Jurisdiction in Arbitration: Comparative Outlook between Tanzania and Rwanda

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Abstract

Importance of arbitration, as an Alternative Dispute Settlement mechanism, offers flexible, convenient and cost effective mode of solving the dispute. The cardinal point is the jurisdiction of the arbitral tribunal which vests powers to the arbitral tribunal or arbitrator to legally arbitrate of the dispute. This paper discuss the cardinal point of the arbitral jurisdiction, tracing where the arbitral tribunal or arbitrator powers originate and what happen if there is abuse or ultra vires in the exercise of the powers vested. The papers, comparatively, takes a snap shot of Rwanda, which has one of the modern arbitration legislation and Tanzania which as the oldest one, dated as far back as 1931.

Key Words: Jurisdiction; Arbitration; Rwanda; Tanzania.

Introduction

Arbitration is one form of Alternative Dispute Resolution (ADR) mechanism, whereby a dispute or difference between the parties is referred for determination after a due process of procedures of evidence and arguments by all parties. A person validly appointed to resolve the dispute, known as arbitrator, acting judiciously, shall at the end of the day make a decision on the dispute which is known as award. This person has got power to resolve the dispute but may exercise the power within the jurisdiction conferred upon him or her[2]. Jurisdiction conferred to him or her is in fact very critical and fundamental to both, the entire process and the final award. Due to that, it is critically vital, at this point to discuss on jurisdiction.

Jurisdiction

Jurisdiction is defined as the authority that an official organization has to make legal decision about or an area or a country in which a particular system of laws has authority[3]. Jurisdiction can simply be referred to as the legal or statutory authority to make a legal decision or enforce the law. In an arbitral process, jurisdiction is a focal point of everything. The arbitral tribunal must not only exercise its powers but also jealously do that within the jurisdiction conferred therein.

In Rwanda, the question of jurisdiction can be traced as way back as from the most fundamental instrument and the mother law of the land, Constitution[4] itself, which provides for establishment of the judiciary, powers to make laws and establishment of various dispute settlement mechanisms.

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2 . Art. 3, littera 1 of the Law on Arbitration and Conciliation in Commercial Matters, N 005/2008 Dated 14th February 2008

3 . Oxford Advanced Learner's Dictionary, Oxford University Press, 6th edition, 2000, p. 647.

4 . Articles 60, 90, 93, 108, 118 and 201 of the Republic of Rwanda Constitution of 2003.

One of the Laws, which have been made pursuant to the constitutional provisions,[5] is Law on Arbitration and Conciliation in Commercial Matters[6], which among other issues, establish and regulate the entire conduct of Arbitration and Conciliation, both locally and internationally[7].

While we are mindful of the fact that we are discussing about arbitral jurisdiction, it will be prudent to appreciate the fact that Rwanda Law on Arbitration and Conciliation in Commercial Matters, N 005 / 2008 dated 14th February 2008, provides for Conciliation as well, both domestic and international. The Conciliation jurisdiction of the above cited law may arise from; parties agreement, statutory obligation, court / arbitral suggestions or directives, or any competent government entity vested with statutory powers to so direct[8].

Under the Rwanda law on Arbitration[9], there are both local and international jurisdictions being conferred to the arbitral tribunal.

Jurisdiction in Arbitration Tribunal

As discussed above, the arbitral tribunal must satisfy itself that it has jurisdiction to entertain the matter or dispute referred to it. The jurisdiction of which the arbitral tribunal enjoys must trace its legal basis from various sources such as; the arbitration agreement[10], further consent of the parties, statutory provision / common law[11] as well as customs and trade usage[12] which has been in practice, accepted and agreed as the sources of jurisdiction.

