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Uganda Chapter

Inaugural Newsletter March 2024

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WORD FROM the Chairman

David Kaggwa, FCIArb, FICCP

“As promised, we shall continue to deliver on our commitment to grow the membership of CIArb in Uganda.

Dear Members,

Greetings from the Chartered Institute of Arbitrators – Uganda Chapter.

It is my absolute honor and privilege to launch our inaugural newsletter!
The Chartered Institute of Arbitrators (CIArb) is the world’s leading qualifications and professional body for dispute avoidance and dispute management. CIArb was founded on 1st March 1915 and was granted the Royal Charter in the United Kingdom in 1979.

In September 2022, CIArb Uganda Chapter was launched; under the auspices of CIArb-Kenya Branch. This year, CIArb Uganda Chapter shall mark 2 years of existence in Uganda. It has been and it continues to be an exciting journey of growth and tremendous achievement within this short time frame.
Ever since its launch in Uganda, CIArb Uganda has conducted and continues to conduct trainings in conjunction with the CIArb Kenya Branch and we have managed to grow our membership in Uganda to over 80 Members. We are working towards increasing our membership this year to 150 members by December 2024.

Our core mandate remains to conduct trainings and pathway courses towards the obtaining of a CIArb qualification; which is an internationally recognized qualification for Alternative Dispute Resolution (ADR) practitioners.

ACTIVITIES FOR 2024

In 2024, we have a number of exciting activities lined up that include courses, trainings, webinars and Social Events that you should keep track of. We have already released this year’s Activity Calendar on all our social media platforms and the same is also shared in this newsletter.

As promised, we shall continue to deliver on our commitment to grow the membership of CIArb in Uganda and to this end, we have organized training courses such as Introduction to Arbitration, Module 1: Domestic Arbitration; Module 1: Mediation, Accelerated Route to Member (ARM) and Accelerated Route to Fellow (Fellow).

To ensure continuous professional development, we shall also have a number of webinars throughout the year to discuss various critical trending topics in the world. We also plan to collaborate with other professional organizations with the objective of ensuring that the message of Alternative Dispute Resolution remains key on the agenda and is implemented by all professional bodies and their membership.

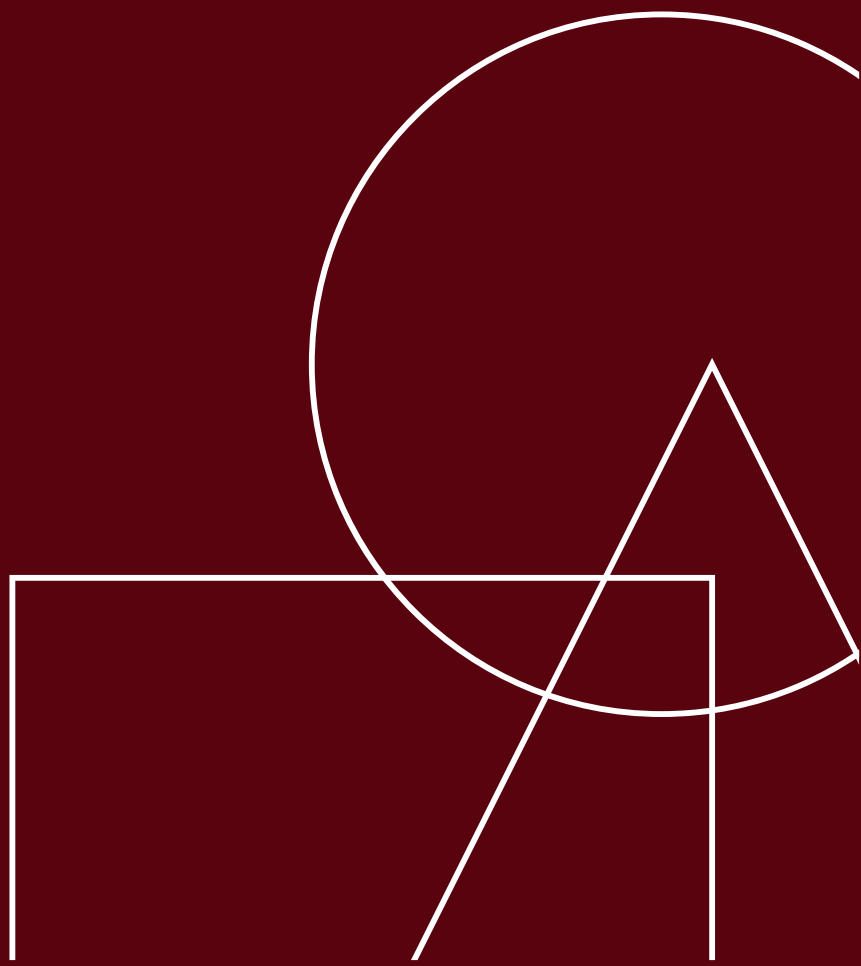
We have also organized networking events wherein CIArb members will get to know each other and share ideas on how to grow the practice of Arbitration in Uganda. Please also look out for our first members Conference that shall be a very exciting event.

I would like to express my sincere thanks and appreciation to the Editorial Board of this Newsletter together with the staff at the CIArb Secretariat that has tirelessly worked to ensure that our inaugural edition is rolled out.

Once again; it is my absolute honor to launch our inaugural newsletter. The subsequent ones shall be released every quarter as we continue to keep you abreast with events in the arbitration space, articles on pertinent issues and insights in leading decisions.

I wish you a nice Read!

01
Events



Meet And Greet 2023

On 14th December, 2024, CIArb Uganda Chapter held its annual Meet and Greet event at Protea Hotel by Marriot, Kololo.

The event is an opportunity for Members to form connections and exchange information with each other in a casual setting. Our event was graced with a panel comprised of foremost experts in the fields of Oil and Gas and ESG who very masterfully elucidated the theme of the night which was "Unlocking Opportunities in the Oil Value chain".

Our utmost thanks goes out to everyone who participated to make the event a resounding success, from the Steering Committee, the Keynote speaker and panelists to everyone who made an effort to attend. The event would not have been what it was without you.

Mr. David Kaggwa, FCIArb, the Chairman of CIArb, Uganda Chapter giving the opening remarks of the event

Chairman Emeritus of the CIArb Kenya branch and Chairman of the CIArb Uganda Transition Committee Mr. Samuel Nderitu giving a rousing speech on the exceptional relationship between our mother branch in Kenya and the Uganda chapter.

Our gratitude goes to him for all his efforts in helping realise the development goals of the Uganda Chapter.

Our Keynote Speaker Mr. Peter Muliisa, Chief Legal and Corporate Affairs Officer, UNOC delivering his address on the theme for the night "Unlocking Opportunities in the Oil Value Chain"

Our distinguished panel of experts in the Oil and Gas industry including (L-R); Olivia Kyarimpa Matovu, MCIArb, Partner at Ligomarc Advocates, Hon. Treasurer CIArb-Uganda Chapter (Moderator), Aisha Naiga Wamala, Managing Partner at ABMAK Associates (Panelist), Denis Kakembo, Managing Partner at Cristal Advocates (Panelist), Albert Mukasa, FCIArb, Managing Partner at M&K Advocates (Panelist), Nanza Iga Mariam, MCIArb (Panelist)

Members of the Institute paying avid attention to the addresses of the night's speakers who delivered captivating insights in expounding the Oil value chain and its impact on Arbitration

ICC YAAF Event

The ICC Young Arbitration and ADR Forum (YAAF) partnered with the Law Development Centre to organise an online event dubbed "ICC YAAF: Energy Disputes: current trends and challenges in Africa".

