurance Co V Lloyds Syndicate [2003] 1 WLR 1041.

[107] See *Banco de Conception v Manfra Tordella & Brooke 70 AD (1 Dept 1997), International Componenents Corp v Klaiber* 54 AD 2.d 253 (1 Dept 1976).

authority of *Dollington Baker v Merrett*,[108] where it was held that parties' within arbitration agreement or proceedings were under an implied obligation to keep the proceedings and documents arising out of confidential. However, the Australian High Court in *Esso Australia Resources Ltd* v *Plowman*,[109] was centrally opposite, as the court held that parties are not owed a duty of care for confidential information or documents to the proceedings. It should be noted that the Australian view has been criticized in Commonwealth countries and is not followed, for example in Singapore,[110] one of the leading centers of arbitral disputes has adopted the English model. Since the Court of Appeal ruling in support of confidentiality, it has given precedent to many cases for example; *Hassneh Insurance Co of Islaeli v Steuart Jew*, [111]where the English High Court considered confidential information. In addition, in the case of *Glidepath BV and others v John Thompson and others*, the court stayed proceedings in favour of the arbitration clause in favour of the English Arbitration under S.9. All arbitration proceedings and materials are confidential.[112] There is no legal basis to support confidentiality in Uganda; in other words, there is a need to insert a confidentiality clause in the arbitration clause.[113]

Uganda in amendment of the current arbitration should consider adoption of the English Model, which provides power for confidentiality.

2.9 Preservation of Evidence:

Preservation of evidence, [114]on interim basis is generally sought where there is a risk that the evidence[115] will be harmed or destroyed,[116] if no urgent measure is not taken.[117] The main purpose is to facilitate arbitral proceedings, whereby; the evidence that would be otherwise be lost at a later stage of proceedings is preserved.[118] Arbitral power to preserve evidence is supported internationally. The key issue is the need to protect the rights, which would be the subject of the tribunal.[119] In addition since arbitrators can have expert determination or experts,

[108] [1995] 128 ALL ER 890.

[109] [1995] 128 ALR 391.

[110] *Mynmayaung Chi oo Co Ltd v Win Win Nu* [2003] SGHC 124.

[111] [1993] 2 Lloyd's Rep 243.

[112] See Ali Shipping Corp v Shipyard Trogir

[113] see Esso Australia Resource Ltd & Others v Plowman (Minister of Energy and Minerals (1995) 128 ALR 391.

[114] English Arbitration Act 1996 S. 38 (6).

[115] Evidence Act S.27.

[116] English Arbitration Act S.34 (2) (d)-(h).

[117] Ibid S.38 (4) and 39 (2).

[118] ICC Rules 23 (2) and LCIA 25 (3).

[119]English Arbitration Act S.43, see Yasli,Mark, Provisional Measures in International Commercial Arbitration at 87.

the issue that courts are the only mechanism is wrong,[120] The Court [121]assistance in taking evidence should only be allowed for host reasons[122] or on application of the tribunal in Uganda,[123] as argued by LJ Steel in Astra *SA Insurance and Reinsurance Co v Sphere Drake Insuranc*e,[124] where it was held that the arbitral tribunal was better to hear evidence from Romanian academics, due to party autonomy doctrine.[125] The East African Court of justice provides that it should be the tribunal to take evidence.[126]

3. Theories in Support of Arbitral Tribunal to Grant Interim Measures:

3.1 The Theory of Kompetenz-Komptenz:

This theory is derived from Germany Federal Court, which means that parties to arbitration agreement vest their power to the arbitral tribunal.[127] The feature of this theory is as follows: the tribunal has the power to rule on its jurisdiction,[128] and decides on its competence.[129] The demands of convenience in arbitral proceedings are satisfied,[130] and the requirement of logic is asserted.[131] In order for the tribunal to grant interim measures,[132] under this theory,[133] the tribunal has to prove that that there is no rebuttable presumption that such jurisdiction was conferred by the will of the parties when they entered into an arbitration agreement.[134] There is a broad international consensus that arbitral tribunal have the competence to grant all interim measures.[135] As a practical matter, arbitral tribunal routinely makes decision concerning jurisdiction matters for example; granting interim measures.[136] The arbitration agreement is not impeached in these circumstances, and because the

[120] Kenyan Arbitration Act S.27 (a), see Evidence Act 27-28.

[121] See East African Court of Justice Arbitration Rules Art.17 and 19.