The arbitration agreement, which form the great base of many arbitral tribunal jurisdiction worldwide can be discussed from three facets; First, existence of arbitration clause within the agreement, which is a core and fundamental part of the arbitral jurisdiction. A good example is a standard arbitration clause of Kigali International Arbitration Centre, which provides:

"Any disputes arising out of or in connection with this contract, including any question regarding its validity or termination shall be referred to and finally resolved by arbitration under the Rules of Kigali International Arbitration Centre."

The existence and presence of such arbitration clause in a contract or agreement, vests jurisdiction to the Kigali International Arbitration Centre to arbitrate on the dispute using the relevant and applicable rules

5 . Ibid
6 . N 005/2008 dated 14th February 2008
7 . Art. 1 of the Law on Arbitration and Conciliation in Commercial Matters, N 005/2008 dated 14th February 2008.
8 . Art. 2 Ibid
9 . Art. 3 ibid
10 . Art. 9 ibid
11 . The laws establishing or providing for the arbitration as well as decided cases, which set precedent.
12 . Art. 40 ibid and Art. 201 of the Constitution of Republic of Rwanda, 2003.

mentioned therein. To the contrary, absence of such arbitration clause, does not confer jurisdiction to the arbitral tribunal, unless, there is a separate parties agreement to that effect.

The separate parties agreement, which specifically deals and provide for arbitration in event of dispute, vests the jurisdiction to the arbitral tribunal to undertake and deal with arbitration matter before it. Under the Rwanda law[13], an arbitration agreement, whether a clause within the agreement or a separate agreement must be in writing. The law is very modern to the extent of accommodating the electronic communication[14]. The notable exception to the arbitration agreement is if the agreement itself is incapable of being performed.

In other situation, in absence of arbitration clause or arbitration agreement, the parties may submit themselves to the arbitral tribunal through their further consent to that effect. The consent may be direct or indirect through the pleadings. For example the consent to arbitration is stated in a statement of claim by a claimant or statement of a defence by the respondent and that the other party does not object to such a statement as to jurisdiction.

Further, the arbitral tribunal can be conferred its jurisdiction from the statutes[15] or common law. In such event, the statute providing for the jurisdiction to the arbitral tribunal, defines the nature and extent of that jurisdiction. The Rwanda law provides jurisdiction to the arbitral tribunal established under Kigali International Arbitration Centre (KIAC) to deal with both local and international arbitration[16] as well as the power to examine and rule on its own jurisdiction. This may happen suo motto, a result of an objection to jurisdiction being raised or when the question of validity of the entire agreement is an issue. The arbitral tribunal may make such a decision on jurisdiction as a preliminary question or during the final award, on which its power to declare the entire agreement null and void but at the same time spare the arbitration clause[17] and if need be, make the interim measures order[18]. In Rwanda law, the jurisdiction of Kigali International Arbitration Centre arbitral tribunal sounds exclusive[19].

Legally, both under domestic and international law, customs have been one of the major sources of law and jurisdiction. In arbitration, customs and trade usage have been conferring jurisdiction to an arbitral tribunal, either through the said trade usage and practice or through a codification of the said customs and trade usage. Sometimes and in many jurisdictions, the constitution of the particular country seems to accommodate the use of the customs and trade usages in not only dispute settlement but also in conferring jurisdiction to various bodies[20]. Such a constitutional recognition to customs and trade usage

[13] . Art. 9 ibid
[14] . Ibid
[15] . Art. 18 ibid, Kenya Arbitration Act, 1995, English Arbitration Act, 1996 and Tanzania Arbitration Act. Cap. 15, of 1932 etc.
[16] . Art. 2 and 3 of the Law on Arbitration and Conciliation in Commercial Matters, N 005/2008 Dated 14th February 2008.
[17] . Art. 18 ibid
[18] . Art. 19 and 20 ibid
[19] . Art. 7 Ibid
[20] . Art. 201 of the Constitution of Republic of Rwanda, 2003.

are normally and principally extended to an arbitral tribunal. A good example is the Rwanda Law on Arbitration and Conciliation in Commercial Matters, which provides:

" In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and where necessary shall take into account the usages of the trade applicable to the transaction"[21].

