

Principles of Arbitration Law

Kenneth Kaoma Mwenda

LL.B, BCL, MBA, PhD, DBA, FCI, FRSA,
Rhodes Scholar, Advocate of the High Court for Zambia, formerly
Law Lecturer in the University of Warwick (UK), and presently
with the World Bank, Washington DC, USA

Principles of Arbitration Law

Copyright © 2003 Kenneth K. Mwenda
All rights reserved.

BrownWalker Press
Parkland, FL • 2003

ISBN: 1-58112-409-0

www.brownwalker.com/books/mwenda3.htm

Preface

This book examines principles of arbitration law as they apply to many common law and civil law jurisdictions. Relevant aspects of international law are examined as well. The book attempts to permeate the intellectual spheres of a field that is increasingly attracting public interest and commentary. The growing interest of persons such as foreign investors, business analysts, scholars, practitioners, judges, and other professionals cannot be ignored as well. In many countries, the use of alternative dispute resolution to resolve matters in areas relating to, say, foreign direct investment and industrial unrest has been heralded by many as a cost-effective way of settling disputes.

This book is not a simple textbook on the introductory aspects of a particular field of law, as is often the case with many other books that have titles such as ‘Introduction to Business Law’ or ‘Fundamentals of Tort Law’, and so forth. By contrast, the book breaks new ground in the area of arbitration law and practice. It focuses on a developing country whose legal framework for arbitration has not been visited, to a large extent, by critical and rigorous jurisprudence.

The book provides refreshing breath on Zambian jurisprudence regarding a topic that has hardly been explored with much intellectual zeal and insightfulness. Although, by design, the book takes a purposeful slant towards Zambian law, the concepts and themes explored apply to many other jurisdictions. Indeed, there are several analyses in the book which are of wider application to many other parts of the world. This point helps to explain why it would not do justice to have the title of the book confined solely to Zambia so that the book title were to read as: *Principles of Arbitration Law*

in Zambia. Indeed, the book discusses contemporary issues in arbitration law which apply to many other countries. Zambia is chosen here for purposes of providing a useful context to the study given that the book addresses issues that are beyond the geographical limits of Zambia.

Chapters in the book cover, among other things, the efficacy of the legal framework for arbitration under Zambia's Arbitration Act 1933, and under Zambia's Arbitration Act 2000, respectively. Also, as noted above, pertinent aspects of international law are examined, together with some international and regional efforts to develop both international and regional frameworks for arbitration.

The interpretations and conclusions expressed in this book are entirely those of the author. They do not necessarily represent the views of any institution or organisation to which the author is affiliated or attached.

Kenneth Kaoma Mwenda, PhD
Washington DC, USA

February 24, 2003

Table of contents

Chapter 1

A global framework for arbitration law

1.0	Introduction	8
1.1	Incorporating international legal instruments into Zambian arbitration law	10
1.2	Arbitration as a form of alternative dispute resolution.....	11
1.3	International efforts to provide for a global framework for arbitration	14
1.3.1	Sources of the law governing the arbitration procedure under ICSID.....	17
1.3.2	The place of ICSID arbitration proceedings	18
1.3.3	Record of arbitration cases before ICSID as a sign of some success with ADR	18
1.3.4	Other efforts to set-up regional or international frameworks for arbitration	19
1.4	Conclusion.....	22

Chapter 2

The legal framework under the Arbitration Act 1933

2.0	Introduction	24
2.1	Office or arbitrator.....	25
2.2	Appointment of two arbitrators.....	31
2.3	Appointment of three arbitrators.....	32
2.4	Statutory powers of arbitrators and umpire.....	35
2.5	Arbitration procedure under Zambia's 1933 legal framework.....	38
2.5.1	Handing down an arbitral award.....	39
2.5.2	Filing of arbitral awards in the High Court.....	40
2.5.3	Setting aside an arbitral award.....	41

2.5.4	Other statutory powers of the High Court in dealing with arbitration procedures.....	42
2.5.5	Applicability of the Arbitration Act 1889 of the United Kingdom to Zambia.....	43
2.5.6	Applicability of international legal instruments to Zambia.....	43
2.6	Conclusion.....	56