[122] See *Jivraj v Hawshani* [2011] UKSC 40.

[123] Kenyan Arbitration Act S.28, or Uganda Arbitration Act S.27.

[124] [2000] 2 Loyd's Rep 68.

[125] See Julian,Lew ,Loukas, Mistelis and Stefan, Cooperative International Commercial Arbitration (Kluwer International 2003) at 335.

[126] East African Court of Justice Arbitration Rules R.19,.and 17.

[127] see Berger-Germany adopts the UNCITRAl Model Law,Int'l Arb Rev 122 (1988).

[128] See Uganda Arbitration Act S. 16 and Kenya Arbitration Act S.17.

[129] McCreaty Tiire & Rubber Co v CEAT SPA 501 F2d 1032 ((3rd Cir 1974), *Oxford Health Plans LCC v Sutter* [2013] 675 F.3d 215 No. 12-135 9 Us Jun 10 2013) at 60, 249.

[130] East African Court of Justice Arbitral Rules R.5,

[131] See DAC Report on English Arbitration Bill 1996 Chaired by Lord Savile LJ at 138.

[132] *Dalmia Dairy Industries Ltd* v *National Bank of Pakistan* [1978] 2 Lloyd's Rep

[133] UNCITRAL Model Law Art 16 (1), UNCITRAL Model Law Art.26.

[134] See *ELF Aquitqine* v *Nioc reported* in *Yearbook Comm Arb* (1886) at 101 -102.

[135] See Jalil Komptenz, Recent USA and Uk Development, 13 IntArb No4 Dec 1996 at 169-178.

[136] *Fiona Trust & Holding Privalov* [2007] UK 40 at 35.

arbitrators are only considering the merits of the parties' underlying the contract, they are in the best position to grant interim measures.[137] Since arbitration agreement is not impeached in these circumstances, and because the arbitrators are only considering the merits of the parties underlying the contract, they are in the best position to grant interim measures.[138] According this doctrine the arbitral tribunal has the power to grant provisional measures within its competence,[139] without having referring into national courts, when the party challenges the jurisdiction, on the grounds that arbitration are judges within their jurisdiction due to party autonomy doctrine.[140] Therefore it's not proportionate to impeach arbitral jurisdiction powers, since party autonomy outs the court jurisdiction in arbitral matters.[141] It's incumbent upon the government of Uganda to see that arbitrators areendowed with powers to decide on their jurisdiction, and thus if the parties' agree that the tribunal will deal with interim measures, then courts will respect the contract and autonomy of the parties' provided that the arbitral power is exercised in good faith, and the interests of the parties are safe guarded.[142] The author however, argues that party autonomy principle accepts the view that parties' are freeto determine the proceedings, nevertheless, the freedom of the parties' to agree on the rules of procedure is subject to necessary precaution in the interest of the fairness and equilibrium of the arbitration process, such freedom are limited by public interest and mandatory rules.[143]

3.2 Contractual Theory:

The proponents of this theory argue that party autonomy in the arbitration agreement is the essence of arbitration. In other wards, the phrase unless otherwise agreed by the parties is a frequent occurrence in all arbitration enactments,[144] conventions and treaties or arbitral rules, that give the parties a great degree of autonomy universally as acceptable principle.[145] An arbitrator is an agent of both theparties' and therefore, what he does has to be regarded as the will expressed by the parties.[146] Parties to arbitration agreement perform under a contractual obligation.[147]

[137] See Emilia Onyema, International Commercial Arbitration and the Arbitral Proceedings (Routldge) at 34.

[138] See William Park, Arbitration International Business Disputes; studies in Law and Practice (Oxford University Press 2006 at 210).

[139] See *Green Tea Financial Corp* v *Bazzle* 539 US 444 (US Ct 2003) at 452-53, where it was held that the tribunal should be the best to grant all interim measures.

[140] Germany Civil Code S.1023 and 1040.

[141] See Gary Born, International Commercial Arbitration Vol.1 (2nd edn Kluwer Int 2009 852)

[142] see English Arbitration ActS.30,*Farmland Industries Ltd v Global Exports Ltd* [1991] HCB 72.

[143] See Uganda Arbitration and Conciliation Act S.6,9,27,3642,43 and 47.

[144] See Merkin, Arbitraction Law at 1.24-26.

[145] See Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance [2000] 2 Lloyd's Rep 68.

[146] *Mitsubishi Motors Corp v Sole Chsler-Plymouth Inc* 473614 (1985) at 433-38.

