REVIEW OF THE LAW REGULATING QUALIFICATIONS OF ARBITRATORS IN TANZANIA

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Abstract

This article analyzes the legal framework regulating arbitrators' qualifications in Mainland Tanzania. It is argued that the success of arbitration in the resolution of commercial disputes depends on the quality and skills of arbitrators and practitioners. The article concludes by noting that the law mandatorily imposes the criteria for arbitrators' accreditation. Such criteria, however, do not compel an arbitrator or practitioner to obtain specialized knowledge and skills in arbitration. Consequently, the law fails to enhance higher arbitration standards by compelling prospective arbitrators to undertake specialized arbitration training. Other arbitrator qualification requirements can be stipulated by parties, arbitral institutions, and the applicable arbitration rules. Since parties have the right to select arbitration institutions and arbitral rules, this article argues that the parties therefore retain the leverage to appoint an arbitrator who possesses necessary qualities befitting the nature of the dispute. It is critical to the efficacy of arbitration that the law should limit whatever qualification requirements it stipulates and allow parties to appoint an arbitrator of their own choice.

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1.0. INTRODUCTION

The legitimacy of arbitration and acceptability of arbitral award depends on the quality, skills and credibility of the arbitrators.[1] There is no gainsaying that the authority that the arbitrator wields in arbitration proceedings is inherently judicial.[2] In the absence of party agreement, the arbitral tribunal determines many critical issues which broadly cover procedural questions, the nature and conduct of evidentiary hearings and allocation of costs, and it ultimately decides on the substantive outcome of the dispute.[3] Thus, the outcome of arbitration shall always be as good as the quality of the arbitrators. In essence, one of the fundamental questions that the parties must answer when considering the dispute resolution clause or otherwise initiating arbitration relates to the suitability of the arbitrator. It is pertinent that an arbitrator should possess the capacity to successfully resolve the dispute and further maintain the amicable commercial relationship of the parties.[4]

Notably, the method of selecting an arbitrator depends on whether the parties have opted for institutional and *ad hoc* arbitration. In the institutional context, there are prescribed rules that map out how the

1 Feehily, R., "Neutrality, independence and impartiality in international commercial arbitration, a fine balance in the quest for justice," Penn State Journal of Law & International Affairs, vol. 7.1, 2019, at p. 92.

2 Hascher, D., "Independence and impartiality of arbitrators: 3 issues," 27 American University International Law Review, 2012, at p. 791.

3 Giorgetti, C., "Who decides who decides in international investment arbitration," Penn Law: Legal Scholarship Repository, 2014, at p. 443.

4 Meason J. and Smith, A., "Non-lawyers in international commercial arbitration: gathering the splinters on the bench," Northwestern Journal of International Law & Business, 1991, at p. 26.

arbitrators get selected.[5] As regards *ad hoc* arbitration, the selection process shall be required to conform to the provisions of the arbitration agreement and the rules of procedure adopted by the parties.[6] It is submitted that in both types of arbitration, the parties have the leverage to fix the qualification of an arbitrator which they desire depending on the nature of the case. The corollary is that parties might by way of mutual agreement stipulate arbitrator qualification requirements. Moreover, the law governing the arbitration and the arbitration agreement might as well contain mandatory provisions on the necessary qualifications of the arbitrator.[7] By and large, the selection of arbitrators has often been reserved for individuals of high standing, knowledge, and experience in the society.[8]

2.0. DUTIES OF AN ARBITRATOR

The arbitral tribunal is under a statutory duty to act fairly and impartially between the parties in the conduct of arbitration proceedings. Each party should be granted a full opportunity to present its case and further deal with the case of the adverse party.[9] Fairness of arbitral proceedings binds the tribunal to uphold due process of the law and further to treat the parties equally.[10] The requirement to grant parties "full opportunity" has been construed to mean giving a party "reasonable opportunity" to

5 Id, at p. 31.

6 Strict adherence to mandatory provisions of the law is advisable given that parties cannot, by contract, derogate from these clear and unequivocal provisions of mandatory law.

7 For instance, rule 14(a) of the Arbitration (Rules of Procedure) Regulations, 2021 (G.N. No. 146 of 2021) provides for mandatory accreditation or registration of arbitrators as a condition precedent to the practice of arbitration.

8 Sitek, B., "Qualifications for becoming an arbitrator of the Arbitration Courts in Roman Law and in selected contemporary legal systems," Wydawnictwo Naukowe Silver Rerum, 2016, at p. 13.

9 Arbitration Act, s. 37(1)(a).

10 Redfern, A. et. al., Redfern and Hunter on International Arbitration, London: Sweet & Maxwell, 2004, at p. 292.

present its case or defence.[11] The significance of arbitral fairness rule cannot be gainsaid. The legitimacy and acceptability of arbitration is pegged on its ability to provide fair and accurate outcome.[12]

During the conduct of arbitration, the tribunal respects the due process rights of the parties by ensuring that each of the parties is granted the right to be heard. In practical terms, it is submitted that the respondent shall be given notice of arbitral proceedings and appointment of an arbitrator. Other scholars maintain that granting parties a reasonable opportunity entails affording parties the right to participate in disclosure, cross-examination and presenting oral submissions.[13] The obligation imposed on the tribunal to act impartially principally enacts the rule against bias. Members of the arbitration panel have a negative duty to refrain from bias in favour of any of the parties or issues in dispute.[14] Impartiality thus enjoins the arbitrators to approach arbitration with an open mind that is not prejudiced against any of the parties' interests.

The arbitral tribunal further has the statutory duty to decide on all procedural and evidential questions that arise in the proceedings.[15] While discharging this fundamental duty, it is required to adopt suitable procedures according to the circumstances of the case. The tribunal shall ensure such procedural steps would avoid unnecessary delay and expense; and it would provide fair means for the resolution of the

11 Ibid.

12 Scherer, et. al., "The principle of equal treatment in international arbitration," Queen Mary, University of London, Centre for Commercial Law Studies, 2018, at p. 5, (available at SSRN https://ssrn.com/abstract=3377237 (Accessed on 23 October 2022).

13 Thirgood, R. & Williams, E., "The non-responsive respondent: taking an arbitration forward and how," International Journal of Arbitration, Mediation and Dispute Management, vol. 85, issue 1, 2019, at p. 69.

14 Bastida, B.M., "The independence and impartiality of arbitrators in international commercial arbitration," Mercatoria, vol. 6, no. 1, 2007, at p. 4.

15 Arbitration Act, s. 38(1).

dispute.[16] Thus in the exercise of its decisional discretion regarding matters of procedure and evidence, the tribunal should promote fast dispute settlement at reasonable costs to the parties.

