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ENFORCEMENT OF ARBITRAL AWARDS AND ITS EFFECTIVENESS IN THE ZIMBABWE MINING SECTOR.

SUBMITTED BY

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DECLARATION

I, RACHEL CHIBAYA do hereby declare that save for the references indicated in the text, this dissertation represents my own work, and it has not been previously submitted for a degree at this or another University.

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ABSTRACT

Study examined the arbitral awards enforcement and its effectiveness in the mining sector in Zimbabwe with a view to produce a model framework for the effective enforcement of arbitration awards. The study was motivated by the rampant disputes in the Zimbabwean mining sector which have threatened production and output in the sector. Highly publicised cases on the enforcement of arbitral awards in Zimbabwe had cast a negative picture of the aspect thereby casting doubt on the utility of arbitration which is evidently a preferred alternative dispute resolution method. The study was a desk study that made use of secondary data. Findings showed that Zimbabwe has adopted the UNCITRAL Model Law which has been appended to the Arbitration Act [Chapter 7:15]. Expectedly, Chapter VIII of the Arbitration Act [Chapter 7:15] is a replica of the Article 35 and 36 of the Model Law and provides for both recognition and enforcement of foreign arbitral awards. The judiciary is important in the enforcement of arbitral awards and Article 35(1) allows national courts to recognise and enforce arbitral awards subject to lack of any grounds for refusal or engagement of the same. The procedure for seeking enforcement as per Article 35 of the ZAA is standardised with processes like applying through courts being in place. There are however challenges relating to the onerous and time-consuming nature of the court procedures when seeking arbitration. The limited array of enforcement options exacerbates the challenges. The study further showed that arbitral award enforcement procedure can be simplified through removal of certain processes like the requirement of notifying parties when applying to courts based on Article 35(2). Further, despite adoption of the Model law, enforcement can be made effective in the mining sector by incorporating local realities thereby coming up with a model tailored to the Zimbabwean context. Courts can also embrace digital technologies and other ICTs in order to quicken the process of enforcement by cutting down the processing times as well as allowing for cost effective enforcement.

***Key terms**: [Arbitration; Arbitral awards enforcement; UNCITRAL Model Law]*

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DEDICATION

This research is dedicated to my Partner, Baba VaLendell for the maximum support as always and to my beautiful kids Lindsey, Leanne and Lendell for the love and patience throughout the whole programme.

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ACRONYMS

ADR - Alternative Dispute Resolution
ASM - Artisanal Miners
BIT - Bilateral Investment Treaties
DRC - Democratic Republic of the Congo
EU - European Union
GDP - Gross Domestic Product
ICC - International Chamber of Commerce
ICSID - International Centre for Settlement of Investment Disputes
SADC - Southern African Development Community
UK - United Kingdom
UNCITRAL - United Nations Commission on International Trade Law
ZAA - Zimbabwe Arbitration Act
ZMDC - Zimbabwe Mining Development Corporation

CHAPTER ONE: INTRODUCTION

1.0 Introduction

The mining sector in Zimbabwe has been characterised by incessant disputes lately and at worst these have turned violent. While disputes are the mainstay of human relations, they can be disruptive which necessitates measures for resolving the same. Arbitration is a measure of choice amongst many though enforcement of arbitral awards underpins its usefulness. However, arbitration has been evidently sub-optimal in terms of enforcement of arbitral awards in Zimbabwe. Various examples in case law show that enforcement of mining sector arbitral awards in Zimbabwe has often proven difficult which has seen the effectiveness of enforcement of arbitral awards locally being called into question.[1] It is important that the enforcement of arbitral awards in Zimbabwe as well as its effectiveness are well understood. The current study examines the arbitral awards enforcement and its effectiveness in the mining sector Zimbabwe.

1.1 Background to the study

Conflicts and disputes are a natural and prominent feature of human existence and this has been the case for ages. The same makes it important to have in place measures for resolving these disputes and conflicts so as to maintain healthy relationships within the society. Contracts are by no means an exception as disputes are inevitable in contractual relations at various levels in business. The main driver in this regard is the dichotomy in interests as well as objectives of parties involved.[2] Various measures have been applied in resolving disputes of different kinds. Arbitration is one such measure and the same has been applied for a long time with the justice systems including the courts are offering provisions underpinning the legal standing of arbitration.[3] Arbitration serves as a more favoured alternative dispute resolution measure to the dreaded and cumbersome process of litigation.

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[1] *Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15*

[2] W S Alalou, M W Hasaniyah and B A Taye, A comprehensive review of dispute prevention and resolution in construction projects. 2019. https://doi.org/10.1051/matecconf/201927005012

[3] M Mahapa & C Watadza. The dark side of arbitration and conciliation in Zimbabwe. Journal of Human Resources Management and Labour Studies. 3. 10.15640/jhrmls.v3n2a5. 13

Just for perspective, a report by the School of International Arbitration and the Queen Mary University, 97% of parties surveyed preferred use of arbitration including its use in collaboration with other methods.[4]

As the 21st Century has seen a considerable expansion in both global investment and trade, arbitration has continued to grow in application and use. This is based mostly on existing international instruments of which two stand out. These are the New York Convention of 1958 as well as the United Nations Commission on International Trade Law (UNCITRAL) Rules popularly known as the Vienna Convention of 1985.[5] The acceptance of these international rules by individual states underpins the success of the system of arbitration.