Chapter 3

The legal framework under the Arbitration Act 2000

3.0	Introduction.....	57
3.1	General improvements to the legal framework.....	58
3.2	Scope of application of the Arbitration Act 2000.....	59
3.3	Arbitration and related matters.....	61
3.3.1	Requirements relating to the form of arbitration agreements.....	65
3.3.2	Arbitration agreements and substantive claims before the judiciary.....	66
3.3.3	Appointment of arbitrators.....	69
3.3.4	Appointment of substitute arbitrators.....	71
3.3.5	Protection of arbitrators, arbitral and other institutions, witnesses, etc.....	73
3.4	Recognition of arbitral institutions.....	73
3.4.1	Conditions for the recognition of arbitral institutions.....	75
3.4.2	Revocation of recognition of arbitral institutions.....	76
3.4.3	Operating arbitral institutions that have no recognition order.....	77
3.5	Power of arbitral tribunal to order interim and other measures.....	77
3.6	Default of a party making a claim and default of a party entering a defence.....	81

3.7 Forms and contents of the arbitral award and costs and expenses of arbitration 82

3.8 Application for setting aside (as exclusive recourse against) an arbitral award..... 84

3.9 Recognition and enforcement of arbitral awards 87

 3.9.1 Effect of an arbitral award..... 89

 3.9.2 Recognition and enforcement of New York Convention awards..... 90

3.10 Legal or other representations..... 90

3.11 Confidentiality of arbitration 91

3.12 Conclusion..... 92

Appendix 1 93

Appendix 2 110

Chapter 1

A global framework for arbitration law

“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

1.0 Introduction

This book examines the efficacy of the legal framework for arbitration in Zambia. Chapter One provides a discussion on some of the international efforts to establish an international legal framework for arbitration. The book does not profess to provide an exhaustive study of all international instruments on arbitration law. Only the most relevant international legal instruments are examined. To what extent, then, can international legal instruments affect the development of arbitration law in Zambia?

Although the discussion in this chapter provides a background against which discussions in the subsequent chapters are marshalled, the advantages and disadvantages of introducing arbitration in a developing country such as Zambia are also spelt out. The discussion places the law in a proper historical context. Indeed, the first statute on

¹ ICC International Court of Arbitration, “International Dispute Resolution Services: ICC Arbitration in 2001,” at: <<http://www.iccwbo.org/index_court.asp>>, visited on March 29, 2002.

arbitration law to be enacted in Zambia was the Arbitration Act 1933. This statute was enacted during the colonial era and its original source was the English Arbitration Act 1889. However, the Zambian statute of 1933 showed some departures from the English statute of 1889, although the English common law of arbitration applied to Zambia from the time colonialism was introduced in Zambia. It is possible that departures in the statutory provisions of Zambia's legislation could have been influenced mainly by the arbitration statutes of other British colonies and dominions in the region at the time.

The year 1933 was a significant one in that important changes would a year later be made to the English Arbitration Act 1889. In 1934, the Arbitration Act 1934 of England was enacted to improve the law of arbitration in the United Kingdom. However, both the 1889 and 1934 English statutes were later replaced by a consolidating measure, the Arbitration Act 1950 of England.

In Zambia, when enacting the Zambian Arbitration Act 1933, the draftsman seemed to have been working with the original English statute of 1889, without the benefit of subsequent improvements. It is easier to identify the probable meaning of provisions of the Zambian Arbitration Act 1933 if one refers to comparable provisions of the English statutes, on which abundant literature and case law is available. A number of defects in the English legislation on arbitration were, indeed, revealed and discussed in the reports by the Departmental Advisory Committee in England from 1989 onwards. These reports provided the background to the introduction of the current English Arbitration Act 1996. In this book, however, we are not concerned with the English law of arbitration.

1.1 Incorporating international legal instruments into Zambian arbitration law

Chapters Two and Three of this book examine and identify areas of vulnerability in the legal framework for arbitration in Zambia. Proposals are made to redress these shortcomings. A historical approach to the study is undertaken, starting with an analysis of the first statute on arbitration law in Zambia up to the present. For a user-friendly and convenient writing style, the study purposely uses the present tense to analyse the Arbitration Act 1933, treating the statute as if it were still in existence. The Arbitration Act 1933 has since been repealed and replaced by the Arbitration Act 2000. The latter statute is examined in detail after a thorough analysis of the former. It will be clear when we look at the Arbitration Act 2000 that Zambia has now made notable strides towards adopting and incorporating several international legal instruments into its own municipal laws on arbitration. Against this background, the book spells out some of the advantages of using arbitration over traditional court processes. Pertinent international law issues applicable to arbitration in Zambia are also examined. But, by design, no attempt is made to delve into intricacies of the literature review of other scholars' work on arbitration law in their countries of origin or interest.²