In Tanzania, The Arbitration Act[22] is the main legislation, which can be traced as far back as 22nd May 1931 when the law was enacted to provide for an alternative dispute settlement during colonial time. With some amendments, the law is still in force today though with lots of reservations and criticism from stakeholders, particularly on whether the same can serve the Tanzania community today.

The Arbitration legislation in Tanzania, does not have the statutory body, which regulate the arbitration, instead, Arbitration is scattered and can be done almost in all areas except land matters[23]. The Arbitral jurisdiction in Tanzania can be vested to an individual person appointed by the parties or designated parties or a specified holder of the certain office. There are equally some arbitral bodies, which enjoy the arbitral jurisdiction in Tanzania, i.e., Tanzania Institute of Arbitrator, which deals with all sorts of arbitration vested referred to it and National Construction Council[24], which has arbitral jurisdiction on construction matters in Tanzania. The court of law, under Tanzania jurisdiction, respects the arbitral jurisdiction and will stay the proceedings to allow arbitral jurisdiction to take its intended course as provided here under:

> "Power to stay proceedings where there is a submission Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary for the proper conduct of the arbitration, may make an order staying the proceedings"[25].

In accordance with section 6 of Arbitration Act of Tanzania, the court still has its jurisdiction and can rightly invoke its jurisdiction and order stay of the court proceedings if it can establish the existence of a valid arbitration agreement on a matter that, under the arbitration agreement, is to be brought to arbitration. The court will not hesitate to grant the stay of legal proceedings and allow the parties to enjoy the opted

[21] . Art. 40, paragraph 4 ibid

[22] . Cap. 15 of the Laws of Tanzania, Revised Edition, 2002, similar to English Arbitration Act of 1889.

[23] . Land Act, No. 4 of 1999.

[24] . Act of Parliament of the United Republic of Tanzania No. 20 of 1979 and become operational in 1981 through the Government Notice, No. 95/1981.

[25] . Section 6 of Cap. 15 of the Laws of Tanzania, Revised Edition, 2002.

arbitral jurisdiction except if there is strong evidence that the arbitration agreement is null and void, inoperative, and incapable of being performed or the applicant has taken a step in the court proceedings.

One of the notable departure and variance between the Tanzania and Rwanda legislation statutory instruments is the level of intervention of the court of law. While in Rwanda, the existence of KIAC serves the purpose in event of laxity of appointment of arbitrator by parties or willingness of parties to be involved in an arbitration proceedings, in Tanzania, the absence of recognized national statutory body dealing with arbitration, makes the court the head prefect of the process. The law[26] in Tanzania empowers the court to appoint the arbitrator or umpire or third arbitrator in the following events;

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

(ii) If an appointed arbitrator neglects or refuses to act or is incapable of acting the vacancy should not be filled and the parties do not fill the vacancy;

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

(iv) where an appointed umpire or third arbitrator refuses to act or is incapable of acting or dies or is removed and the submission does not show that it was intended that the vacancy should not be filled, and the parties or arbitrators do not fill the vacancy, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

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

Thus, unlike the position in Rwanda, where the court can intervene on arbitral jurisdiction only in event of serious irregularities, in Tanzania, the court intervention is much wider, starting from appointment of arbitrator, staying of proceedings and setting aside the award.

Once the arbitral tribunal is vested with jurisdiction and exercise its powers within the jurisdiction, the court of law will be hesitant to interfere with the vested jurisdiction. In the case of Construction Engineers and Builders Ltd. vs. Sugar Development Corporation[27], the court ruled that:

> "Where it is clear that the parties to the contract have agreed to submit all their disputes or differences arising under the contract to an arbitrator, the dispute must go to arbitration unless there is good reason to justify the court to override the agreement of the parties."[28]

[26] . Section 7 and 8, Ibid
[27] . [1983] T.L.R. 13
[28] . Ibid p. 14

The above decision of the Court of Appeal of Tanzania underlines the exclusivity nature of the arbitration clause and jurisdiction vested to an arbitral tribunal to the extent that the court cannot interfere, save for good reason.