Lord Diplock said ―arbitration constitutes a self-contained contract collateral to the ship building agreement. The courts intervention will be a breach of the contract agreed by the parties.‖[148]

Uganda Arbitration needs to consider this theory to see arbitration very competitive, for example; in the case of *Tullow Uganda Operations Pty Ltd and Tullow Uganda Ltd v Republic of Uganda, a dispute relating to a production sharing agreement between the Tullow Uganda Operation Pty Ltd and Tullow Uganda Ltd (the claimants)* and the Government of Uganda (Respondent) concerning exploration development and production of petroleum was forwarded to International Centre for Settlement of Investment Disputes (ICSID). Although the parties' to the arbitration agreement jointly informed the tribunal that they had reached a settlement agreement and requested that the tribunal issue an order over taking note of the discontinuance of the proceedings pursuant to ICSID.[149] Noteworthy from the case there was no any arbitrator chosen from Uganda, or even in East Africa or African origin, the composition of the arbitrators' came from United Sates, Switzerland and Bangladesh. This was due to the fact our arbitration is not attractive or that the are no trained arbitrators to handle arbitration cases. This theory is supported by separability doctrine,[150] which provides that arbitral proceedings are autonomous that survives invalidity of the underlying contract.[151] While in support of the doctrine of party autonomy and separability, it's of great concern that Uganda is considered to be arbitral trained friendly. However, there is lack of sufficient trained arbitrators with sufficient knowledge, exposure to be appointed as international arbitrators. This has been due to the failure of the government and the judiciary to provide funding to CADRE to increase training all over the country. The lawyers in Uganda have less support of arbitration proceedings, others do not know how arbitration proceedings, they confuse mandatory mediation with arbitration proceedings. Indeed this calls for CADRE, to ensure that qualifications and accreditation of arbitrators is competently handled to match international standard.[152]

[147] See Francis Kellor, Arbitration in Action, and Quoted by Morris Stone in ― A paradox in Theory of Commercial Arbitration (1996) 21 Arbitral Journal.

[148] Ibid.

[149] See ICSID Rule 43 (1) Arbitration Rules.

[150] Macmillan LJ in *Heyman v Darwins* Ltd [1942] AC 356.

[151] See English Arbitration Act S.7, Habour Insurance Co v Kansa General International Co Ltd [1993] QB 701.

[152] See Redfern & Hunter, Law and Practice of International Commercial Arbitration, (2nd edn,London: Sweet & Maxwell 1991) at 155 As quoted by Asouza‖ Some Fundamental Concerns and Issues about International Arbitration in Africa, African Development Bank Law Development Review,Vol.1 par 81 (2006) at 86.

3.3 Jurisdiction Theory:

This theory was developed in 1965, by Rubellin-Devich. Courts in most jurisdictions were still hostile to arbitration and fewer subject matters were held to be arbitral, while institution arbitration was beginning to spread. There was no clear demarcation between the tribunal and judicial courts.[153] The jurisdiction theory highlights the dominance and control exercise by the sovereign state in regulating by arbitral proceedings conducted within its territorial jurisdiction through national laws.[154] The main theme of this theory is derived from the idea that every state is entitled to control any activities, which take place within its territory, and that every right or power a private person enjoys is inexorably conferred by or delivered from municipal law.[155] The jurisdictionary theory is based on the premise that the arbitrator performs a judicial function as alternative (through private) judge as permitted under national law or international convention of the particular sovereign state. It thus emphasizes the fact international arbitration references cannot take place in a territorial vacuum, without the permission of the stat, and must therefore be subject to the law of a particular state. This permission of the sovereign state covers matters such as the disputing parties' to opt for arbitration over an arbitral subject matter and the procedure phase of the arbitral reference. In analysis according to this theory, party autonomy is derived from the state, not the parties to the arbitration contract. In other words arbitral tribunals perform a judicial function, since an award is comparable to the judgment rendered by the state in that it is not self –executing and if not voluntarily performed. The winning party has the authority to apply to the state for enforcement in the same way as ordinary court judgment.[156].

Although jurisdiction theory is well accepted by many states, it has some shortcoming. The argument that the tribunal has the power like that of the judge is not true, since the arbitrator has the power to modify the arbitration agreement between the parties, while the judge just applies the law and enforces the agreement.The reason why the arbitrator has such power is because of the party autonomy, which is the main characteristic feature of arbitration proceedings. Hence the arbitrator's duty is to respect the freedom of the parties', doing what the parties stipulate, rather than what is stipulated by government regulation. Similarly interim measures are provisional remedy in nature; it has no similarity to a court judgment.