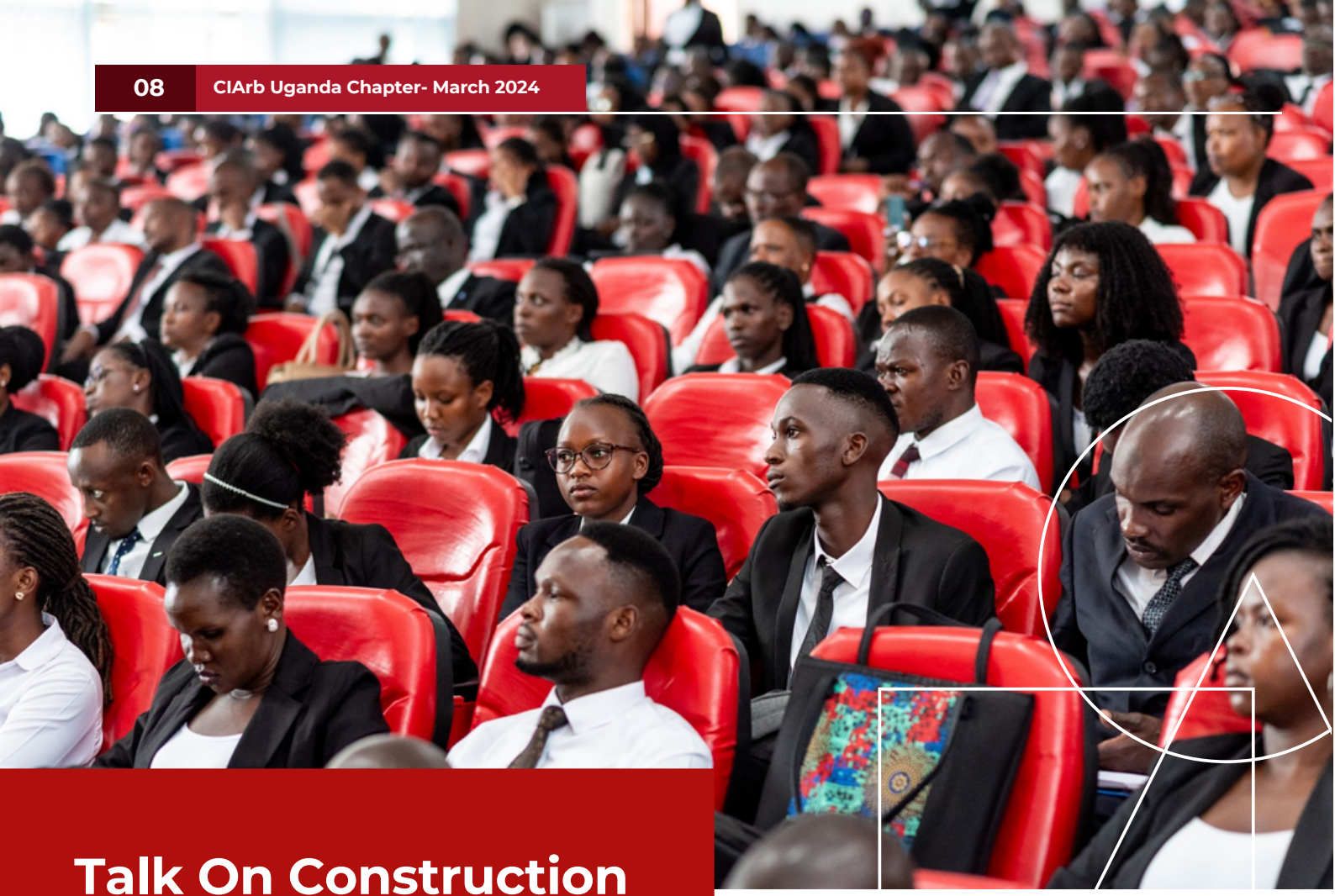
Mr. Mukasa Albert, FCIArb and ICC YAAF Africa Representative introducing the panel of experts to address the LDC students and the online participants.

The panel constituted: Kaggwa David, FCIArb, Chairman CIArb-Uganda Chapter, Senior Partner, Kaggwa & Kaggwa Advocates (Panelist) Nanza Iga Mariam, MCIArb, ESG Expert (Panelist), Denis Kakembo, Managing Partner Cristal Advocates (Panelist), Dr. Susan Nakanwagi, Natural Resources Governance and Rights Specialist, Regenerate Africa (Panelist)

Africa Chief Justice's Summit On ADR

The Chartered Institute of Arbitrators was invited by the Chief Justice Hon. Alphonse Owiny-Dollo to attend the Africa Chief Justices' Summit on ADR which was organised in conjunction with Pepperdine University (USA) under the theme "Re-engineering the Administration of Justice on the African Continent"

Mr. Gimara Francis, MCIArb, one of our esteemed members acquired a Master's degree in Dispute Resolution and a Certificate in International Commercial Arbitration from Pepperdine University. Our sincere congratulations to Mr. Gimara on his accomplishment.



Talk On Construction Arbitration

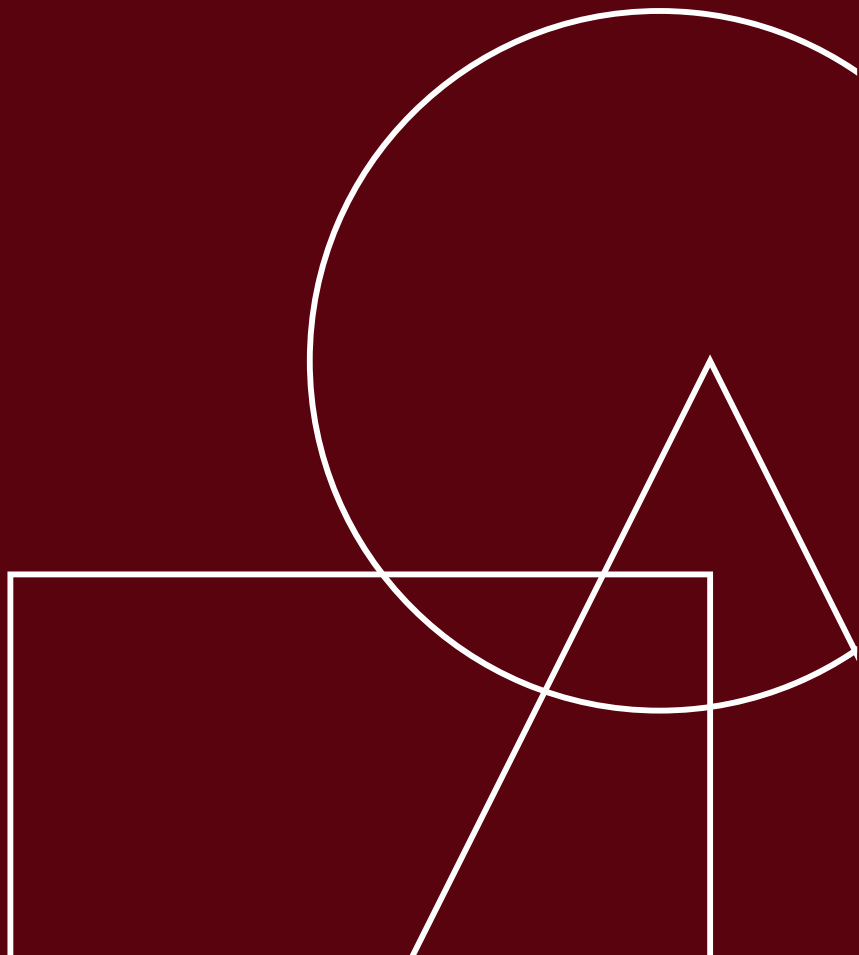
he Chairman of the Chartered Institute of Arbitrators-Uganda Chapter was invited to give a lecture at the Law Development Centre on the practical aspects of Construction contracts and Construction arbitration.