In another English case of Heyman v. Darwins Ltd[29], Lord Wright, discussing on jurisdiction of the arbitral tribunal, had this to say:

> "I need not quote authorities for what has been said so often, that under the general submission the arbitrator is appointed to decide issues both of fact and of law… it will require substantial reason to induce the court to deny its due effect to the agreement of the parties to submit the whole dispute, whether it includes both facts and law or is limited to either fact or law[30]".

Once again, the above quotation from Lord Wright underline the importance of not only jurisdiction, on matters of law and fact, to the arbitration process but also the need for the arbitral tribunal to swim within the limits of its jurisdiction, otherwise, the court will be invited deny the due effects of arbitration clause.

Lack of Jurisdiction

As stated above, jurisdiction is a statutory authority to arbitrate upon the dispute or matter between the parties, in most cases arising from contractual arbitration clause, or separate agreement or statutory instruments or customs and trade usages. There are some matters, which cannot be arbitrated, and as such the arbitral tribunal or an independent arbitrator lacks jurisdiction over those matters.

Parties may object and dispute the jurisdiction of the tribunal at the initial stage of the arbitral proceedings. The objection is raised before the arbitral tribunal itself and the tribunal shall then decide on its own substantive jurisdiction, unless the objection is otherwise settled by the parties. A party may object on the ground that the tribunal lacks substantive jurisdiction, but this objection must be raised before contesting the merits of the case

The arbitral tribunal shall have no jurisdiction to try the matters, which are not validly referred to it by the parties. If the parties have not referred the matter to an arbitral tribunal or if the matters have been wrongly referred to an arbitral tribunal, the said arbitral tribunal lacks jurisdiction to entertain the matter and any proceeding and its subsequent award shall be challenged in court of law.

An arbitral tribunal will have no jurisdiction to deal with matters, which are beyond the scope of the dispute envisaged in the arbitration agreement or matters, which were not in existence during the commencement of the arbitration proceedings. If arbitral tribunal does that, it will be acting *ultra-viresly* by dealing with the matters, which are not arbitrable.

[29] . [1942] A.C. 356
[30] . Ibid p. 389

In other circumstances, the rules apply to a specific type of disputes. The Rwanda law, for instance, deals with commercial matters only, thus one cannot refer political disputes or matrimonial disputes to Kigali International Arbitration Centre because that matters are not arbitrable and the arbitral tribunal lacks jurisdiction.

Therefore, when we are assessing the existence or lack of jurisdiction, we are basically and essentially analyzing the dispute over the scope of arbitration clause and establish its scope. We are assessing the validity and appropriateness of and appointment of the arbitrator and more vital the validity of the arbitration agreement. All these form the basis and foundation of jurisdiction of the arbitral tribunal.

Conclusion

The powers of the arbitral tribunal originates from and depends much on the jurisdiction which is vested in that tribunal from arbitration agreement, statutory provision, consent of the parties or customs and usages. If the arbitral tribunal has jurisdiction, it can exercise the powers but if lacks jurisdiction, it consequently has no power to do anything in the arbitration proceedings. To assess and establish the existence of the jurisdiction, which enables arbitral tribunal to exercise its powers, it has to be established that there is a valid arbitration agreement; there is proper appointment and the scope of the matters properly submitted to the tribunal.

In that sense, it is beyond doubt that jurisdiction is everything in arbitration because everything revolves around it. The entire process, proceedings and final awards depends much on the existence of the jurisdiction. If there is jurisdiction, there is a valid process and award but if there is lack of jurisdiction, there is lack of valid process and award, which is open to be challenged before the court of law. This will lead to either non-recognition of the award or non-enforcement of the award[31].

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