An arbitral tribunal is further charged with the duty to uphold the confidentiality of arbitration and to conduct the proceedings in camera. Indeed, the confidentiality rule which demands that arbitral proceedings shall be conducted in camera constitutes one of the attractive features of arbitration.[17] It is noted that the privacy of arbitration and the proceedings could be critical in the protection of trade reputation and trade secrets which form the lifeblood of trading. The confidentiality rule binds parties and the arbitral tribunal from disclosing confidential information pertinent to arbitration except under limited circumstances. Some of the instances under which confidential information in arbitration might be divulged include interactions with a professional adviser, arbitration proceedings or while asserting legal rights against a third party.[18]

Other instances where either a party or the tribunal may disclose confidential information include where such disclosure is permitted by law, court or tribunal's order. Where such disclosure is sanctioned by law, a party or an arbitral tribunal has the freedom to disclose confidential information on the condition that written details and an explanation of the disclosure are given beforehand.[19]

In view of the due process and decisional duties of the tribunal, it is fundamental to the efficacy of arbitration that arbitrators should possess knowledge and skills in arbitration. The arbitrator qualification

16 Id, s. 37(1)(b).

17 Id, s. 39(1) and (2).

18 Id, s. 39(3)(a) and (b).

19 Id, s. 39(3)(d).

requirements which are pegged on holding a state job, career or professional seniority may not improve the quality of arbitration in the absence of arbitration training. The corollary is that an arbitrator should be compelled to undergo expertise training in the law and practice of arbitration.

3.0. POWERS OF AN ARBITRATOR

The powers of an arbitrator may be conferred directly by the law governing arbitration or by the arbitration agreement. Indirectly, parties may confer such arbitral powers on the arbitrator courtesy of any institutional or *ad hoc* arbitral rules to which arbitration is subject.[20] The objective of clothing the arbitrator with these procedural powers is to enable the arbitral tribunal undertake its functions properly and effectively.[21] In the event of overlap between any of these sources, mandatory provisions of the relevant law shall prevail.[22] Accordingly, any clause of the arbitration agreement which would conflict with mandatory legal stipulation shall be invalid to that extent. Similarly, any such powers purportedly exercised by the tribunal in breach of mandatory law shall be a nullity. Indeed, parties have no room to contract outside the mandatory provisions of the arbitration statute.[23]

As regards powers conferred on the arbitrators by the parties, they should be stipulated in the arbitration agreement. Practically, these powers may relate to the power to hold evidentiary hearings, receive oral and documentary evidence and appoint experts, amongst others.[24] Ordinarily, parties have autonomy to determine by way of agreement

20 Redfern, A. et. al., Redfern and Hunter on International Arbitration, above note 10, at p. 278.

21 Ibid.

22 Ibid.

23 Arbitration Act, s. 9(1).

24 Redfern, A. et. al., Redfern and Hunter on International Arbitration, above note 10, at p. 279.

what powers should be vested in the tribunal to attain necessary arbitral efficacy. However, whatever powers the parties wish to confer on arbitrators, care must be taken to uphold fair hearing and equality of treatment of parties.[25] Moreover, it is critical that the power vested in the arbitral tribunal does not tinker with the fundamental right of the parties to be granted full opportunity to present their respective cases and to deal with that of the opponent.[26]

The new Arbitration Act which is currently in force in Mainland Tanzania[27] confers upon the arbitrator a host of powers to enhance the efficacy of the tribunal. The foremost power is that the arbitral tribunal has the authority to rule on its own jurisdiction. This authority gives the tribunal jurisdiction to pronounce on the validity of the arbitration agreement, the composition of the tribunal and the matters that should be submitted to arbitration under the arbitration agreement.[28] As noted earlier, the arbitral tribunal has statutory authority to decide on procedural and evidential questions which arise in the course of proceedings.[29] On the same vein, the arbitrators have the legal authority to appoint experts, legal advisers and assessors to assist them in the handling of technical matters which might arise in the proceedings.[30]

It is further noted that under the Arbitration Act, the arbitral tribunal has been vested with the power to make interim orders to preserve assets and evidence.[31] Such interim measures may see the tribunal ordering the

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25 Bantekas, I., "Equal treatment of the parties in international commercial arbitration," Cambridge University Press, 2020, at p. 996.

26 Ibid.

27 Under s. 2 of the Arbitration Act, the application of the new statute is restricted to Mainland Tanzania.

28 Arbitration Act, s. 34(1)(a)(b) and (c).

29 Id, s. 38(1).

30 Id, s. 44(1).

31 Id, s. 45(2).

claimant to deposit security for costs of arbitration,[32] or otherwise order for inspection, photographing or taking samples of property which is the subject of arbitration,[33] amongst other interim measures. Other statutory powers vested in the arbitral tribunal include the authority to make provisional awards,[34] make peremptory orders[35] and further to withhold the award in the event of non-payment of arbitrator's fees and expenses.[36]

4.0. QUALIFICATIONS OF AN ARBITRATOR

The qualification required of an arbitrator, whether professional, academic or otherwise, depends on the agreement of the parties, stipulations of the applicable law and the requirements of the relevant arbitration institution in the case of institutional proceedings.[37] Redfern and Hunter disavow the stipulation of strict criteria for arbitrator qualifications before a dispute has arisen. They maintain that during the pre-dispute period, the nature of the dispute is still unknown and thus it would be impractical to stipulate the qualifications of an arbitrator.[38]

It is advisable that an arbitrator must have practical arbitration knowledge and skills and it is immaterial whether these qualities should be imposed before or after a dispute arises.[39] As rightly observed by Redfern and Hunter above, parties, arbitral institutions and any other

32 Id, s. 45(2)(a).

33 Id, s. 45(2)(b).

34 Id, s. 46(1) and (4).

35 Id, s. 48(2)(c).

36 Id, s. 63(1).

37 Kann, C.E., "A report card on the quality of commercial arbitration: assessing and improving delivery of the benefits customers seek," DePaul Business and Commercial Law Journal, vol. 7, at p. 500.

38 Redfern, A. et al., Redfern and Hunter on International Arbitration, above note 10, at p. 259.

39 Sitek, B., "Qualifications for becoming an arbitrator of the Arbitration Courts in Roman Law and in selected contemporary legal systems," above note 8, at p. 13.

arbitrator appointing authorities should opt to set the criteria of arbitrator qualification after a dispute has arisen. This would permit the appointment of an arbitrator equipped with a suitable knowledge base and skills in light of the peculiar nature of the dispute.

4.1. Qualifications imposed by law

Tanzanian arbitration law imposes certain restrictions on the eligibility of an individual to be appointed as an arbitrator. One of the foremost restrictions is that an arbitrator must be duly accredited or provisionally registered to practice arbitration in Mainland Tanzania.[40] The way in which the arbitrator accreditation system is structured tasks the government to subtly superintend arbitration proceedings seated in Tanzania. Furthermore, an arbitrator must be independent and impartial towards the parties and the issues in dispute.[41] The letter of the law is categorical that an arbitrator shall not have a family relationship with any of the parties based on descent or marriage down to the third generation.[42] However, the foregoing restriction is silent on any close relationship which the arbitrator may have with the parties' lawyers and companies which are closely affiliated to any of the corporate parties.