[153] See Y. Dezalay & BG Garathy, Transnational Legal Order, Chicago University Press 1996 at 20.

[154] See Emilia Onyema at 33-36.

[155] Man F ─ Lex Facit Arbitral, in Sanders, International Arbitration Liber Amicorum for Martin Domek at 160.

[156] See Hong Lin YU Hong, The Explore the Void-AN Evolution of Arbitration Theories Part 1 International Arbitration Law Review Vol 7 at 435,who argues that arbitrators are in the same power as courts in granting interim measures.

It is internationally recognized that national law is important in arbitration, wherethe parties‘ seek assistance. The arbitral tribunal seeks support from national courts where it lacks capacity for example; to force third parties‘ to give evidence in arbitral proceedings or the enforcement of interim measures.

The court‘s control is fettered, in order to see the effectiveness of arbitral proceedings. Redfern and Hunter rightly concluded that international commercial arbitration is a hybrid, explaining that it begins as a private agreement between parties‘ and continues by way of private proceeding, in which the wishes of the parties‘ are of great importance. Yet, as they point out, it ends with an award which has a binding legal effect, which an appropriate condition being met, the courts will be prepared to recognize and enforce.[157] This approach gives a clear picture of the legal nature of arbitration and is appropriate for current practice of international arbitration in Uganda.[158] The effectiveness of this theory depends on how the government of Uganda, strikes a balance between the state‘s power to control and the autonomy of the parties.[159]

4.Arbitration Institutional Development in Uganda:

The New York Convention which was adopted by the United Nations diplomatic conference on 10th June 1958, enforced on 7th June 1959, requires all courts of contracting states to give effect to the private agreements to arbitrate, to recognize and enforce arbitral awards made in contracting states.[160] It is of great importance to note that Uganda ratified the New York Convention on 12t February 1992, and has since recognized foreign arbitral awards by the enactment of the Arbitration and Conciliation Act. The New York Convention provides that arbitral awards shall be considered as binding and enforced in accordance to rules of procedure of the territory. Given that Uganda is less recognized when it comes to arbitration, as evidenced in the case of Tull oil,[161] there is a need for the government of Uganda, to amend the current arbitration Act 1996, which provides for both mediation and arbitration to only concentrate on arbitration if the foreign countries are to bring their arbitral disputes in Uganda.

There is lack of trust for foreigners to bring their cases in Uganda, which calls for urgent training, funding in order to attract this multi-billion investment.

[157] Hunter on International Arbitration at 146 par 1-16.

[158] Department of Advisory Committee of England 1996 Clause 33.

[159] See Polish Arbitration Act 2005 Art. 1666.

[160] See United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations 1958.

[161] See Tullow V Uganda.

Although Uganda signed the New York Convention, there is still lack of support of the judiciary when it comes to enforcement of arbitral awards. Uganda needs to adopt Rwanda Model, although Rwanda adopted the New York Convention on January 29 2009, the parliament of Rwanda enacted an Act creating the independence of the Kigali International Arbitration, to handle international arbitration or adoption of the Kenyan model[162] which established the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K), which was established in 1984 as one of the branches of the Chattered Institute of Arbitrators, United Kingdom whichwas found in 1915 with headquarters in London. The Kenya branch now has over 700 members [163]with wide pool of knowledge and experienced arbitrators andfacilitates their appointment.[164]

In addition to Kenya, has also Nairobi Centre for International Arbitration, which was set up through the office of the Attorney General under the auspices of the Asian-African Consultative Organization (AALCO).[165] This was established after Memorandum of Understanding (MoU) between AALCO and Republic of Kenya, which was signed on 3rd April 2006. Its is the third African Centre set up of AALCO after the Cairo Regional Centre for International Commercial Arbitration, Egypt and Lagos Regional Centre for International Commercial Arbitration, Lagos, Nigeria. The Nairobi Centre was established under the Nairobi Centre for International Arbitration Act 2013,[166] to facilitate and encourage international commercial arbitration, administer domestic and international arbitrations, to ensure arbitration is reserved as the dispute resolution choice.[167] Kenya also has a center for Alternative Dispute Resolution (CADR), aimed at enhancing settlement of disputes through ADR mechanism, with recognition of Art.159 of the Current Constitution of Kenya 2010. This adduces that Kenya government has supported the institutional frame work of arbitration process, indeed this is clear that a person would prefer to go to such established arbitral mechanism than Uganda, when it comes for choice of forum, lex arbitrie (law governing arbitration) and seat, than Uganda in East African country. This warrants for Uganda in its reform in commercial disputes under commercial court to adopt Kenya Model to attract both

[162] Cap 108 Laws of Kenya.

