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Judicial Review and Arbitration: Delineating the Scope of Court's intervention in Arbitration in Uganda

High Court explains *ouster* of jurisdiction of courts to intervene in arbitration save as permitted under the law. Judicial review is therefore unavailable to a party aggrieved over an arbitral award, although it could be available in instance of *ultra vires* exercise of power to appoint an arbitrator.

Introduction

Dispute resolution is a hallmark of a legal system in enabling the determination of competing legal rights and obligations. While the primary mechanism for dispute resolution remains judicial settlement before the courts, the others have included mediation, conciliation and arbitration. Mediation has since become an integral part of judicial settlement (in the context of court-annexed mediation). On its part, arbitration, under the *Arbitration and Conciliation Act*, Cap 4 (as amended in 2008), has quietly played its role in the settlement of disputes (especially of a commercial nature) in the past over 30 years. The role of the courts in relation to arbitration has mainly been in relation to issues of stay of proceedings filed before the courts and arbitral awards.

For a dispute resolution forum that is therefore not very noticeable in legal circles, arbitration had key court decisions in 2019. This article focuses on decisions of the High Court in *International Development Consultants Ltd. v Jimmy Muyanja & Others*, Misc. Cause No 133/2018; *Global Industries Ltd. v Trident Infratech Ltd.,* Misc. Application No 250/2019 and *Fountain Publishers v Nantamu & Another*, Arbitration Cause No 1/2011. The three decisions reflected on the extent of court intervention in arbitral matters as stated in s. 9 of the *Arbitration and Conciliation Act*: "*Except as provided in the Act, no court shall intervene in matters governed by this Act.*"

Review of key decisions of Courts

International Development Consultants Ltd. v Jimmy Muyanja & Others, Misc. Cause No 133/2018. The issue was whether s. 9 of the *Arbitration and Conciliation Act* could be relied on to exclude the judicial review jurisdiction of the High Court. The Applicant had filed an application for judicial review challenging the actions of the First Respondent in determining an application for the appointment of an arbitrator (vide CADER Misc. Application No 67/2017).

Acknowledging that the provision of s. 9 of the Act operates as an "ouster clause"—being clauses that strip the courts of their supervisory judicial function—Ssekaana J. held that the provision did not operate to oust the jurisdiction of courts in judicial review where the subject matter of the complaint is an *ultra vires* decision and therefore a nullity in law. The judge noted that CADER Misc. Application No 67/2017 had been heard and decided by the First Respondent as Executive Director of the Second Respondent. The Judge held that the Second Respondent had no authority to delegate exercise of statutory power delegated to it by Parliament—and s. 68 of the Act had not provided for such delegation—and, as such, "all actions of the 1st Respondent in relation to CADER Misc. Application No 67/2017 are null and void". The nullified *actions* of the First Respondent included the appointment of the Third Respondent as an arbitrator. Further, the Judge addressed the power to appoint an arbitrator under the Act as vested exclusively in the Second Respondent or an "appointing authority" and held that the First Respondent was not an "appointing authority" within the meaning of s. 2 of the

Act and in the context of ss. 11(3)-(4), 67(1), 68(a), 69 and 70(1)-(2) of the Act.

> "The wrongful exercise of any power by the Executive Director or CADER can be brought into question by way of judicial review. The exercise of power by persons not authorized by the Act can indeed be a subject of judicial review and does not in any way conflict with section 9 which bars intervention in matters governed by the *Arbitration and Conciliation Act*."
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> Ssekaana, J.

In the end, the court granted an order of *certiorari* to quash the proceedings, ruling and orders arising from CADER Misc. Application No 67/2017 for illegality.

Global Industries Ltd. v Trident Infratech Ltd., Misc. Application No 250/2019. An application was likewise presented for judicial review in relation to an award issued in an arbitration (CAD/ARB/47/ 2018). As in the *IDC* case, the issue concerned the jurisdiction of the High Court to address the application in light of s. 9 of the Act. The matter—which, as Mutonyi J. noted, birthed a plethora of applications—was a dispute that arose out of a tenancy agreement that moved from civil litigation to arbitration (in light of the arbitral clause in the tenancy agreement) that resulted in an arbitral award in favour of the Respondent. Being dissatisfied with the award, the Applicant filed an application for judicial review (Civil Application No 07/2019). On its part, the Respondent executed the award by forcefully ejecting and locking out the Applicant from the rental premises. The plethora of other applications were efforts by the Applicant to seek interim orders for stay of execution of the arbitral award in respect of being locked out of the rental premises.