Global Surveyor's Day

On the 21st of March, 2024, our Chairman Mr. David Kaggwa was invited by the Institution of Surveyors of Uganda to speak at their Global Surveyor's day & Pre-AGM conference and his presentation was on "The critical role played by ADR in the management of disputes in the Land, Water and Built environment".

On the same day, RSU Kaheru Phillip, FCIArb, one of the Institute's most prominent members also moderated a panel that was speaking on the topic "The critical role played by ADR in the management of Construction & Project Management disputes".

02
Thought Leadership



Key Arbitration Caselaw Developments in Uganda 2023-2024

Moses J. Adriko, SC, FCIArb

Gulam Hussein Dawood, MCIArb

An Overview of Uganda's Arbitration Legal System

Uganda's legal system follows the common law tradition where binding legal rules are gradually developed by a hierarchical judiciary that interprets and applies the Ugandan Constitution, statutes passed by Parliament, applicable international treaties, subsidiary laws, the English Common Law and doctrines of Equity, and in limited circumstances, local customary law.

In terms of Arbitration Law, Uganda is a member of the New York Convention which means that foreign New York Convention Awards are easily enforceable in Uganda and vice versa. Uganda is also a member of the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

The Arbitration and Conciliation Act, Cap. 4, which commenced in the year 2000, is the governing domestic statute on arbitration. It covers both domestic and international arbitration and further domesticates the New York and ICSID Conventions.

As with many countries around the globe, Uganda's Arbitration Act is based on the UNCITRAL Model Law and its courts generally refrain from interfering with arbitration matters and awards save in well circumscribed instances.

Uganda's specialised Commercial Court/Division is charged with consideration of applications to enforce or to set aside commercial arbitration awards and is the main source of the existing arbitration caselaw.

With this brief introduction, we now address the recent caselaw developments in Uganda's Arbitration Law landscape.

Recent Developments

With an increased number of post-arbitration rulings in applications seeking to set aside domestic awards or to resist the enforcement of foreign awards, the Arbitration Law landscape in Uganda continues to develop into a more comprehensive body of law.

We analyse key holdings drawn from the leading cases decided in the 2023-2024 period. The majority of the rulings reviewed focus on the various grounds upon which a domestic arbitration award may be set aside or based on which the enforcement of a foreign award may be refused as well as the extent of judicial participation in the arbitral process and related matters.

We have structured our case analysis thematically.

Setting-aside vs Resisting Enforcement of Awards

The High Court has, in *Aya Investments (U) Limited vs Industrial Development Corporation of South Africa Ltd (High Court Misc. Cause No. 58 of 2021)*and *Great Lakes Energy Company NV vs MSS Xsabo Power Ltd and 4 others (High Court Consolidated Arbitration Causes No. 2 and 5 of 2023),* held that under Uganda law, an arbitral award can only be set aside at the seat of arbitration and where a foreign award is set aside at the seat, it becomes unenforceable in Uganda.

Where, however, a foreign award is sought to be enforced in Uganda, enforcement may be resisted/refused by the High Court on the basis of any of the grounds set out under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards including: (i) incapacity, (ii) improper notice and inability to present one's case, (iii) that the award exceeds or does not fully cover the scope of what was referred to arbitration, (iv) improper composition of the arbitral tribunal, (v) that the award is not yet binding or has been set aside at the seat of arbitration, (vi) that the subject matter of the dispute is not arbitrable in Uganda, or (vii) that the recognition and enforcement of the award would offend Uganda public policy.

It is noteworthy that the grounds under Article V of the New York Convention for the resistance of enforcement of a foreign arbitral award are largely similar to the grounds for setting aside a domestic award in Uganda. Nevertheless, practitioners are advised to take note of the nuances and the pre-existing authoritative interpretations of the Convention.

Enforcement of Partial Awards

Partial Awards, being awards that finally decide one or more of the substantive claims submitted to an arbitral tribunal while leaving other claims pending, are enforceable in Uganda notwithstanding that the tribunal is still seized with the other undecided claims and this was seen in *Great Lakes Energy Company NV vs MSS Xsabo Power Ltd and 4 others, Consolidated Arbitration Causes No. 2 and 5 of 2023.* In enforcing such Partial Awards, the procedure to be adopted is the same as that governing the enforcement of final awards. Importantly, the High Court stated that foreign awards granting provisional measures or containing injunctive relief are enforceable in Uganda.

Judicial and appellate intervention in arbitration matters is greatly limited

Recent rulings by the **Court of Appeal** (Aya Investments (U) Limited vs Industrial Development Corporation of South Africa Ltd, Court of Appeal Civil Application No. 410 of 2023) and **High Court** (AYA Investments (U) Limited vs Industrial Development Corporation of South Africa, HCMA No. 775 of 2023) and other disputes like Lakeside Diary Limited vs Midland Emporium Limited and 3 others, Court of Appeal Civil Application No. 858 of 2022, have further clarified and cemented the position that the courts are barred from interfering with arbitration processes or awards except as may be expressly provided for in Uganda's Arbitration and Conciliation Act, Cap. 4.

This means that in general, there is no right of appeal against the decision of the High Court in an application to set aside an arbitral award or to resist the enforcement of one. The only avenue through which appeals may be pursued to the courts is if the arbitration agreement contains an option for an aggrieved party to an award to appeal against it on a question of law to the High Court. Any further appeal to the Court of Appeal requires the express agreement of the parties in addition to leave by the High Court or the Court of Appeal itself. Absent this, all other attempts to appeal against an arbitral award to the courts or to appeal against a High Court ruling on an application to set aside or resist the enforcement of an arbitral award are barred.

These recent decisions by the Court of Appeal and High Court confirm the older position in Babcon Uganda Limited vs Mbale Resort Hotel Ltd(Supreme Court Civil Appeal No. 6 of 2016) and Bilimoria and anor vs Bilimoria ([1962] 1 EA 198) to the same effect.

Party Autonomy

Increasingly, Ugandan caselaw is buttressing the centrality of party autonomy and the desirability of enforcing arbitration agreements as much as practicable. This policy manifests itself in the form of restrictive analyses of applications to set aside arbitral awards with a strict focus on the process of arbitration and less focus on the substantive decision reached by the arbitrator on the merits of the case as seen in Great Lakes Energy Company NV vs MSS Xsabo Power Ltd and 4 others, Consolidated Arbitration Causes No. 2 and 5 of 2023.

The commonly applied adage is that generally the parties take their arbitrator for better or worse or both as to decisions of fact and law as court elaborated in Smile Communications Uganda Limited vs ATC Uganda Limited and Eaton Towers Uganda Limited, Arbitration Cause No. 4 of 2022.

Thus, practitioners are required to address the limited grounds for setting aside an award or resisting its enforcement and are largely precluded from arguing errors of law or fact which are in the nature of a disguised appeal on the merits.

Arbitrability of specific disputes

The High Court has further stated that non-arbitrable disputes either constitute those disputes whose resolution is reserved by the legislature to exclusive public fora or matters which are excluded by necessary implication by virtue of their public nature. Where, however, a dispute straddles the line between arbitrability and non-arbitrability, the courts and tribunals may in the absence of binding precedent consider the manner in which the claim is framed, the nature of remedies sought, and whether the public or any third parties may be affected by the adjudication, in assessing whether to decide in favour of arbitrability or non-arbitrability. *(Smile Communications Uganda Limited vs ATC Uganda Limited and EATON Towers Uganda Limited, Arbitration Cause No. 4 of 2022.)*
In general, the following matters are considered non-arbitrable in Uganda: employer-employee disputes, criminal offences, child custody and guardianship, insolvency and winding up, constitutional law matters, and others.