Another major legal restriction is that an arbitrator shall not have a financial interest in the outcome of the arbitration.[43] Again, the law does not define the nature and scope of the financial interest that it outlaws. The presumption is that the arbitrator shall not have any financial interest at all in the outcome of arbitration, irrespective of the amount of funds involved and the timeline when the financial interest was conceived.

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40 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021 (G.N. No. 147 of 2021), rule 14(a).

41 The Arbitration (Rules of Procedure) Regulations, rule 24(1).

42 Id, rule 14(b).

43 Id, rule 14(c).

The law further provides that an arbitrator shall be named in the arbitration agreement by the parties.[44] This restriction is curious and unduly restrictive. Suffice to say that an arbitration agreement that does not name the arbitrator is not necessarily invalid *ipso facto*. What is critical is for the arbitration agreement to either name the arbitrator or, instead, stipulate the method of appointing an arbitrator. The law is further emphatic that an arbitrator must have high moral character and be capable of exercising independent judgment. Additionally, an arbitrator should have recognized competence in the field of law, commerce, industry or finance.[45] The foregoing requirement has unduly restricted the choice of arbitrators to professionals holding tertiary education certificates only, save for industry arbitration.

4.1.1 Accreditation requirement

The arbitration statute compels every arbitrator who practices at a fee to obtain accreditation or provisional registration prior to taking up the assignment as an arbitrator.[46] An accreditation panel has been established under the Ministry of Constitutional and Legal Affairs which principally undertakes registration, suspension and deregistration of accredited arbitrators.[47] There is no legal requirement that a prospective arbitrator should undertake specialized arbitration training so as to obtain necessary qualifications for arbitration. It is submitted that where a prospective arbitrator lacks the accreditation criteria stipulated by law, he should be afforded an opportunity to acquire the necessary qualifications through expertise arbitration training.

Composition of the accreditation panel epitomizes creeping government control of arbitration proceedings seated in Mainland Tanzania. In

44 Id, rule 14(d).

45 Id, rule 14(e).

46 The Arbitration Regulations, rule 14(a) and s. 93 of the Arbitration Act.

47 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, rule 3(1).

essence, the accreditation panel consists of the Attorney General, the Solicitor General, and the chairman of the governing board of the Tanzania Arbitration Centre. Other members of the accreditation panel are the president of the Tanzania Institute of Arbitrators, the president of Tanganyika Law Society and two appointees of the minister each of whom is drawn from the National Construction Council (NCC) and the Public Procurement Regulatory Authority.[48]

Notably, five out of the seven members of the accreditation panel are either senior government officials or appointees of the minister responsible for legal affairs. Both the attorney general and the solicitor general are appointees of the President of the United Republic of Tanzania.[49] The law requires that the chairman of the governing board of the Tanzania Arbitration Centre should be drawn from the ranks of retired Judges of the High Court or Court of Appeal and at the recommendation of a search panel constituted by the Chief Justice of Tanzania.[50] In essence, the legal structure of arbitrator accreditation in Mainland Tanzania has effectively given control to the central government to regulate who should be registered, suspended or deregistered as an arbitrator.[51]

The fact that the government exercises effective management and control over the registration of arbitrators risks undermining the arbitrator's impartiality and independence. It is debatable whether arbitrators adjudicating over disputes to which the government is a party would be able to uphold the required standards of independence and

48 Ibid.

49 Under art. 59(1) of the Constitution of the United Republic of Tanzania, 1977 the President of the United Republic of Tanzania has the authority to appoint the Attorney General. Similarly, under the Attorney General (Restructure Order), 2018, (G.N. No. 48 of 2018), the President enjoys the power to appoint the Solicitor General.

50 The Tanzania Arbitration Centre (Management and Operations) Regulations, 2021 (G.N. No. 149 of 2021), rule 4(2)(a).

51 Under rule 17 thereof, the arbitrator shall be required to apply for renewal of the accreditation certificate after the lapse of two years.

impartiality in the conduct of the arbitral proceedings. By virtue of being a professional body, the arbitration fraternity should be permitted to self-regulate without direct or covert government superintendence. The law further prescribes criminal sanction of a fine or imprisonment or both on any person who practices as an arbitrator for a fee without necessary accreditation.[52]

Regarding qualifications of an arbitrator, either the applicant should be eligible for appointment as a Judge of the High Court of Tanzania,[53] should possess experience of not less than five years before arbitral tribunals,[54] or possess a dispute resolution certificate from a recognized institution.[55] The law does not specify whether the dispute resolution certificate referenced above relates to diploma, degree or any other certificate. It is submitted that any tertiary certificate in dispute resolution that is issued following post-secondary education would suffice.

Other alternative eligibility requirements include being a practicing advocate for not less than five years,[56] or a practicing professional with an allied association for not less than five years.[57] Moreover, the law further provides that an individual holder of a bachelor's degree or its equivalent from a recognized institution backed up with work experience of not less than ten years in telecommunication, information technology or intellectual property rights would be eligible as well for appointment to serve as an arbitrator.[58]

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52 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, rule 26.

53 Id, rule 6(1)(a).

54 Id, rule 6(1)(b).

55 Id, rule 6(1)(c).

56 Id, rule 6(1)(d).

57 Id, rule 6(1)(e) read together with rule 2 thereof. An allied association has been defined as a professional body or association which is duly recognized as such under any written law, and includes the National Board of Auditors and Accountants, Engineers Registration Board and the Contractors Registration Board.

58 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, rule 6(1)(f).

Thus, generally, eligibility requirements are predicated on holding a state job, seniority in varied professions and holding an academic certificate or degree from a recognized institution. Mistakenly, the law presumes that by reason of being eligible for appointment as a Judge or being a practicing advocate or chartered accountant for a number of years, that person has acquired the necessary knowledge, skills and experience in arbitration. Arguably, one may indeed meet the state job and career seniority criteria referenced earlier but still fall short of the basic knowledge and skills required of an arbitrator. The other fallacy that is inherent in the accreditation legal criteria is that holding an academic certificate or degree, even in a non-arbitration industry, could imbue an individual with critical arbitral knowledge and skills. It is submitted that in the absence of basic knowledge and skills in arbitration, academic certification would not transform an individual into an able arbitrator.

Most significantly, the legal restriction providing for compulsory accreditation of arbitrators is meant to ensure that only persons who meet eligibility criteria are appointed to serve as arbitrators. Parties and appointing authorities would no longer have the flexibility to appoint any person as arbitrators, since that undermines party autonomy doctrine. Provided that the accreditation criteria are structured to ensure an arbitrator possesses basic knowledge and skills in arbitration law and practice, these criteria uphold the quality and integrity of arbitration.