The Judge addressed the role of the court in relation to arbitration and held that the remedies of both the parties lay in the *Arbitration and Conciliation Act*. She held that the procedures for resorting to the remedies are set out in the Act. As a party dissatisfied with an award, the Applicant had its remedy (and procedure) set out in s. 34 of the Act. On the other hand, as the successful party, the Respondent likewise had its remedy of enforcing the award (and procedure before the Court) as set out in ss. 35-36 of the Act. In respect of the latter, the Judge held that the Respondent, as the successful claimant, should have applied to Execution and Bailiffs Division of the High Court for the execution of the award. In the Judge's view, the Respondent disregarded the procedure under the Act in using "crude methods" of execution by "forcing the Applicant out of the rented premises with the help of police". On the other hand, the Judge considered the Applicant's application to set aside the award by way of judicial review ill-conceived in light of s. 9 of the Act and remedy available to the Applicant under s. 34 of the Act.

> "… Once the parties in their contract executed on 1st July 2017 agreed to have their disputes resolved by arbitration, both of them must follow the law and rules thereunder that govern arbitration proceedings right from the manifestation of a dispute, and throughout the whole dispute resolution process under the *Arbitration and Conciliation Act* Cap 4."
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> Mutonyi, J.

Further, the Judge considered the dispute between the parties to concern the determination of private rights and therefore the "issue between the parties does not fall under the ambit of judicial review."

In the end, the Judge set aside the interim order issued (by a Deputy Registrar), declared all applications filed before the court incompetent and directed the parties to pursue their remedies in accordance with provisions of the arbitration law.

Fountain Publishers v Nantamu & Another, Arb. Cause No 1/2011. The Applicant sought to set aside an arbitral award by way of a review on the ground that there was an error apparent on the face of the record. The contention was that the award was delivered beyond the time specified in the *Arbitration and Conciliation Act* without the arbitrator extending the time in writing. In dismissing the application, Wangutusi, J. stressed the essence of s. 9 of the Act and the instances that warrant court intervention and stated that any action to set aside an award should strictly be under the Act.

> "The Applicant should know that the only way an award in arbitration can be set aside is through the provisions of section 34 of the *Arbitration and Conciliation Act*. In section 34 of the *Arbitration and Conciliation Act* court is given the monopoly by section 9 of the Act."
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> Wangutusi, J.

The Judge was alive to possible reliance on the delay in rendering an arbitral award as a

sufficient ground for setting aside an award but directed that it would still have to be in light of the provisions of s. 34 of the Act. The Judge noted that the Applicant had in fact sought to do so (in Misc. Application No 135/2011) but its application had been dismissed for having been filed outside the time limits set out in s. 34(3) of the Act.

Concluding observations

Observations can be made of implications of the key decisions as follows:

1. Where parties choose arbitration as a means of dispute resolution, they should seek remedies in light of the arbitration law—whether it is to enforce an award in *Global Industries Ltd* case or setting aside an award in *Fountain Publishers* case.
2. The jurisdiction of courts in relation to arbitration is limited to matters that are specifically set out under the *Arbitration and Conciliation Act*.
3. Judicial review is not available in respect of arbitral matters where the remedies (and the procedures and timelines for resorting to them) are set out in the *Arbitration and Conciliation Act*.
4. Judicial review is concerned with control of exercise of power by public officials and is therefore not available for the determination of private rights in disputes between private parties, as was explained in the *Global Industries Ltd* case.
5. Judicial review in *IDC* case is borne out in the actions of the CADER Executive Director that were held to be exercise of power by a public official and constituted an *ultra vires* decision that was therefore a nullity in law.
6. The legal status of CADER is, as a result of the *IDC* case, in limbo with a legal conundrum as follows—
   (a) CADER operations significantly slowed down although it had previously been in operation despite being improperly constituted.
   (b) The "appointing authority" under the Act needs to be changed and the impasse occasioned by the decision in the *IDC case* resolved by an amendment to the Act.

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