Time within which arbitral award must be delivered

In relation to the time within which an arbitral award must be delivered, recent caselaw has clarified that where an arbitration agreement fixes the time within which an award must be delivered, an arbitrator is powerless to extend that period without the mutual agreement of the parties and at the expiry of that set time, the arbitrator's mandate lapses. In view of this strict approach, practitioners are cautioned against drafting unreasonably short timelines into arbitration agreements and are advised to retain the default power of an arbitrator to extend the time within which an arbitral award ought to be delivered.

The default Uganda law position is that an arbitrator must deliver his or her award within two months after entering on the reference or being called on to act by written notice from any party to the submission, or within such period as the arbitrator may enlarge the time for delivering the award provided the enlargement is done before the expiry of the initial period.

Time within which arbitral award must be challenged

Under Uganda law, an application to set aside a domestic arbitral award must be filed within one month of receipt of the award. The courts have construed the reference to "one month" as being a reference to thirty days and have clarified that time starts to run when the award is signed and delivered either to the parties or to the registry of the institution administering the arbitration, and not when the parties actually do collect the award.*(National Housing and Construction Company Limited vs Ambitious Construction Company Limited, Misc. Cause No. 54 of 2023)*

In relation to foreign arbitral awards, the action to resist enforcement must be filed within 90 days of receiving notice of the filing of an application for the recognition and enforcement of the award. The application for recognition and enforcement, however, must itself be made within the six-year time limit provided for under Uganda's Limitation Act, Cap. 80. *(Great Lakes Energy Company NV vs MSS Xsabo Power Ltd and 4 others, Consolidated Arbitration Causes No. 2 and 5 of 2023.)*

Concerning bias

In relation to bias, the Commercial Court has re-affirmed that when approached in connection with a potential appointment, an arbitrator should disclose any circumstances likely to give rise to justifiable doubts as to their independence or impartiality including disclosure of any connection or relationship which the arbitrator has previously had with any of the parties or the subject matter of the dispute which may give rise to an impression of bias. Where doubts are raised as to the impartiality or independence of the arbitrator during the arbitral process, the arbitrator must determine the issue and in the event of a finding of no bias, the question may be reserved by the aggrieved party for determination in a setting aside application following the delivery of the arbitral award. *(Smile Communications Uganda Limited vs ATC Uganda Limited and EATON Towers Uganda Limited, Arbitration Cause No. 4 of 2022)*

The Court has also reaffirmed that an arbitral tribunal must not only be free of actual bias, it must avoid even the appearance of bias. Thus, partiality may manifest as actual partiality, an appearance of partiality, or a reasonable impression of partiality.

Importantly, the Court has clarified that the impartiality and independence of an arbitrator is not assessed on the same standard of judicial impartiality and independence since arbitrators are often appointed for their niche expertise and it would be unrealistic to demand that they be free of any and all association with the parties or the subject matter of the dispute. Nevertheless, the arbitrator retains a duty to disclose all circumstances which might lead to an impression of bias in order that the parties may consider any objections they may have and any waivers they may want to make.

The above decisions highlight the continued development of Arbitration Law in Uganda particularly toward a more assertive pro-arbitration stance with limited judicial intervention reserved largely for the correction of fair hearing breaches, public policy considerations, allegations of bias, and questions of non-arbitrability.

We expect to see continuous growth in the uptake of arbitration as a mode of dispute resolution in Uganda as well as the development of additional arbitral institutions with the attendant jurisprudential and economic benefits.

Alternative Dispute Resolution in ESG

My simple definition of ESG is what we are doing to the planet and to each other.
ESG stands for Environmental, Social and Governance. These are pillars in ESG frameworks and represent tenets of sustainability that we as humanity should collectively embrace if we are to overcome and undo all the mayhem we have caused in a bid to gain economic development. Sustainability defines the core values that shape culture and dictates how we live and interact as human beings with the bare minimum of dignity and in peace.The social, environmental and economic attributes of sustainability affect us all irrespective of gender, race, geographical location, and all other demographics. It is in the very universality of its multi faced nature relating to the 3Ps; People, Planet and Profits, where we can each see ourselves and what is our direct and indirect role to make this situation "better or worse".

Our world faces a number of global challenges: climate change, transitioning from a linear economy to a circular one, increasing equality in different social strata, balancing economic needs with societal needs, to mention but a few. These challenges notwithstanding, Investors, regulators, as well as consumers and employees are now increasingly demanding that companies should not only be good stewards of financial capital but also of natural and social capital and in addition, have the necessary governance framework in place to support this. In a nutshell, more investors are incorporating ESG elements into their investment decision making process, making ESG increasingly important.The luxury of cherry picking which of the ESG aspects to honor has been overtaken by the emergency we face collectively as humans as - global warming effects are now felt worldwide and further, investors are increasingly demanding a detailed due diligence report covering all ESG tenents, before investment decisions can be made.

The ongoing historical debate between idealism and realism, between the way things should be and the way things actually are, and the debate as to whether legal philosophy should incorporate ethical standards or confine itself to an analysis of the law as it stands is a vital one that continues today. In contrast, realists have a negative opinion of human nature and consider international anarchy as being characterized by a struggle for State survival and vying national interests, where the conquest of power is of vital importance given the ever-present possibility of conflict. As indicated earlier on, the eye should remain on the prize.

ABOUT THE AUTHOR

MariamN.Iga, MCIArb

- Nanza is a thought leader and professional with many years of combined experience in the fields of, Academia, Alternative Dispute Resolution, Management Consulting, Procurement and Project Management.

This is the time to mute all "buzz" words around the ESG issues and focus squarely on interventions that will produce the desired outcome, which is economic and social development across the entire ecosystem. In ideal and absolute terms, ESG and justice ought to be a given, a basic human right so to speak but however, the reality remains that the ever growing gap between the economic and social constraints globally will require deeper thought and re prioritization if ESG and its accruing benefits are to be achieved.

ESG aspects constitute a common roadmap for international development and are underpinned by legal obligations arising from international human rights law. However, as it is with competing priorities anywhere be it at micro and / or macro level, tensions may emerge when, for example, big infrastructure projects for example wind farms that are generators of clean energy, displace communities, or where major investment decisions are made without considering the benefits for the local population. This calls for a drastic paradigm shift and principled pragmatism to navigate these tensions at the basis of rule of law and democratic procedures, and ensuring non-retrogression.

Much has already been achieved in terms of such 'vertical integration' of rights and priorities. However, another set of tensions may arise in terms of ensuring horizontal convergence between the ESG aspects and making requisite tradeoffs.

What is the role of Alternative Dispute Resolution (ADR)?

As we grow and quickly move into a dispensation where ESG related disputes are slowly taking center stage, adaptation to ESG is now more apparent. The need for a fast and trustworthy dispute resolution mechanism is even much greater than in decades past. One of the ways of amicably resolving such disputes is through ADR. ADR is now a preferred mode of dispute resolution compared to resolution of disputes through litigation due to the former being more efficient in terms of time and the preservation of relationships; business or otherwise.

ADR is any process or procedure in which a neutral third party assists in or decides on the resolution of the issues in dispute. Among the many different types of ADR processes, the most common are mediation, arbitration, and conciliation.