The accreditation regulations further compel foreign practitioners to first apply for and obtain accreditation prior to serving as an arbitrator in Mainland Tanzania. The only condition is that the foreign expatriate must possess an arbitrator's practicing certificate from another jurisdiction before lodging the accreditation application.[59] The challenge here is that only a limited number of jurisdictions have embraced

59 Id, rule 7.

compulsory registration or accreditation of arbitrators.[60] For want of practice certificate, foreign arbitrators face disenfranchisement from the practice of arbitration in Mainland Tanzania.

As for foreign arbitrators who already hold practice certificates from foreign jurisdictions or foreign arbitration institutions, the law still compels them to obtain local accreditation if they desire to practice arbitration locally.[61] An ideal situation would have been outright recognition of the practice certificate already issued elsewhere in keeping with the objective of rendering arbitration less formal and less bureaucratic.[62] By subjecting certified foreign arbitrators to the stringent local accreditation requirements, the restriction smacks of trade protectionism. In consequence, Mainland Tanzania risks the tag of unfriendly jurisdiction to international arbitration.

4.1.2 Impartiality and independence of arbitrator

The arbitration law requires an arbitrator to be impartial and independent. It is instructive that the law does not expressly impose the requirement of impartiality or independence on the arbitrator. However, when it is established that there is justifiable doubt regarding an arbitrator's impartiality or independence, that finding in and of itself constitutes valid ground for the removal of the arbitrator from office.[63] This approach has been borrowed from the UNCITRAL Model Law where there is no direct duty of impartiality or independence which is expressly imposed on the arbitrator as a matter of law. Nonetheless, the

60 For instance, in India arbitrators require mandatory accreditation under s. 43G of the Arbitration and Conciliation Act, 1996.

61 Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, rule 7.

62 Redfern, A. et. al., Redfern and Hunter on International Arbitration, above note 10, at p. 231.

63 Reference is made to s. 28(1)(a) of the Arbitration Act, and rule 24(1) of the Arbitration Regulations. The former provision refers solely to 'impartiality' and it is debatable whether, in that context, independence of the arbitrator is subsumed therein.

arbitrator's legal duty of impartiality and independence arises by necessary implication.

Where justifiable doubt emerges regarding either the arbitrator's impartiality or independence, a valid ground for challenge to the arbitrator is established.[64] Similarly, proven lack of impartiality or independence on the part of the arbitrator constitutes ground for vacation of the arbitral award.[65] The net effect is that an arbitrator whose relationship or conduct creates justifiable doubt regarding his impartiality or independence would, as a matter of law, be disqualified from appointment as an arbitrator or, having been appointed, gets disqualified from continuing to so serve.

It is unhelpful that the arbitration statute is silent on the meaning of 'justifiable doubt as to the arbitrator's 'impartiality or independence'. The concept of independence of the arbitrator focuses on any past or present relationship between the arbitrator and any of the parties or their legal representatives. Such kind of relationship could be personal, social, financial[66] or professional[67] and direct or indirect.[68] The rule of thumb is that the closer the relationship, the higher the likelihood that the arbitrator would not be independent. An assessment of the extent of independence of the arbitrator, therefore, involves an objective

64 Art. 12.2 of the UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006. It is remarkable that Tanzania has so far not acceded to nor ratified the UNCITRAL Model Law on Arbitration, 2007.

65 Under s. 75(2)(a) read together with s. 37(1)(a) of the Arbitration Act, an award could be set aside by reason of lack of impartiality and fairness on the part of the arbitrator.

66 Bastida, B.M., "The independence and impartiality of arbitrators in international commercial arbitration," above note 14, at p. 2.

67 Giorgetti, C., "Who decides who decides in international investment arbitration," Penn Law: Legal Scholarship Repository, above note 4, at p. 451.

68 Bastida, B.M., "The independence and impartiality of arbitrators in international commercial arbitration," above note 14, at p. 3.

examination of the level of proximity between an arbitrator and a party or its legal representative. Suffice to say that an arbitrator must not only be independent but he must be perceived so in the eyes of a neutral third party.[69]

Impartiality principally means that the arbitrator should not be in favour of any of the parties and not be biased against any of the issues in dispute. Thus, to determine whether an arbitrator is impartial or not is to assess the state of mind of the arbitrator. For that case, evaluation of impartiality is essentially a subjective test seeking to determine the state of mind of an arbitrator.[70] Determination of impartiality is always difficult because it involves examination of abstract concepts such as the arbitrator's state of mind.[71]

The overarching legal duty imposed on the arbitrator to be and remain independent throughout the arbitral proceedings bars the arbitrator from having a family relationship with any of the parties.[72] Such family relationships prohibited are based on descent or marriage relationship down to the third generation. Thus, the closer the proximity of the relationship, the higher the likelihood that the arbitrator would be unable to exercise independent judgment.

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69 Jung, H., "The standard of independence and impartiality for arbitrators in international arbitration - a comparative study between the standards of the SCC, the ICC, the LCIA and the AAA," LL.M Thesis, Uppsala University, 2008, at p. 7.

70 Malacka, M., "Party autonomy in the procedure of appointing arbitrators," International and Comparative Law Review, vol. 17, No. 2, 2017, at p. 95.

71 Jung, H., "The standard of independence and impartiality for arbitrators in international arbitration - a comparative study between the standards of the SCC, the ICC, the LCIA and the AAA," above note 70, at p. 7.

72 Ng, J., "When the arbitrator creates the conflict: understanding arbitrator ethics through the IBA Guidelines on Conflict of Interest and published challenges," McGill Journal of Dispute Resolution, vol. 2, 2015-2016, at p. 25.

Moreover, the law prohibits the arbitrator from having any financial interest in the outcome of arbitration.[73] Every arbitrator who possesses any financial interest in the result of arbitration shall be conflicted and thus ineligible to serve as an arbitrator. This legal stipulation is commendable to the extent that it would foster the fairness of arbitration. An arbitrator shall be prevented from being a judge in his own cause in consonance with the dictum that no one shall be a judge in his own cause.

In *Motosach International Company Limited v. Dar es Salaam City Council*,[74] a petition to set aside an arbitral award was preferred for the reason that the arbitrator was an employee of Kinondoni Municipal Council at the material time. It was the petitioner's contention that there was an apparent bias on the part of the arbitrator. While setting aside the arbitral award, the High Court of Tanzania faulted the arbitrator for non-disclosure of his employment relationship with a sister body to the respondent city council. Accordingly, the court found that the arbitrator lacked independence as he had become a judge in his own cause.[75] *Motosach*'s case is remarkable in the way the court tied the arbitrator's duty of independence to the right to be heard. Indeed, the petitioner was denied the right to be heard when the arbitrator was drawn from a sister body to the respondent without disclosure of the relationship.