[163] The Chattered Institute of Arbitrators Kenya Branch available at http://www.ciarbkenya.org/membership.html ,accessed 20/7/2017.

[164] See Chartered Institute of Arbitrators Branch Constitution Clause 2.

[165] See Asian –African Legal Consultative Organization, Report on the AALCO‘s Regional Arbitration Centers Par 23 at 5.

[166] See S.5 (a) No.26 of 2013 of Laws of Kenya.

[167] Ibid S.5 (b) –(d).

investors and also dispose of commercial back log cases, to promote efficiency, and justice to be seen to be done without technicalities.[168]

4. The Role of Courts in support of Arbitration in Uganda.

4.1 Enforcement of Arbitration Clause:

The main role of the courts in Uganda is the enforcement of the arbitration clause. The courts in Uganda help in enforcement of the arbitration clause, which was developed in England by Lord Parker L.J, in the case of home *Insurance* v *Mentor Insurance*, held that *— in cases where there is an arbitration clause, it is my judgment the more necessary, that full scale argument should not be permitted. The parties" have agreed on their chosen tribunal and defendant is entitled, prima facie, to have the dispute decided by the tribunal in the first instance, to be free from intervention of the courts until it has been so decided."*

The arbitration clause is clearly evidenced under scheduling conference under order 12 Rule I of the CPR.[169] The court is mandated to hold a scheduling conference to sort out points of agreement and dis-agreement. This vividly applied in the case of *Bokomo* (U) *Ltd* v *and another* v *Rand Blair Momentum Feeds*,[170] where it was heldthat that holding of scheduling conference by court is mandatory and that this provision applies to all divisions of the High Court. The main intention of the scheduling conference is to enforce the intentions of the parties who did agree to settle their disputes via arbitration.[171]

The notion of mandatory scheduling conference was evident further in the case of *Tororo Cement Co.Ltd* v *Froskina International*, [172]where Tsekooko J.S.C held that scheduling conference is mandatory. The judges are encouraged to follow the procedures and the parties are expected to cooperate with the court to sort out the points of the dis agreement and agreement as outlined by Justice Geoffrey Kiryabwire in *Shay Kameo and others* v *Kenya Airways Ltd*.[173] It should however be noted that Order 12 rule 2(1), is discretionary power exercised by the court after evaluation of the case during scheduling conference. Under Order 12 rule 2 (3), the chief justice is mandated to make directions for better carrying into effect

[168] see Ugandan Constitution S.126 (1) d.

[169] Civil Procedure Act Cap 71 Order 12 Rule 1 (1) and (2).

[170] See Justice Christopher Izam Madrama, in *Bokomo* v *Rand Blair* Civil Appeal No.22 of 2011 (arising from miscleneaous application No.33 of 2011) arising from Civil Suit No 13 0f 2010.

[171] See Justice Yorokamu Bamwine in the case of *Eastern Trade and Another* v *Hassan Basajjabalaba and Another* Civil Appeal (HCT-00-CC-CS-0512-2006)

[172] Court of Appeal No.13 of Supreme Court (Un reported).

[173] *Shay Kameo and 4 Others* v *Kenya Airways Ltd HCCS* No.*151* of *2009* (Commercial Court Division).

alternative dispute resolution for example; arbitration, however, the chief justice hasnot yet made any directions under sub rule3. This expressly adduces why the judges have not used this rule consistently since the amendments of the Civil Procedure Rules were made in 1998 after the Wolf Reform of 1996 in England.

It should be noted that Order 47,[174] provides for arbitration under orders of the court. This is also referred to as court annexed arbitration. This rule comes into play when a party to a dispute requests the trial judge to refer a dispute to arbitration before trial. Rule 1 (1) of this order further provides that

" Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for anorder of reference.""