Arbitration is by far one of the most preferred forms of ADR due to its finality and party autonomy. Party autonomy ensures that there is a high degree of satisfaction with the arbitration process since the parties are free to decide on a myriad of issues. The enforceability of arbitral awards, the flexibility of the procedure and the depth of expertise of arbitrators are all major advantages of arbitration. In addition to all the aforementioned benefits, privacy, the ability to choose an arbitral tribunal and neutrality are considered highly valuable attributes of the arbitral process. This gives the parties to a dispute a sense of ownership of the resolution mechanism and makes it easy to accept the outcome of the process.

Against this background, it is therefore no surprise that Alternative Dispute Resolution Mechanisms are now being catapulted to the front and center of conflict management. The direct benefits of amicable resolution through negotiation, expert determination, neutral evaluation, negotiations and mediation cannot be underrated be it in private commercial disputes or in interstate dispute resolution. The benefits of ADR embody a safe, timely and cost-effective option. Moreover, cost and time savings might be just the tip of the iceberg.

The indirect impacts—such as improvements in resolution effectiveness while focus is on preserving party relationships, party autonomy, the business environment, and trust in the legal system— could potentially be even more important in the overall contribution of ADR to economic development.

Most ESG related disputes require critical and urgent resolve and hence, legal rights may not mean much if justice is delivered years after a dispute arises and at a very expensive price; both in terms of time and destroying of relationships.

In a nut shell, in order to benefit from this ESG wave, we should take advantage of the legal and regulatory "blank canvas" to design the tapestry that has a multipronged approach toward Environmental, social and Governance aspects of sustainability.

One way of designing this tapestry is through the promotion of ADR in resolution of disputes relating to ESG. ADR especially arbitration, offers plenty of low hanging fruit that can be picked to ensure that ESG initiatives are not "dead on arrival" at the mercy of strenuous, long winding and costly legal options.

Adjudication And Arbitration; is there a difference? A critique of selected rulings from Centre of Arbitration and Dispute Resolution (CADER).

Adjudication is an Alternative Dispute Resolution (ADR) mechanism where an independent neutral third party makes a decision on a dispute between parties. The decision is temporarily binding. The adjudicator acts in an intermediate capacity on the spectrum between expert determination and arbitration. Adjudication is a common method of dispute resolution in the construction industry due to its benefits which include speed, flexibility, use of experts to resolve disputes, cost effectiveness and privacy. As such, it has also found a place in the construction industry in Uganda on public works. However, it is yet to be embraced fully in the private industry.

Adjudication in Uganda

There are three forms of adjudication, namely: statutory, contractual and ad hoc. Statutory adjudication is a form of adjudication in jurisdictions like England and Wales where there is an Act that applies to a contract between parties. The Act in this case is the Housing Grants, Construction and Regeneration Act (HGCRA) 1996 as amended by the Local Democracy, Economic Development and Construction Act (LDEDCA) 2009. When a contract falls within the description of a 'construction contract' in the mentioned Act, then a mandatory provision of dispute resolution by adjudication applies.

Contractual adjudication, on the other hand, is a form of adjudication where an Act does not apply, but the parties have agreed a mechanism in their contract where they resolve disputes by adjudication.

Ad hoc adjudication refers to a form of adjudication where the parties have agreed to submit their dispute, without reservation, to adjudication, thereby giving an adjudicator jurisdiction to decide their dispute in circumstances where an Act does not apply and where there is no pre-existing contractual agreement to adjudicate.

In Uganda, the most common forms of adjudication are contractual and ad hoc adjudication. Uganda does not have a statutory adjudication regime in place for the construction industry.

Standard Form Contracts and Adjudication in Uganda

Contractual adjudication in Uganda is common due to the proliferation of the use of Standard Form Contracts which are mostly used on public projects and a few private projects.

The common Standard Form Contracts in Uganda include the Public Procurement and Disposal Authority (PPDA) form of Contract, FIDIC forms of contract and the East Africa Institute of Architects form of contract which is commonly used for buildings in the private industry.

ABOUT THE AUTHOR

Gavamukulya Charles, MCIArb, AICCP.

Managing director of CG Engineering Consults and Resolve360.

It is critical to note that there must be a dispute in order for the adjudication process to become operable. Court held in the case of *AMEC Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339* that the word dispute should be given its normal meaning and there is no special meaning ascribed to it. A dispute crystallizes when a claim made by one party is either accepted, modified or rejected by the other party as was held in the case of *Fastrack v Morrison [2000] 75 ConLR 33.*

The Adjudication process in the PPDA forms of Contract which are often used on public works has come under scrutiny in a number of cases at the Centre of Arbitration and Dispute Resolution (CADER).

CADER was established in the Arbitration and Conciliation Act 2000 pursuant to Section 68 of the Act with a role of performing administrative procedures for alternative dispute resolution processes specifically; arbitration and conciliation.

Selected Cases at CADER

Reference is made to the selected cases of *Board of Governors, John Paul S.S Chelekura v Kheny Technical Services Ltd, China Jiangxi Corporation for International Economic and Technical Corporation v Cotton Development Organization, Namabale Enterprises Ltd v Busitema University and Plinth Technical Works Ltd v Hoima Municipal Local Government Council* where the parties wrote to CADER requesting for the appointment of an adjudicator. All these cases had a similar dispute resolution clause which was adopted from the clause in the PPDA form of contract. The clause is replicated here for ease of reference:

Disputes (Clause 24)

24.1 If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to any Adjudicator appointed under the contract within 14 days of the notification of the Project Manager's decision.

Procedure for Disputes (Clause 25)

25.1 Unless otherwise specified in the SCC, the procedure for disputes shall be as specified in GCC 25.2 to 25.4.

25.2 Any Adjudicator appointed under the contract shall give a decision in writing within 28 days of receipt of a notification of a dispute, providing that he is in receipt of all the information required to give a decision.

25.3 Any adjudicator appointed under the contract shall be paid by the hour at the rate specified in the SCC, together with reimbursable expenses of the types specified in the SCC, and the cost shall be divided equally between the Employer and the Contract, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

25.4 Any arbitration shall be conducted in accordance with the arbitration law of Uganda, or such other formal mechanism specified in the SCC, and in the place shown in the SCC.

The SCC stands for Specific Conditions of Contract. The SCC provided for the procedure for adjudication of disputes to be as specified in the GCC 25.2 to 25.4 and then specifically provided that the appointing authority for the Adjudicator would be CADER (Emphasis Added).

It should also be noted that the contract defined an adjudicator as:

1.1 (b) The 'Adjudicator' is the person appointed jointly by the Employer and Contractor to resolve disputes in the first instance. (Emphasis added)

In the cases under review herein, the Executive Director of CADER stated that the definition of an adjudicator is synonymous with the function of the arbitration agreement set out in s.2(1)(e) Arbitration and Conciliation Act, Cap 4 which is replicated here for ease of reference:

"arbitration agreement" means 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 defined legal relationship, whether contractual or not."

The Executive Director further proceeded to state that "there is no provision in the ACA, which restricts the definition of an arbitrator." (Emphasis added)

He then added that he "accordingly exercised the powers vested by **S.11(4) ACA** to appoint an adjudicator." (Emphasis added) which he proceeded to do in all the cases.

This was a consistent construction of the clauses and conclusion in decision across all of these selected cases.

A Critique of these decisions

It should be noted that there is a conflation of arbitration and adjudication which are different dispute resolution mechanisms. Whereas it is true that the parties chose the Centre of Arbitration and Dispute Resolution (CADER) to appoint the adjudicator, this appointment was pursuant to a contract between the parties and it is in this capacity that CADER was exercising its appointing authority. The parties had already defined who an adjudicator is in their contract and the extent of his jurisdiction. This extent was limited to; when one of the parties was dissatisfied with the Project Manager's decision and the second scenario; where there was a dispute relating to the interpretation of a contractual clause or provision.