4.1.3 Duty of disclosure

The law imposes on the arbitrator the duty to disclose any facts and circumstances that are likely to give rise to justifiable doubts regarding the arbitrator's impartiality or independence.[76] This duty arises from the moment an arbitrator gets designated and it subsists throughout the

73 Id, rule 14(c).

74 The High Court of Tanzania, Commercial Division, at Dar es Salaam, Miscellaneous Application No. 106 of 2018.

75 Id, at pp. 7–10.

76 The Arbitration (Rules of Procedure) Regulations, rule 23(2).

arbitration proceedings. The test of disclosure is whether the facts and circumstances will raise reasonable doubt in the mind of the parties regarding the arbitrator's impartiality or independence.[77] To all intents and purposes, this is an overtly subjective test which the arbitrator must undertake to determine whether the duty to make disclosure arises.

An arbitrator who has been selected is duty-bound to lodge with the TAC a written statement of his willingness to avail himself for arbitration throughout the arbitral proceeding. Contained within the written statement shall be the designated arbitrator's statement of disclosure.[78] Furthermore, the arbitrator is required to execute a statement of independence in a prescribed form.[79] The independence statement essentially commits the arbitrator to act autonomously, independently and impartially.

It is noteworthy that the law is silent on any remedy for breach of the arbitrator's duty of disclosure. What is pivotal is the nature of the undisclosed facts and circumstances. Thus, the default to make disclosure in and of itself does not give rise to conflict of interest, and for that matter, does not constitute ground for arbitrator disqualification. Justifiable doubt as to the arbitrator's impartiality or independence would arise if facts which, from their nature required disclosure, were not disclosed.[80] In a nutshell, the arbitrator's failure to disclose is relevant in an assessment of arbitrator bias, but not determinative.

77 Hascher, D., "Independence and impartiality of arbitrators: 3 issues," 27 American University International Law Review, above note 3, at p. 798.

78 Ibid.

79 The Arbitration (Rules of Procedure) Regulations, rule 15(1) and Form No. 1 to the Fourth Schedule thereof.

80 See Halliburton Company v. Chubb Bermuda Insurance [2018] EWCA Civ. 817.

In the case of *Salu Company Ltd v. Cool Air Services Ltd*,[81] the respondent's counsel Mr. Kisamo failed to disclose that he was also a quantity surveyor affiliated with the NCC which administered the arbitration. Incidentally, the sole arbitrator one Shaibu S. Likumbo and Mr. Kissamo both were members of the NCC at the material time. The petitioner unsuccessfully applied to the High Court of Tanzania to set aside the award by reason of the failure of Mr. Kisamo (advocate and quantity surveyor) to disclose these relationships he had with the sole arbitrator. In dismissing the petition, the court ruled that there was no evidence depicting that Mr. Kisamo had interfered with the decision of the arbitrator to render it improper. The court rightly held that NCC was not a party to the proceedings and non-disclosure of Mr. Kisamo's affiliation to NCC was inconsequential in an assessment of arbitrator bias. Hence, the nature of the relationship between Mr. Kisamo and the NCC did not have a bearing on the assessment of arbitrator bias. As a result, such non-disclosure was inconsequential and thus it could not vitiate the award.

4.2. Qualifications imposed by agreement

Parties may, by way of agreement, impose qualifications on the choice of arbitrator. Such qualifications may relate to trade, nationality, experience, professional background or language restrictions. The restriction may apply to the sole or presiding arbitrator but not to the entire members of the tribunal in the case of multi-arbitrator tribunal.[82] Furthermore, the restrictions on the choice of arbitrator may be imposed directly or indirectly through the adoption by the parties of institutional arbitral rules which provides for such arbitrator qualifications.[83] The practice has been prevalent in standard forms of international contracts especially in insurance, reinsurance, shipping and commodity trades industry. A case

81 High Court of Tanzania, Commercial Division, at Dar es Salaam, Misc. Commercial Cause No. 56 of 2017 and Misc. Commercial Case No. 322 of 2016.

82 Born, G., International commercial arbitration, 2nd edn., Kluwer Law International, The Netherlands, 2014, at p. 186.

83 Ibid.

in point is the GAFTA arbitration rules which stipulate that an arbitrator must be a GAFTA-qualified arbitrator.[84]

Fixing the required qualifications of an arbitrator prior to a dispute has been a useful tool for upholding trade arbitration. On various occasions, this tool has been deployed to restrict the choice of arbitrators to members of the relevant trade or profession, or rather to render lawyers ineligible for appointment as arbitrators. In a landmark English case, the arbitration agreement restricted the choice of arbitrators to what it referred to curiously as "commercial men". The English Court of Appeal construed the restriction to mean that practicing members of the legal profession had been excluded from the appointment as arbitrators.[85] Yet in another English case concerning reinsurance dispute, the parties had adopted the Joint Excess Loss Committee terms of which clause 15 provided-

> *Unless the parties otherwise agree the arbitration tribunal shall consist of persons of not less than ten years' experience in insurance or reinsurance.*[86]

The English Court of Appeal construed the above clause to permit for the appointment as an arbitrator a practicing barrister with more than ten years' experience in the insurance and reinsurance disputes. To the court, it was not mandatory that the person of the arbitrator must necessarily be experienced in insurance and reinsurance industry, and thus an insurance disputes' lawyer was suitable. The foregoing decision is laudable for upholding the parties' choice of an arbitrator. It is submitted that where it is the intention of the parties that the selection of arbitrators

84 GAFTA Arbitration Rules, 2016, rule 3.7. GAFTA qualified arbitrator is a person who has been actively engaged in grain and feed trade for the past ten years prior to appointment as an arbitrator.

85 Pando Compania Naviera SA v. Filmo SAS [1975] 1 Q.B. 742.

86 Allianz Insurance Plc and Sirius International Insurance Corporation v. Tonicstar Limited [2018] EWCA Civ. 434.

should be confined to industry insiders, the arbitration clause should clearly and unambiguously say so.

It is not uncommon for parties to provide by way of agreement restrictions regarding the professional qualification of the arbitrator. Where arbitral proceedings are presided over by a sole arbitrator, it is advisable that the person should have a legal background.[87] Furthermore, in the case of three members' tribunal, it is preferable that the presiding chair should ideally be a lawyer.[88] The underlying rationale is that whenever technical questions of procedure or evidence arise in the proceedings, it is presumed that the legal training would equip the sole or presiding arbitrator with necessary skills to navigate these issues.[89] The same may not be said about non-lawyers who are more likely to face difficulties in determining intricate procedural and evidential issues that may arise in the course of the arbitral proceedings.

Suffice to say that under Tanzania arbitration law, parties have the freedom to mutually agree upon the qualifications and attributes of the arbitrator. Courtesy of the party autonomy doctrine, the parties can utilize this liberty to their advantage by prescribing arbitrator qualities that are suitable to the peculiarities of their dispute. Unlike court litigation where a judge or magistrate is assigned a case irrespective of his area of specialization or competence, parties can ensure that the arbitrator possesses the necessary qualities for effective and robust dispute resolution.

4.3. Qualifications imposed by institutional rules

The arbitration rules adopted by the parties or applicable to the chosen arbitral institution may impose restrictions on the choice of an arbitrator.