In arbitration the principal focus of the parties is the maintance of mutual respect for each other's interest, in other words, creating census on key matters. The role of the court is to recognize the interest of the parties and refer the parties to arbitration in line with their request. Order 47,[175] was applied by Court of Appeal in the case of*National Social Security Fund and others v Alcon International Limited*,[176] where Lady Justice Mpagi-Bahigeine, J.A, held that

" The import of this Rule (Order 47) is that the court can only refer a matter to arbitration upon written application by one of the parties" and the court then has power to make an order of reference after the consent of the parties" to the case before it."

Further she held that *" it is thus apparent that by incorporating this clause in the contract both the appellant and the respondent, for all intents and purposes, recognized arbitration as an effective and efficient means of resolving all the disputes arising out of their building contract. This clause was binding on the parties to the contract. An arbitral clause in a contract has an enduring and special effect, that is, even if parties decided that arises under a contract, the arbitration continues in force and will not be deemed to be repudiated unless there*

[174] See Civil Procedure Order XLVII.

[175] See M.SSekana & S. Ssekana, Civil Procedure and Practice in Uganda, 2014 Law Africa 1st ednt . Chap 15 at 255-257.

[176] Civil Appeal No.2 of 2006.

is a solid reason for doing so. Courts will always refer a dispute to arbitration where there is an arbitration clause in a contract."[177]

In practice, however, a party may attempt to abandon his or her right to arbitrate, for example; by delay or inaction, or by commencing court proceeding in breach of an arbitration agreement, but the courts appear to be firm in enforcing the terms of their agreement. In some instances, a party may attempt to repudiate the arbitration clause in agreement, but courts have been unable accept such repudiation without consent of the other party.[178] Even if the right to arbitrate a particular dispute has been abandoned,[179] that in itself does not mean that the arbitration agreement itself has been abandoned, courts will inevitably enforce the arbitration agreement or clause.[180]

4.2 Enforcement of Parties Intentions to Arbitrate (Party Autonomy):

Unlike the old Arbitration Act of Uganda, the current arbitration incorporates, the New York Convention,[181] which restricts the intervention of the courts in arbitral proceedings. The current Arbitration and Conciliation Act, S.9 provides that *" except as provided in this act no court shall intervene in matters governed by this Act.*[182] Section 9, provision seems to oust the inherent jurisdiction of the High Court of Uganda, as evident in the case of *East African Development Bank* v *Ziwa Horticultural Exporters*, where Justice Richard okumu Wengi, in applying the current Arbitration Act and Conciliation, he said that the Act outs court inherent jurisdiction. In his criticism he said that the S.9 should be read with S.5 (1) and 6(1), which provides the role of courts in arbitral proceedings. The effect of the S.5 and 6 is to grant court discretion to hear the matter or refer it to arbitration.[183] It has been the practice of the courts to respect and enforce arbitration agreement entered into by the parties.[184] The current Act, therefore request to the parties to arbitration to submit their disputes to arbitration,[185] this was applied in *East African Development Bank v Ziwa Horticultural Exporters,* where it was held that

[177] Ibid.

[178] see Judicature Act Cap 13 Laws of Uganda.

[179] See David Sutton in Russel On Arbitration (22nd edn, Sweet & Maxwell) par 2-119 at 80.

[180] See John Ochepa Arutu, Court Annexed Mediation in Uganda, Law and Practice Practioner's Handbook 2014 at 58-59.

[181] See *Mitsubshi* v *Solar Chrysler Plymouth* Inc 473.US 614 (1985).

[182] See Arbitration Act & Conciliation Act Cap 4.

[183] S.6 of the Arbitration Act Cap 4, provides that ─ a party to an arbitration agreement may apply to court, before or during arbitral proceedings, for interim measures of protection, and the court may grant that measure.‖

[184] See National *Security Fund and Others* v *Alcon International Limited*

[185] Ibid.

reference to arbitration under S.6 by court was mandatory to parties to a dispute. In other words parties are encouraged to submit to arbitration instead of litigation.[186] Ithas been the practice of the courts to implement the intentions of the parties' as much as it can, this was adduced in the case of Farmland *Industries Ltd v Global Exports Ltd,*[187] where the court was held that it was the duty of the courts in arbitration proceedings to carryout the intention of the parties. The intention of the parties' was that before going for expensive and long procedures of arbitration, the parties' had to first negotiate a settlement, failing which they could resort to arbitration. The current Arbitration Act, commands the courts to refer arbitration agreement to arbitration before courts, as adduced in the case of *Shell v Agip,*[188] where J.W.N Tsekooko, held that, ― *its now trite law that where the parties have voluntary chosen by agreement, the forum for resolution of their disputes, one party can only resile for a good reason*.‖ He went further to hold that certain conditions must be present before stay of proceedings is given by the court. The essence of arbitration would be entirely lost if the courts' were to stay or set aside arbitration would be entirely lost if the courts were to stay arbitral proceedings. Justice Okello, in *Fulgensius Mungereza v Price watercoopers Africa*,[189] rejected to set aside arbitral proceedings because of party autonomy and arbitration agreement.