² See for example M. Jacobs, The Law of Arbitration in South Africa, (Cape Town: Juta, 1977); E. Cotran and A. Amisshah (eds), Arbitration in Africa, (The Hague; Boston: Kluwer Law International, 1996); D.W. Butler and E. Finsen, Arbitration in South Africa: Law and Practice, (Cape Town : Juta, 1993); D. Campbell and S. Meek, The Arbitration Process, (The Hague; Boston: Kluwer Law International, 2002); H Smit and V. Pechota, Arbitration Rules – National Institutions, (New York: Juris, 1999); P. Finn, Mediation and Arbitration, (St. Paul, Minn.: West Group, 2002); J. Fellas, International business and litigation and arbitration, (New York, N.Y. : Practising Law Institute, 2002);

1.2 Arbitration as a form of alternative dispute resolution

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. There are many other forms of alternative dispute resolution, such as mediation and conciliation, which are, however, not the concern of this study. Suffice it to say, several approaches have been adopted to reform and improve judicial systems in many countries. For example, some training programmes for members of the judiciary have been introduced in some countries. 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, privatisation 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 the judges 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?

A.F. Lowenfeld, International litigation and Arbitration, (St. Paul, Minn.: West Group, 2002); R.M. Greenberg, Enforceability of Arbitration Agreements in Contracts of Employment, (Washington, DC: World Jurist Association, 2001); M.H. Ye, International Commercial Arbitration in China: Law and Practice, unpublished LLM thesis, (Arizona: University of Arizona, 1998); A.S. Rau, J.S. Murray, E.F. Sherman and others, Arbitration, (Westbury, N.Y.: Foundation Press, 2002).

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 back-log of cases they face, especially commercial 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?

Among the available dispute resolution alternatives to the courts, arbitration is by far the most commonly used internationally. The reasons for this are clear. The ICC International Court of Arbitration observes that some of the advantages of using ADR procedures, such as under an arbitration agreement, include the following:

“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.”³

The ICC International Court of Arbitration observes further that:

“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.”⁴

Other advantages cited by the ICC International Court of Arbitration include the following:

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 *Ibid.*

“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 judgements, 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.”⁵

1.3 International efforts to provide for a global framework for arbitration

There are a number of international bodies and forums that deal with ADR, and Zambia is a member State to treaties establishing some of these forums. For example, one such body, where Zambia is a member State, is the International Center for the Settlement of Investment Disputes (hereinafter referred to as ‘ICSID’). ICSID argues:

⁵ See *Ibid.*

“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.”⁶

ICSID argues further:

“ICSID was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention)⁷ 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.”⁸

⁶ See ICSID web-site at:

<<<http://www.worldbank.org/icsid/about/about.htm>>>, visited on March 31, 2002.

⁷ This treaty is available Online at:

<<<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>>>, visited on March 31, 2002.

⁸ See ICSID web-site at:

<<<http://www.worldbank.org/icsid/about/about.htm>>>, visited on March 31, 2002.

Apart from its organisational structure, as explained above,

“...ICSID is an autonomous international organization. However, it has close links with the World Bank. All of ICSID’s 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.”⁹

In addition, it is important to observe that 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. As ICSID observes,

“...these (i.e. Additional Facility Rules) 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

⁹ *Ibid.*

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.’...’¹⁰

A third activity of ICSID in the field of settlement of disputes can be seen where the Secretary-General of ICSID accepts to act as the appointing authority of arbitrators for ad hoc (i.e. non-institutional) arbitration proceedings.¹¹ 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.¹²

1.3.1 Sources of the law governing the arbitration procedure under ICSID

ICSID observes that:

“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

¹⁰ *Ibid.*

¹¹ See *Ibid.*

¹² See ICSID web-site at:

<<<http://www.worldbank.org/icsid/about/about.htm>>>, visited on March 31, 2002.

Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).”¹³

1.3.2 The place of ICSID arbitration proceedings

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.”¹⁴

1.3.3 Record of arbitration cases before ICSID as a sign of some success with ADR

Generally, the number of cases submitted to ICSID has increased significantly in recent years.¹⁵ These include cases brought under the ICSID Convention and cases brought

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ See *Ibid.*

under the ICSID Additional Facility Rules.¹⁶ 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.”¹⁷

1.3.4 Other efforts to set-up regional or international frameworks for arbitration

Elsewhere, I have provided a detailed examination and analysis of the efficacy of the ADR process under ICSID.¹⁸ Here, suffice it to say, the ICC International Court of Arbitration, like ICSID, is an institution that has been

¹⁶ *Ibid.*

¹⁷ See *Ibid.*

¹⁸ See generally K.K. Mwenda and N.G. Gobir, “International Commercial Arbitration and the International Centre for the Settlement of Investment Disputes,” *Zambia Law Journal*, Vol. 30, 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.

heralded as one of the world's foremost institutions dealing with ADR on business and commerce related matters.¹⁹ ICC observes:

“While most arbitration institutions are regional or national in scope, the ICC Court is truly international. Composed 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.”²⁰

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.²¹ In the case of the latter, the process of

¹⁹ 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.