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87 Born, G., International commercial arbitration, above note 84, at p. 186.

88 Redfern, A. et. al., Redfern and Hunter on International Arbitration, above note 10, at p. 232.

89 Ibid.

As for the NCC which predominantly administers arbitration in construction disputes in Mainland Tanzania, an arbitrator must be chosen from an approved list of arbitrators maintained by the NCC.[90] Much like other specialized arbitral institutions, the NCC maintains a list of approved arbitrators who qualify for registration with NCC after undertaking and passing written examinations administered by the arbitral institution.[91] As a corollary of the requirement that an arbitrator must be chosen from the NCC approved list, any potential arbitrator who lacks NCC registration shall be ineligible for appointment.

In sync with NCC rules, the TIArb further restricts the choice of arbitrators to the panel of members maintained by the institute.[92] Any individual who aspires to be registered as a panel member must also undertake written examination offered by TIArb as a condition precedent.[93] More curiously, TIArb rules specify the benchmarks which its chairman shall consider when making arbitrator appointment. In particular, one of the rules states:

> *When appointing the arbitrators, the chairman shall consider the nature and circumstances of the dispute, the applicable law, the seat and language of the arbitration, and the nationality of the parties.*[94]

A person who has been empanelled as an arbitrator, and therefore meets the qualifications criteria, may still be unsuitable for selection based on the nature and circumstances of the dispute. For instance, it is advisable to settle for an arbitrator who has an accounting background where disposal of the dispute depends on an evaluation of financial figures or

90 The National Construction Council Arbitration Rules, 2001 Edition, arts. 5.1, 5.2 and 5.4.

91 The present author herein sat for and passed NCC examinations in 2021.

92 Tanzania Institute of Arbitrators Arbitration Rules, 2018, art. 6.1.

93 According to one of the TIArb officers who requested for anonymity, these examinations are conducted annually.

94 Tanzania Institute of Arbitrators Arbitration Rules, art. 6.8.

statements of accounts. The consideration of the applicable law when nominating an arbitrator could not be more apt. It is preferable that the sole or presiding arbitrator should be familiar with the applicable law where the dispute is dispositive primarily through legal interpretation.[95]

Where the dispute is governed by the laws of Tanzania, the law stipulates that at least one of the arbitrators preferably the chairperson should be a lawyer.[96] Indisputably, it would be undesirable to cause an arbitrator unfamiliar with the chosen law to dispose of the dispute on the basis of such law and expect him to administer justice fairly. It is under such circumstances that the tribunal might be compelled to appoint experts or legal advisors to assist the tribunal in as much as that would increase the costs of arbitration.[97]

By requiring the appointing authority to consider the language of arbitration, TIArb rules would assist the parties in avoiding additional costs for hiring translators and interpreters. It is noted that where the arbitrator is familiar with the language of arbitration, he will be able to understand the proceedings and prepare a fairly considered and acceptable award. Other considerations such as the seat of arbitration and nationality of the parties are similarly critical in the choice of an arbitrator. As regards local arbitration, it is argued that the arbitrator should preferably hail from the city where the seat of arbitration is situated. This would again eliminate unnecessary travel and accommodation costs that an arbitrator who resides elsewhere would have incurred to the detriment of the parties.

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95 Redfern, A. et. al., Redfern and Hunter on International Arbitration, above note 10, at p. 232.

96 The Arbitration (Rules of Procedure) Regulations, rule 16.

97 S. 44(a)(i) and (ii) of the Arbitration Act permits the arbitral tribunal to appoint experts and legal advisors. It must be emphasized that the costs of arbitration in terms of fees and expenses payable to legal advisors and experts, even where they are appointed by the tribunal, must be borne by the parties.

On another note, appointing an arbitrator of a nationality different from that of the parties might give rise to a sense of neutrality in the arbitral tribunal. It is presumed that an arbitrator drawn from a neutral state shall be free from the baggage of a parochial sense of nationalism when rendering arbitral decisions. It is argued that the assumption is not necessarily true. An arbitrator of impeccable integrity is capable of dispassionately determining the dispute even if he shares nationality with one of the parties. The insistence on an arbitrator of neutral nationality provides the perception that the arbitrator is unlikely to be swayed by an overzealous sense of nationality when preparing the award.

5.0. THE KNOWLEDGE REQUIREMENT

The law does not place any specific knowledge requirement on the person who is being considered for appointment as an arbitrator. In generic terms, the law merely requires an arbitrator to, amongst other attributes, have recognized competence in the fields of law, commerce, industry or finance on condition that he may be relied upon to exercise independent judgment.[98] It is submitted that the requirement to have 'recognized competence' in specified fields sets subjective standards which are not capable of objective verification. From the language of the law, it is not clear whether the arbitrator must possess an academic or professional certificate in the listed fields of discipline or whether no certificate is required.

In the absence of legal stipulation that an arbitrator should possess an academic or professional certification, an individual may rightly be appointed an arbitrator irrespective of his level of education, but subject to an agreement between parties. Practically, parties or the appointing authority rarely consider the level of education of the arbitrator. More

98 The Arbitration Regulations, rule 14(e).

weight is often given to the experience and skills of the arbitrator who is under consideration for appointment.[99]

The pertinent question that pops up is whether an arbitrator should ideally be a subject matter expert apart from compulsory acquisition of arbitration experience. For the purpose of effective control of proceedings, it is recommended that an arbitrator must not necessarily be a subject matter expert in the relevant field of the dispute. What has proved critical to the efficacy of arbitration is knowledge and experience in arbitration. It has been argued elsewhere that an arbitrator who has amassed substantial experience and skills in arbitration would be better placed to effectively administer arbitration.[100]

It is submitted that such an individual would be able to effectively conduct arbitration in a fair and impartial manner relative to one who is merely skilled in the subject matter of arbitration. Suffice to say that the experienced individual would be capable of hearing and determining preliminary objections on points of law to permit the proceedings to progress seamlessly towards finality. It is submitted that technical questions of procedure or evidence that are likely to arise during proceedings would be resolved quickly and resoundingly by reason of the experience already gathered in arbitration. In the circumstances, considerations of the experience of an arbitrator should ideally triumph over the consideration of the industry knowledge-base of a potential arbitrator.

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99 Sitek, B., "Qualifications for becoming an arbitrator of the Arbitration Courts in Roman Law and in selected contemporary legal systems," above note 8, at p. 13.

100 Born, G., International commercial arbitration, above note 85, at p. 186.

6.0. TRAINING OF ARBITRATORS

The need to provide specialised training to arbitrators has never been more compelling. Arbitrators determine complex procedural, evidential and substantive arbitral issues that require expertise. The use of information technology (IT) tools to accelerate and facilitate arbitration has been taking root as exemplified in case management websites, virtual case rooms, extra nets and other IT tools permitting multiparty communication.[101] Common arbitration mistakes which could be minimised or avoided through specialised training. Unfortunately, arbitrators are seldom sanctioned, removed or reprimanded for mishandling proceedings. Due to deficient skills of arbitrator, arbitral awards have faced the ignominy of annulment.[102]

Tanzania law does not provide for compulsory training of arbitrators. Local arbitration institutions such as NCC, TIArb and Tanzania International Arbitration Centre (TIAC) occasionally offer arbitration training often on *ad hoc* basis. Granted, university colleges offer compulsory arbitration training to law students. Thus non law students who ultimately offer arbitration services, do not benefit from this training.