Domestic courts in Uganda should encourage the resolution of disputes through arbitration[190] thus the growth of jurisprudence in international commercial arbitration. In this regard, Campbell J stated in *Board Sweden AB* v *NYA Stronmes AB,*[191] that ― very strong public policy of this jurisdiction (is) that where parties have agreed by contract that they will have the arbitrators decide their claims,[192] insteadof resorting to the courts, the parties should be held to their contract.[193] There is a problem in application of the current application Arbitration and Conciliation Act, because some of the judges argue that Art.139 which provides unlimited jurisdiction of the High Court. This has brought challenges when judges reside over arbitral cases they do not refer some arbitral cases to arbitration, even when there is a clause; they continue to entertain such arbitral cases.

[186] S.2(1) (c) defines an arbitration agreement as ‒an agreement by the parties to submit to arbitration all, or certain disputes agreement as ― 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.‖

[187] [1991] HCB72.

[188] *Shell (U) Ltd v Agip (U) Ltd* Supreme Court Civil appeal No. 49 of 1995.

[189] Court of Appeal Civil Appeal No.34 of 2001.

[190] *Automatic System Inc* v *Bracknell Corporation* (1994) 18 O.R (3rd Cir 257).

[191] (1998) B.L.R 295 (Ont H.C).

[192] See Redfern Hunter, Law & Practice International Commercial Arbitration, Student Edition (4th edn 2004, Sweet & Max Well, at 22-26.

[193] Construction Systems Inc v Pacific Parkland Properties Inc (1992) C.L.R 74 (B.C.S.C)

Although domestic courts, serve as a check on arbitrators, thereby preserving and confidence in the arbitral process.[194] Domestic courts generally, exercise this supervisory power by granting interim measures, or assistance in taking evidence, such powers should be left to the domain of the tribunal[195] due to the doctrine of competence,[196] where by an arbitrator acts as judge in his or her capacity when taking over arbitral proceedings. Courts role should be only invited for host reasons for example granting freezing orders and enforcement of arbitral awards[197] in order to comply with the intentions of the New York Convention. This silent intervention of courts in arbitral proceeding[198] was not provided in the Model Law working group, [199] parties are not free to preclude the court's power in taking evidence. The author argues that Uganda should attempt to adopt the principle of reprocity like Qatar, Dubai, where they have given the arbitral tribunal full autonomy in arbitral proceeding.[200] It's imperative to note that modern arbitral laws give the disputing parties and arbitrators a wide discretion over their conduct and procedure of arbitral reference., since arbitrators only consider the merits' of the parties'[201] underlying contract, they are in the best position to grant all arbitral interim measures.[202]

5.1 Conclusion and Reform:

What the judiciary and the Arbitration and Conciliation Act Cap 4 should aim to achieve a system that is internationally acceptable and this means final awards would only be paramount if interim measures were given legal effect. At the moment the Uganda Arbitration law is still ambiguous in regards to interim measures. All interim measures according to the current arbitration are only limitedto the courts, for example; taking evidence,[203] and interim measures.[204] Since arbitration can use expert determination[205] in handling of evidence, the tribunal can

[194] Soleimany v Soleimany

[195] *Electricity and Gas Insurance Co of Zurich Ltd (AEGIS) v European Reinsurance Co of Zurich* (2003) UKP.

[196] See ICC Art.6.

[197] *Hassneh Insurance* Co of *Israel and Others* v *Mew* [1993] 2 Lloyd's Rep 243.

[198] *United States v Panhandle Eastern Corp* 118 FRD 346 Del 1998.

[199] Model Law Art.27.

[200] Ibid Art.1 (2).

[201] *Green* Tree *Financial Corp* v *Bazzle* 539 US 444 (US Ct 2003), where the Us Supreme Court held that all interim measures should be done by arbitral tribunal.

[202] See Emilai Onyema, International Commercial Arbitration and the Arbitrators Contract (Routledge) 34.

[203] Arbitration Act and Conciliation Act Cap 4S.27.