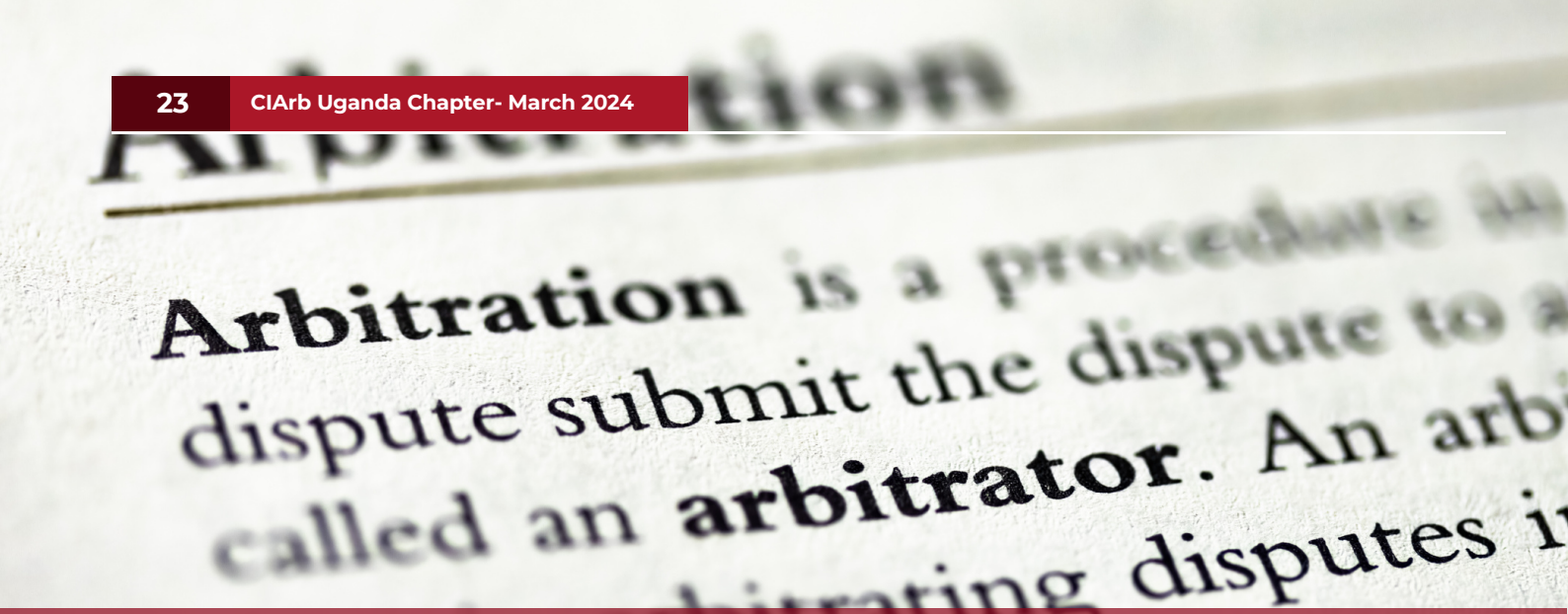
Secondly, whereas the Executive Director of CADER mentioned that there is no provision in the Arbitration and Conciliation Act that restricted the definition of an arbitrator, it is also true that an arbitrator and an adjudicator serve roles which may be different and have outcomes that have different degrees of finality. An adjudicator's decision is temporarily binding while the arbitrator's award is final and binding.

Conclusion

In conclusion, adjudication and arbitration are two different procedures on the ADR continuum and therefore should not be conflated to mean one and the same. Unlike jurisdictions like England and Wales where adjudication is mandatory and statutory in nature for construction contracts, in Uganda, adjudication is usually contractual or ad hoc.

Additionally, in jurisdictions like England and Wales, adjudication and arbitration are governed by different statutes, that is to say the HGCRA 1996 and the Arbitration Act 1996 respectively. In Uganda, the Arbitration and Conciliation Act 2000 governs arbitration and conciliation as ADR mechanisms. It does not govern adjudication. As such, it would be a flaw of procedure to appoint an adjudicator using a section in the Arbitration and Conciliation Act especially where there is a provision for contractual adjudication between parties.

For the purposes of adjudication, CADER is simply an Adjudicator Nominating Body (ANB) whose role is to aid parties in appointing adjudicators and administering the process where need be. It is also common place for Adjudicator Nominating Bodies like the Chartered Institute of Arbitrators (CIArb) to also carry other functions in other ADR mechanisms like appointing mediators and arbitrators.
What ultimately stands out as good practice, is the acknowledgement of the differences between these ADR mechanisms and using the correct procedure while administering processes in the different mechanisms.



The Relevance of the Arbitral/Tribunal Secretary in the Arbitration Process

Arbitration continues to grow in Uganda and in the world as a preferred method of dispute resolution.

The volume of disputes that are referred to Arbitration has skyrocketed in Uganda mainly due to case backlog. It was for example recently reported that in Uganda's Commercial Court, there are unresolved disputes to the tune of Ug. Shs. 85 trillion (approximately USD 21.7 Billion). According to the Report, on average, the Commercial Court receives about 2,000(Two Thousand) cases annually with only half of these being resolved. Because of this major reason, contracts are now increasingly containing an arbitration clause; as the mode of dispute resolution for a myriad of disputes across the legal spectrum.

In an arbitration, the parties involved are the Tribunal or Arbitrator(s) – Sole or a Panel; party representatives and Counsel instructed by the parties to the proceedings and further, during the hearing, witnesses may be required to give oral evidence. Due to the confidentiality of the arbitral proceedings, no other parties can take part in the conduct of the proceedings.

The confidentiality of the proceedings notwithstanding, arbitral Tribunals increasingly need assistance in administering the arbitration process from commencement and through the proceedings. This has introduced the need for another active participant in the arbitration proceedings – the Tribunal Secretary.

Who is a Tribunal Secretary and What qualifications do they possess?

A Tribunal Secretary can be referred to as one who assists or supports an Arbitrator or Arbitral Tribunal in different aspects of the arbitral process based on party and tribunal preference. In certain jurisdictions, a Tribunal Secretary is referred to as an "Arbitral Secretary" or "Administrative Secretary".

Tribunal Secretaries are usually persons with a legal background and also with a certain degree of experience in arbitration.

It is common practice for lawyers who sit as arbitrators, to choose one from among their legal team, to sit as a Tribunal Secretary.

However, it is not uncommon to find Engineers and Architects who sit as Arbitrators using one of their assistants as a Tribunal Secretary in the proceedings.

The key requirement in both instances is "a certain degree of experience in arbitration."

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The major role of the Tribunal Secretary is to support arbitrators in their administrative and research work though not in the decision-making process which is a preserved role for the Tribunal and cannot be delegated.

Relevance of the Tribunal Secretary in the proceedings

It should be noted that before a Tribunal Secretary is appointed, the Arbitrator or Tribunal members are obliged to introduce the Tribunal Secretary at the preliminary meeting and seek the parties' consent on whether they are agreeable to the Tribunal Secretary being part of the proceedings. Where the parties to the Arbitration consent to the Tribunal Secretary, their mandate starts immediately with the recording of proceedings, the preparation and follow up on implementation of procedural orders, the management of the Arbitration Registry; among other tasks.

However, the scope of involvement of the Tribunal Secretary in arbitration proceedings remains an area that has been the subject of heated debate in the International Arbitration Community especially regarding the precise role a tribunal secretary plays and whether at all they are necessary during the arbitral proceedings.