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101 Kauffman-Kohler, G. and Schultz, T., "The use of information technology in arbitration, Jusletter, 5 December 2005, at p. 5.

102 See, for instance, CSI Electrical Limited v. Capcon Limited, High Court of Tanzania, Commercial Division, at Dar es Salaam, Miscellaneous Commercial Cause No. 59 of 2022 where the arbitral award was nullified due to unilateral communication of award to one party prior to its publication; Medical Stores Department v. Cool Care Services, High Court of Tanzania, Commercial Division, at Dar es Salaam, Consolidated Miscellaneous Commercial Case Nos.12 and 32 of 2020 where the award was set aside for want of jurisdiction; and The Registered Trustees of the Diocese of Central Tanganyika v. Afriq Engineering & Construction Company Limited, High Court of Tanzania, Commercial Division, at Dar es Salaam, Consolidated Commercial Cause No. 4 & 9 of 2020 where the award was set aside when the arbitrator amended the pleadings and substituted the claimant all by himself.

7.0. INELIGIBILITY FOR SELECTION AS ARBITRATOR

All individuals who have not been duly accredited to practice arbitration in Mainland Tanzania are ineligible for selection as arbitrators. The prohibition arises by necessary implication in light of the compulsory accreditation requirement as explained above. It is further argued that sitting judges and magistrates are proscribed from taking up arbitration duty unless he has retired from the judicial office. In Tanzania, a judicial officer is barred from undertaking any activity that could reflect badly on his impartiality or interfere with the discharge of his judicial duties.[103]

Similarly, a judicial officer has been enjoined to steer clear of any cause or organization that might be involved in litigation.[104] The *rationale* for the prohibition is not far-fetched. It is submitted that where a sitting judge or magistrate practices arbitration, that undertaking would most likely interfere with the discharge of his judicial duties particularly where the dispute is escalated to arbitration or vice versa. In this scenario, a conflict of interest would arise such that the judicial officer would not be permitted to be a judge in his own cause.

It is noteworthy that Tanzanian law is silent on the eligibility of criminal convicts to serve as arbitrators. The upshot is that persons convicted of criminal wrongs, even economic crimes, can rightfully be appointed to serve as arbitrators. Perhaps, it could be ironical to permit economic crimes convicts to arbitrate over commercial disputes in light of their questionable integrity in financial matters. The office of arbitrator has since time immemorial been a preserve of persons of high standing, possessed of immense skills and experience (but not necessarily immense

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103 Rule 7(2) of the Code of Conduct and Ethics for Judicial Officers, 2020. See also Sitek, B., "Qualifications for becoming an arbitrator of the Arbitration Courts in Roman Law and in selected contemporary legal systems," above note 8, at p. 13.

104 Rule 7(4) of the Code of Conduct and Ethics for Judicial Officers, 2020.

knowledge).[105] For purposes of upholding the integrity, legitimacy and acceptability of arbitration and resultant awards, persons convicted of economic crimes should be prohibited from practicing arbitration.

A person who is assailed with a mental disorder as well should be disbarred from practicing arbitration. Logically, such an individual would be unable to apprehend the pleadings, the evidence and the submissions. Most importantly, a person of unsound mind lacks the capacity to undertake rational decision making and thus he would be unable to prepare a well-reasoned award that would be acceptable to the parties. Nonetheless, it must be clarified that Tanzanian law does not expressly prohibit a person with mental disorder from the practice of arbitration. As a result, the parties may invoke the party autonomy doctrine and select an arbitrator who is mentally impaired without actually breaking any law. Thus, it is high time the law is reviewed to avoid the spectacle of the selection of an arbitrator who suffers from fits of lunacy.

8.0. WAIVER OF QUALIFICATION REQUIREMENT

It may occur that the arbitrator who is mutually agreeable to the parties does not possess all the qualifications required of an arbitrator. Courtesy of the party autonomy doctrine, the parties may agree to the conduct of arbitration by an arbitrator who does not possess all the qualifications stipulated in the arbitration agreement. It is advisable that the parties should execute a clear and unambiguous written waiver of the requirements from the inception of arbitration. This is significant in the event of a challenge to award on the ground that an arbitrator lacked the required qualifications. Non-challenging parties would invoke the waiver agreement to establish that the parties mutually opted to disregard the unduly restrictive arbitrator qualifications.

105 Sitek, B., "Qualifications for becoming an arbitrator of the Arbitration Courts in Roman Law and in selected contemporary legal systems," above note 8, at p. 13.

An aggrieved party who intends to overturn an award may apply to a court to set aside it for the reason of an irregularity in the arbitral tribunal. In particular, under the arbitration statute, a party has the option to challenge the award by reason that the tribunal has failed to conduct the proceedings in accordance with the procedure agreed upon by the parties.[106] It is submitted that improper composition of the tribunal, in the absence of a waiver of specified arbitrator qualifications, would amount to a failure to conduct proceedings in accordance with the agreement of the parties. This kind of lapse would attract annulment of the arbitral award within the meaning of s. 75(2)(c) of the Arbitration Act. A case in point is *Vodacom Tanzania Public Limited Company v. Planetel Communications Limited* which narrates how the appellant had petitioned the High Court of Tanzania to remove an umpire in ongoing arbitral proceedings for alleged misconduct.[107]

A more apt provision is traceable in the New York Convention which stipulates for denial of recognition and enforcement of a foreign award where the composition of the arbitral authority was not in conformity with the agreement of the parties.[108] Tanzania acceded to the convention on 13 October 1964.[109] Consequently, where an arbitrator lacked the stipulated qualifications the award risks annulment.

It is pertinent to underscore that parties have the right to waive only the arbitrator qualifications which they had prescribed by way of agreement. This right is not available to the parties in respect of qualifications prescribed by legislation or institutional rules. The rule is that parties cannot purport to vary by contract mandatory legal stipulations

106 Arbitration Act, s. 75(2)(c).

107 Court of Appeal of Tanzania, at Dar es Salaam, Civil Appeal No. 43 of 2018.

108 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958, art. V(1)(d).

109 List of countries which ratified or acceded to the New York Convention available at https://www.newyorkconvention.org/countries - (Accessed on 17 September 2022).

expressed in statutory law.[110] Suffice to say that arbitrator qualification requirements set by legislation and institutional rules are of a mandatory nature and they cannot be circumvented by private arrangements of the parties. Thus, the tribunal should be constituted in accordance with the agreement of the parties.