[204] Ibid S. 6.

[205] Ibid. S.26.

handle all evidence, and courts can only intervene if the courts for complimentary support[206] not as interventionist invite them.[207]

It should be noted that arbitral interim measures are voluntary adhered[208] to avoidthe adverse effect of fines.[209] Its imperative that courts are called upon for host reasons, for example; where tribunal cannot compel third parties' to attend a hearing as a witness, even if the parties to the contract have conferred such power to the tribunal; hence assistance is sought from the municipal courts. The courts' role should only be restricted for the benefit of the arbitral proceedings and not just to intervene, this can be demonstrate by an American case, *Mitsubishi* v *Soler Chrysler Plymouth*,[210] where the United States Supreme Court allowed a dispute concerning a supposed violation of anti-trust laws to be settled by the arbitration tribunal. In reality parties delegate their right to their appointed lawyers, and this goes against the sanctity of the doctrine of party autonomy. Hence lawyers' autonomy has replaced party autonomy and this transformation is disturbing. Like any doctrine has shortcomings, this should not be an open gate for court intervention in arbitral proceedings, to avoid opening doors to delaying tactics and obstruction, thus undermining the arbitration agreement.
There is urgent need for the current arbitration Act to be separated from arbitration and Conciliation to Arbitration like all international arbitration centers, that have a separate act, an independent tribunal to handle all arbitral proceedings. This will remove the confusion between an arbitrator and conciliator. This can be achieved by clear funding from the government not from the Judicial studies Board, since USAID, which was funding CADER, in 2008, its effectiveness is less effective, since it cannot train new arbitrators, in the whole of Uganda to be effective.

Since the arbitrator acts as judges in ruling over his jurisdiction, due to doctrine of Kompetenz-Komptenz,[211] separability.[212] This means that during his tenure he/she should be immune[213] for all the decisions during the proceedings. The Uganda arbitration model should adopt, England, Paris, Hong Kong and Dubai Arbitration Acts that provide immunity of the arbitrator. Indeed this will enhance Uganda but

[206] S.28, 10

[207] Ibid.

[208] see Misteris , Comparative International Commercial Arbitration, The Hague London (2003) at 60.

[209] see *Pacific Reins Mgt Corp v Ohio Corp* 935 F.sd 1019 10223 (9 Cir 1991)

[210] 91985) 473 614 a6 630-639.

[211] See Berger –Germany adopts the UNCITRAL Model Law, Int'l IArb Rev 122 (1988). See Germany Arbitration Act 1998 Part IV, French Civil Code Procedure Art.1465. *Fiona Trust & Holdings Privalov* [2007] UK 40 at 35.

[212] *Prima Paint Corp v Flood & Conklin Manufacturing Co* 3888 US 395 (1967)

[213] See Kenya Arbitration Act S.16 B.

also the East African Federation. The main aim of the New York Convention was tosee that arbitral awards are enforced international, since Uganda is a signatory,[214] they should comply with Model Law,[215] which restricts the courts' intervention in arbitral awards. In Uganda there is too much court intervention[216] especially when they apply Art.139,[217] which provides unlimited jurisdiction, [218]without considering the arbitration clause or agreement.[219] Art.26 of UNCTRAL expressly provides that a tribunal may take any interim measures.[220] Uganda is a signatory to the NewYork Convention as provided for under Article 2(3) however it has not been complied with. Courts in considering scheduling conference should refer all arbitral cases to the arbitral tribunal.[221]

Reference:

Legislation:

- The Arbitration And Conciliation Act 2008 Cap 4
- The Constitution of Uganda 1995
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[214] see Loukas and Julian ,Pervasive Problems in International Arbitration (2006) Kluwer International at 21.

[215] Art.5.

[216] see Kenya Arbitration Act S.10, 7 .

[217] Uganda Constitution 1995.

[218] *Hubco* v *Water and Power Development Authority* (WAPDA) (2000) at 439., see *Westcare Investments Inc* v *Jugoimport – SPdr Holdings Co Ltd and Others* [2000] QB 288, where it was held party autonomy could intervened for public policy reasons.

[219] See Treaty For The Establishment of the East African Community Art.43, see The East African Court of Justice Arbitration Rules, Rule 9.

[220] Kenya Arbitration Act S.18.

[221] See Civil Procedure Rules Order 47. See *Bokomo Ltd and Anor v Rand Blair Feeds Civil* Appeal No22 of 2011 (Commercial Court).

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