Mixed feelings in the International Arbitration Community

In as far as International Arbitration is concerned, there are mixed feelings about the role of Arbitration Secretaries; it has been argued that since there is no absolute scope on where the Tribunal Secretary's role starts and ends, there is great potential for abuse or misuse of the said role which undermines party autonomy.

One of the most recent and popular challenges to an arbitral award based on the involvement of a Tribunal Secretary is Russia's application to the District Court of The Hague to set aside the Tribunal's awards in the Yukos proceedings through a setting aside petition (Yukos Universal Limited (Isle of Man) v. Russia, UNCITRAL, PCA Case No. AA 227. Russia sought to set aside the awards, on the ground that the arbitrators delegated their adjudicative function to an 'assistant to the Tribunal and therefore did not personally fulfil their mandate.

Russia argued that the job description of a tribunal secretary, as defined by international practice, was in any event only one of support to the tribunal in the carrying out of administrative tasks relating to the organisation of the arbitration.

Russia further argued that the fact that the Tribunal Secretary's hours were greater than those of any member of the tribunal was evidence of an improper and unauthorized delegation of the tribunal's mandate to the Secretary, whose hours according to Russia could only be explained on the basis that he had participated in substantive work and deliberations. Russia also complained that the tribunal did not obtain the permission of the parties to the appointment of the Tribunal Secretary who had been brought in at the request of the chairman, to provide him with personal assistance 'in the conduct of the case'. Russia further went to great lengths in proving its case by submitting a report from a linguistics expert who, having conducted an analysis of the writing styles of the arbitrators and the Tribunal Secretary, concluded that it was 'extremely likely' that the Tribunal Secretary wrote a substantial part of sections of the Award that is; 79% of the preliminary objections, 65% of the liability section and 71% per cent of the damages section.

However, in 2016, the District Court of The Hague set aside the award on different grounds but did not address Russia's concerns regarding the Tribunal Secretary's involvement in the proceedings. In 2020, the Hague Court of Appeal overturned the District Court decision and addressed the issue of the involvement of the Tribunal Secretary in the proceedings. The Court of Appeal noted that the tribunal had failed to fully inform the parties on the nature and extent of the Tribunal Secretary's work but however that this did not amount to a major procedural violation; and most importantly, the Court of Appeal found that, in the absence of a contrary agreement between the parties to the Arbitration, a tribunal has a procedural right to use an Tribunal Assistant or Secretary for the drafting of an arbitral award as it sees fit. The submission of draft texts of the award by the Secretary did not justify the conclusion that the Tribunal has violated its mandate; "what matters in the end is that the arbitrators have decided to assume responsibility for the draft -

version of the Award since Russia's argument was not that the Tribunal had 'accepted' these drafts without a second thought".

Regulation of Tribunal/Arbitral Secretaries

Arbitral secretaries are not mentioned in most of the organizing statutes for international arbitration. For instance, the 1958 New York Convention and the UNCITRAL Model Law on International Commercial Arbitration respectively are both silent on assistance to arbitral tribunals by tribunal secretaries.

Within Uganda, domestic Arbitration statutes equally do not provide for assistance by tribunal secretaries. The Arbitration and Conciliation Act Cap 4 (as amended) makes no mention of Tribunal Secretaries or any assistance to be rendered to Arbitrators in Arbitration proceedings.

It should be noted that the "Young ICCA Guide on Arbitral Secretaries" sets out non-binding guidelines for the appointment and use of arbitral secretaries. This Guide was as a result of studies conducted in 2012 and 2013 which concluded that 'with appropriate direction and supervision' by the arbitral tribunal, an arbitral secretary's role 'may legitimately go beyond the purely administrative'. The Guide set out a non-exhaustive list of 10 tasks that 'may' be undertaken by the tribunal secretary, to include undertaking administrative matters, communicating with the arbitral institution and parties, drafting procedural orders and similar documents, research, reviewing the parties' submissions and evidence, drafting factual chronologies and memoranda, summarizing the parties' submissions and evidence, attending the arbitral tribunal's deliberations and drafting appropriate parts of the award. Furthermore, the study ultimately concluded that; "it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience and expertise."

A Case for Tribunal Secretary – Considerations for Arbitrators

A case can be made in support of the Tribunal Secretary even for non- complex Arbitrations. Because Arbitration as a method of Dispute Resolution is final and binding, it cannot be - overstated that the Arbitrator(s) or Tribunal needs to give undivided attention to the hearing and decision-making process that culminates into the Final Award without paying attention to otherwise mundane tasks that can be performed by the Tribunal Secretary.

Further, The Tribunal is usually bestowed with a critical task of delivering an Award in an efficient and timely manner and this may not be achieved without assistance from a Tribunal Secretary to take charge of the administrative tasks that would otherwise occupy an Arbitrator.

It should also be noted that acting as an Arbitrator is a secondary profession and hence an Arbitrator or Tribunal members may not always be available to receive submissions and other correspondence that may be delivered by hand to his or her office at all times. The appointment of a Tribunal secretary ensures that there is a central point of access by the parties to a person who is bound by confidentiality to receive the documents on behalf of the Tribunal. It is then that the Arbitral Secretary acts as a registry and receives all documents pertaining to the Arbitration and dispatches them to the respective Tribunal members incase of a panel whether by hand or otherwise. For Ad hoc Arbitrations, the Tribunal Secretary's role could even be stretched to reminding parties on compliance with Procedural Orders; for instance, regarding adhering to timelines and following up on payment of Arbitrator's fees.

Finally, A Tribunal Secretary's active role in the Arbitration is an import precursor for them to transition to Arbitrator since, by being part of the proceedings, they are exposed to a 360-degree view of what is expected of them when they transition to Arbitrator.

Conclusion

There is no doubt that the role of a Tribunal Secretary in an Arbitration is of great relevance not just in International Arbitrations but Domestic Arbitrations too. It therefore follows that more should be done to ensure the Tribunal Secretary's role in Arbitral Proceedings is taken more seriously and also, that the Tribunal Secretary is equally held to high standards. One way to do this is through the -

issuance of binding guidelines by Arbitration Centers; recognizing and regulating the role of the Tribunal Secretary. For Arbitration Centers that are legally regulated, amendments can be sought such that the Tribunal Secretaries are fully and legally recognized.

To further promote the role, Arbitrators should ensure they cater for reasonable Tribunal Secretaries' fees when determining the fees that should be paid and these can form part of the Tribunal's expenses.

In addition, Arbitrators should ensure that the parties are introduced and consent to the participation of the Tribunal Secretary at the Preliminary Meeting and the Tribunal Secretary included in Procedural Order No.1.

Also, trainings should be set up to enforce best practices through teaching Arbitration Practitioners on the roles of Tribunal Secretaries and their limits.

Finally, Curated trainings should be organized by Alternative Dispute Resolution (ADR) institutions to train and mentor young Arbitration practitioners in the role of a Tribunal Secretary. The ripple effect of this is that by continued mentorship and inclusion, not only will the young Arbitration practitioners fully understand that they can be a recognized part of the Arbitral process but also, it shall encourage them to promote Arbitration as the most preferred form of dispute resolution.