9.0. LEGAL REMEDY FOR ARBITRATOR LACKING QUALIFICATIONS

Where it is established that an arbitrator lacks the required qualifications, a party may petition for the removal of the arbitrator.[111] This remedy is only available during the pendency of the arbitral proceedings. Want of qualifications may relate to alleged lack of arbitrator accreditation or registration which could result in justifiable doubt regarding the arbitrator's independence or impartiality.[112] An application for disqualification of the arbitrator shall be lodged at the relevant arbitral institution or body which has been vested with the authority to remove an arbitrator.[113]

In practical terms, the forum could be an arbitral institution or appointing authority that has been vested with arbitrator removal powers. The long and short of it is that where an arbitral institution or body lacks authority to remove an arbitrator, the parties have the discretion to clothe such institution or body with disqualification powers. This legal position is commendable in the sense that it potentially renders arbitration self-contained insofar as arbitrator disqualification architecture is concerned. Neither party would be compelled to petition

110 Arbitration Act, s. 9(1).

111 The Arbitration Regulations, rule 24(3).

112 Id, rule 14.

113 The Arbitration Act, s. 28(2).

elsewhere for arbitrator disqualification and it could save time in processing the removal motion.

Absent any institution or body with the authority to remove an arbitrator, the aggrieved party is entitled to directly petition TAC to discharge an arbitrator who lacks stipulated qualifications. Thus, TAC is principally a default removal authority whose disqualification mandate could be activated only in the absence of any organ vested with removal powers. Incidentally, at the material time of writing this article, TAC is yet to be set up. It is argued that momentarily parties could lodge disqualification petition directly in court until TAC is set up and operational. It is submitted that such a petition may be filed in court under s. 27(4) of the Arbitration Act [Cap. 15 R.E. 2020]. This legal provision preserves the legal authority of the court to revoke the appointment of an arbitrator according to law.

In one landmark case,[114] the Commercial Court (per Hon. Nangela, J.) removed the sole arbitrator Ms. Larrissa Leach, in ongoing arbitral proceedings, for breach of principles of natural justice. It was established that the sole arbitrator, acting on the pretext that parties had settled for evidentiary proof through review of documents only, overruled a preliminary objection on a point of law challenging jurisdiction without affording the parties the right to be heard. The petition was lodged in the High Court of Tanzania under the provisions of ss. 27(4)(b), 28(1)(a)(d) and 96 of the Arbitration Act.

Where the proceedings have been concluded and an award handed down, an aggrieved party may petition to set aside the arbitral award on the ground that the arbitral tribunal did not conduct proceedings

114 The Arab Contractors (Osman Ahmed Osman & Co. and Elsewedy Electric Company v. Bharya Engineering & Constructing Company Limited (BECCO), High Court (Commercial Division), Dar es Salaam, Miscellaneous Commercial Case No. 28 of 2022 (unreported).

according to the agreed procedure.[115] Under the New York Convention, a party may petition to set aside the award on the ground that the composition of the arbitral tribunal was not in accordance to the law of the country where the arbitration took place.[116] For the case of Tanzania, a party who neglects to object to the improper composition of the tribunal during the currency of proceedings would be deemed to have waived the right to object.[117] Unless such a party has compelling reasons for default to promptly object to the membership of the tribunal, it would be estopped from raising objection during the post-award period.[118]

Perhaps one may wonder as to why an application to remove an arbitrator is not maintainable during post-award period. Suffice to say that it would be an exercise in futility to press for the disqualification of an arbitrator who has already exhausted his mandate and delivered an arbitral award. The only practical option at this stage is to challenge the award and not the tribunal anymore. A petition seeking to set aside the award shall be lodged at the court of competent jurisdiction[119] by way of petition.[120]

In a landmark English case, clause 15.5 of the JELC terms which constituted the arbitration clause provided:

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115 The Arbitration Act, s. 75(2)(c).

116 The New York Convention for Recognition and Enforcement of Foreign Arbitral Awards, 1958, art. V(1)(d).

117 Under s. 35(1) of the Arbitration Act, an objection that the arbitral tribunal lacks substantive jurisdiction should be raised at the material time when the party takes first step in the proceedings to contest the merits of the claim. This ideally should be at the time when the respondent lodges a reply to statement of claim or when the claimant files a reply to counterclaim or similar pleadings.

118 The Arbitration Regulations, rule 24(2). Challenge must be preferred within 14 days after information forming basis of the challenge becomes known to the challenging party.

119 S. 3 of the Arbitration Act defines "court" as a court of competent jurisdiction in Mainland Tanzania. However, as regards international arbitration the term "court" refers to the High Court in the exercise of its original civil jurisdiction.

120 The Arbitration Regulations, rule 63(1)(a).

> *Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience in insurance or reinsurance.*[121]

A dispute subsequently broke out between the parties culminating in the appointment as an arbitrator of a practicing lawyer with over 30 years' experience in insurance and reinsurance law. The Court of Appeal of England ruled that the experience requirement was satisfied by the appointment of a lawyer who advised in insurance and reinsurance law. It is noteworthy that the English appellate court construed the qualification requirement broadly to include industry and legal advisory experience. It is submitted that this holding could be attributed to the synergy that exists between legal practice and the business of insurance and reinsurance.

10.0. CONCLUSION

The qualification of an arbitrator is critical to the integrity and efficacy of arbitration. Parties are entitled to fix the required qualifications of an arbitrator through a mutually sanctioned agreement. Depending on the nature of the dispute, parties may conveniently opt for an arbitrator with specialized knowledge and skills in the relevant industry or prefer an experienced arbitrator without necessarily having subject matter expertise. Additionally, the qualities of an arbitrator can be prescribed by mandatory law at the seat of arbitration. For the case of Mainland Tanzania, an arbitrator has a mandatory legal duty to obtain accreditation or provisional registration prior to practicing arbitration for a fee.[122]

It is the law that an arbitrator must at all material times be and remain independent and impartial towards the parties and the issues in

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121 Allianz Insurance Plc and Sirius International Insurance Corporation v. Tonicstar Limited [2018] EWCA Civ. 434.

122 Arbitration Act, s. 93.

dispute.[123] Granted, the main objective of legal prescription of arbitrator qualification is to improve standards of arbitration proceedings and resultant awards. The emerging challenge is that the accreditation criterion does not provide for specialized training in arbitration as a springboard to eligibility for registration. On the same vein, the arbitrator accreditation legal architecture does not recognize arbitrators accredited in foreign jurisdictions or arbitral institutions. In consequence, foreign arbitrators who have been tapped to preside in proceedings seated in Mainland Tanzania face disenfranchisement. Thus, Mainland Tanzania risks losing a chance of becoming a seat of choice for the parties. The accreditation panel habitually sits four times annually and a foreign arbitrator might not have the luxury of time to obtain accreditation timely against the backdrop of parties anxious for swift settlement of their commercial dispute.

123 Rule 24(1) of the Arbitration Regulations.