²⁰ See *Ibid.*

²¹ See *Ibid.*

arbitration is administered by arbitrators themselves.²² 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 arbitration 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.”²³

There are many other multilateral efforts to establish an international legal framework for arbitration. For example, the London Court of International Arbitration (‘LCIA’) provides a comprehensive international dispute resolution service, both under its own Rules and under the United Nations Commission of International Trade Law

²² *Ibid.*

²³ *Ibid.*

(‘UNCITRAL’) Rules,²⁴ for operation under any system of law in any venue throughout the world.²⁵ LCIA is probably the longest-established of all the major international institutions for dispute resolution, but also one of the most modern and forward-looking.²⁶ Its organisation, operation and outlook, and the services which it provides, are world-wide in scope.²⁷ It is such international legal instruments and facilities that have helped to shape the landscape of arbitration law in Zambia.

1.4 Conclusion

This chapter has examined some of the advantages of using arbitration over traditional court processes. Pertinent international law issues applicable to arbitration proceedings in Zambia were examined. The chapter looked at salient features of the institutional and legal frameworks for arbitration under arrangements such as ICSID, ICC International Court of Arbitration and LCIA.

It was argued that although ADR is thought of by many as a way in which to de-congest court systems that experience a back-log of cases, especially commercial law cases, the rapid

²⁴ See also UNCITRAL Notes on Organizing Arbitral Proceedings of 1996; and see generally F. Davidson, International Commercial Arbitration: Scotland and the UNCITRAL Model Law, (Edinburgh: Green/Sweet and Maxwell, 1991); I. Dore, The UNCITRAL Framework for Arbitration in Contemporary Perspective, (Boston: Graham and Trotman/Martinus Nijhoff, 1993); and I. Dore, Theory and Practice of Multiparty Commercial Arbitration, (Boston: Graham and Trotman, Martinus Nijhoff), 1990.

²⁵ For fuller details, see the LCIA web-site, at: <<<http://www.lcia-arbitration.com/lcia/>>>, visited on July 18, 2002.

²⁶ See *Ibid.*

²⁷ *Ibid.*

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.

Further, it was observed that some developing countries and transition economies have adopted other means of improving their judicial systems, in line with technical assistance from donor countries and multilateral financial institutions. 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.

Chapter 2

The legal framework under the Arbitration Act 1933

2.0 Introduction

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. This chapter examines the efficacy of the legal framework for arbitration in Zambia prior to the enactment of the Arbitration Act 2000. As noted in Chapter One, we use the present tense in this chapter to analyse the Arbitration Act 1933, treating the said 1933 statute as if it were still in existence. The reason for doing so is to provide an active mode in which to view some of the shortcomings and strengths of the Arbitration Act 1933. The Arbitration Act 1933, as noted in the previous chapter, has now been repealed and replaced by the Arbitration Act 2000.

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

“23. This Part (*i.e.* Part II²⁸) 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

²⁸ 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.

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.”²⁹

The Arbitration Act 1933 stated clearly that provisions of Part II of that Act were binding on the State.³⁰ Let us now take a more reasoned look at the legal framework for arbitration under the Arbitration Act 1933.

2.1 Office of arbitrator

Under the Arbitration Act 1933, parties to a dispute can agree that the dispute will be referred to an arbitrator or arbitrators for settlement.³¹ Furthermore, in accordance with the intentions of the parties, an arbitrator or arbitrators can be appointed by a person designated by the disputing parties.³² Here, the designation must be contained in a document known as a submission.³³ This document is a written agreement to submit present or future differences to arbitration, whether an arbitrator is named in it or not.³⁴ A submission can, therefore, not be made orally. But, 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 is that, is it any body corporate or individual that can

²⁹ Arbitration Act 1933, secs. 23 and 24.

³⁰ *Ibid.*, sec. 21.

³¹ *Ibid.*, sec. 5

³² *Ibid.*, sec. 5.

³³ *Ibid.*, sec. 5

³⁴ *Ibid.*, sec. 2.