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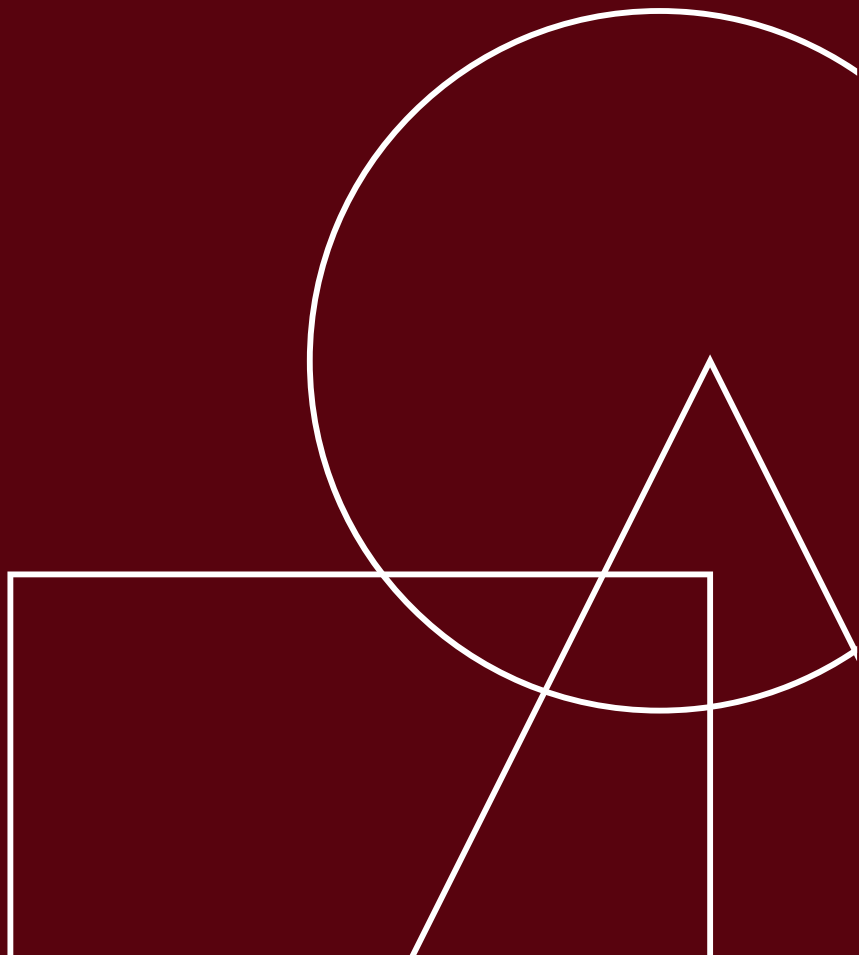
Activity Calendar



ciarb Uganda Chapter

Activity Calendar 2024

Plan your year ahead with our activity calendar in mind. From webinars, trainings and even more newsletters, stay in the loop with all our upcoming events.

Activity	Date
Release of 1st Newsletter	29th March 2024
Introduction to Arbitration	17th April 2024
Roundtable discussion at Makerere University	19th April 2024
Webinar: Enforcement of Foreign Arbitral Awards	30th April 2024
CIArb Kenya 40-year Anniversary Conference	15th-17th May 2024
Arbitration Award Writing	10th June 2024
Release of the 2nd Newsletter	28th June 2024
Module 1: Domestic Arbitration	11th July 2024
Webinar: Design & Build contracts and disputes that arise therefrom	30th July 2024
Module 1: Mediation	19th- 23rd August 2024
Release of 3rd Newsletter	27th September 2024
Webinar: Climate change and energy transition disputes	29th October 2024
Accelerated Route to Member	21st November 2024
Accelerated Route to Fellow	2nd - 3rd December 2024
Meet and Greet	6th December 2024
End of year Newsletter	30th December 2024

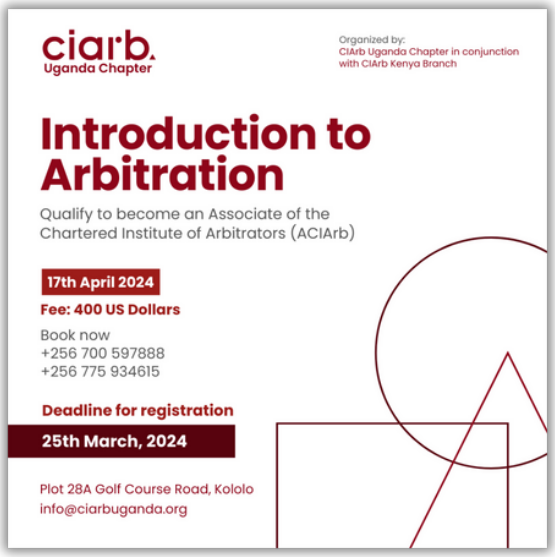
Upcoming Events

April - June 2024 Activities

Look out for our April to June lineup! From an insightful workshop on Arbitration Award writing followed up by a webinar on Enforcement of Foreign Arbitral Awards, our calendar is jam-packed. We are also gearing up to attend international conferences starting with our mother branch as they celebrate 40 years! Lots of exciting activities are coming your way. Don't miss out!

INTRODUCTION TO ARBITRATION

Registration is currently underway for the Introduction to Arbitration course which will take place on the 17th of April, 2024. The deadline for registration is 31st March, 2024.



ROUNDTABLE DISCUSSION AT MAKERERE UNIVERSITY

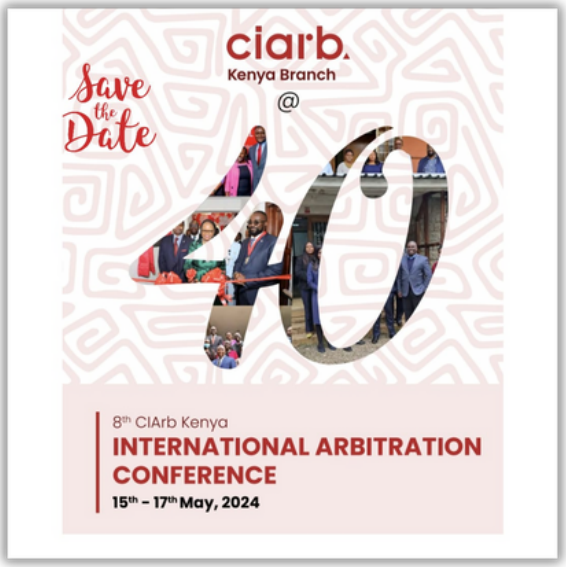
CIArb – Uganda Chapter was invited by the SOAS University of London to participate in a Roundtable discussion on "Arbitration in Africa and careers in dispute resolution" that they are organizing at Makerere University Faculty of law on 19th April.

1ST WEBINAR

We are organising a Webinar on the 30th of April, 2024 under the topic "Enforcement of Foreign Arbitral awards" and the panel of seasoned experts in the field of Arbitration include; David Kaggwa, FCIArb, Albert Mukasa, FCIArb and Robert Kirunda, MCIArb

CIArb KENYA'S 40 YEAR ANNIVERSARY

Our mother branch in Kenya is celebrating its 40 year anniversary between the 15th to the 17th of May and to commemorate the event, is holding the 8th Kenya International Arbitration Conference. CIArb- Uganda Chapter was invited and will be represented by the Chairperson and other members of the Steering Committee.



AFRICA CONSTRUCTION LAW CONFERENCE

CIArb – Uganda Chapter will be in Nairobi for the Africa Construction law Conference 2024 that will take place on the 3rd to the 4th of June, 2024.

ICC AFRICA CONFERENCE

CIArb – Uganda Chapter will be attending the 8th ICC Africa Conference on International Arbitration in Nairobi on the 29th- 31st of May, 2024.

ARBITRATION AWARD WRITING

We are pleased to announce that we shall be conducting a training on the writing of Arbitration awards conducted by our very own Aliker Philip, FCIArb, Chartered Arbitrator, that will take place on the 10th of June, 2024. Further details to follow.

ciarb.
Uganda Chapter

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