These instruments have ensured seamless enforceability as their main thrust. Yet the matter of enforcement of arbitral awards has been a major issue in relation to arbitration and the same has attracted a great deal of attention from both academics and practitioners. Most countries do make provisions for the enforcement of arbitral awards. However, as noted in extant literature these provisions do not always guarantee effective and relatively easy enforcement of arbitral awards.[6] Challenges have been faced in various jurisdictions in an effort to enforce arbitral awards. Far afield in China, inherent weaknesses of the Chinese judicial systems are cited as the main source of challenges in the enforcement of arbitral awards. In Nigeria, defects as well as challenges inherent in the institutional and legal framework for arbitral award enforcement have hindered key enforcement aspects.[7] The enforcement of arbitral awards is thus susceptible to error, corruption as well as other undue means which may be employed or occur naturally thereby causing injustice to parties to a given dispute. The foregoing speaks to variations across jurisdictions with regards to

[4] K Kalaitsoglou. Exploring the concept of arbitral awards under the New York Convention. Journal of strategic Contracting and Negotiation. 2021. 22

[5] The two international instruments inform most of the national arbitration law globally.

[6] GR Delaume 'Enforcement against a Foreign State of an Arbitral Award Annulled in the Foreign State' <
http://www.cm-p.condpublications/1 I 96.htm> (6 June 2022).

[7] E Moneke. Strengthening the legal regime for the recognition and enforcement of arbitral awards in Nigeria. 2018. 33

enforcement of arbitral awards. This necessitated a contextual analysis of arbitral award enforcement and its effectiveness.

Arbitration in Zimbabwe is undertaken based on the Arbitration Act (Chapter 7:15) which came into force on the 13th of September 1996 and the same serves as the principal national statute in the context of arbitration in Zimbabwe.[8] The country adopted the 1985 UNCITRAL Model Law through Section 2 of the Arbitration Act albeit with some modifications.[9] The international instrument was incorporated as a Schedule to the act. As such all processes of arbitration in Zimbabwe should conform to the provisions of the Model Law which applies to both domestic and international arbitration. Zimbabwe however, modified the text of the Model Law with particular focus on the public policy exception to enforcement of awards. Through the Arbitration Act, the text is supplemented through Article 34(5). The main import in this regard is that the public policy defence is restrictively construed as demonstrated in Zesa v. Maposa.[10]

Arbitration has thus been applied in Zimbabwe with provisions for enforcement being put in place. This is in the wake of various disputes including in the extractive industries chief amongst these being the mining industry. The industry is at the centre of efforts to grow the economy in Zimbabwe making it a flagship industry in Zimbabwe, a position it occupies in various other countries. Government envisages that the industry will be a US$12 billion industry by 2023.[11] This coincides with deliberate efforts to attract foreign investors and optimise foreign direct investment locally. Yet a Southern Africa Resource Watch report indicated that disputes have plagued the mining sector in Zimbabwe with the judicial system being found wanting

[8]Arbitration Act [Chapter 7:15] available at https://old.zimlii.org/zw/legislation/num-act/1996/6/Arbitration%20Act%20%282006%29.pdf

[9] The Arbitration Act [Chapter 7:15] was put in place to give effect to both international and domestic arbitration agreements as well as to apply the modified Model Law as well as repeal the Arbitration Act [Chapter 7:02].

[10]The court held that the public policy defence should be restrictively construed so as to preserve and recognise the basic aim of finality as applied in arbitration. Thus the defence should only apply where the fundamental law and morality principles are violated. See *Zesa v. Maposa (2) ZLR 452(S) (1999)*

[11] See the National Development Strategy (NDS1) policy document by the Government of the Republic of Zimbabwe. http://www.zimtreasury.gov.zw/index.php?option=com_phocadownload&view=category&id=64&Itemid=

in its handling of these.[12] Given the nature of mining as a complex business that requires significant investment and generating high returns, disputes are inevitable. Mining disputes often arise throughout the life of mining projects. Generally, the heavy exposure of mining projects to regulation and control by the state breeds a lot of friction culminating in disputes of some sort.

Enforcement of arbitral awards has however lingered as a challenge in its application in Zimbabwe. Enforcement has not been optimal locally and this has applied mostly to foreign arbitral awards as evidenced by various documented cases where challenges have been faced in seeking enforcement. Various cases demonstrate this including the case between British-Virgin Islands-based firm Amari Holdings subsidiaries and Zimbabwe Mining Development Corporation (state-owned entity) saw Amari Face difficulties in their attempt to enforce its US$65 million award forcing the entity to contemplate targeting assets outside Zimbabwean borders including shipments of minerals and other exports by the state (Prinsloo, Sguazzin & Marawanyika, 2019).[13] In the same vein, cases like the famous case of von Pezold have only served to portray enforcement of arbitral awards as being difficult and ineffective.[14] In both cases, enforcement efforts proved futile.[15] This is contrary to other outstanding cases abroad including some of the outstanding cases in literature include the First Quantum v. DRC case which was settled in 2012 as well as Senegal v. ArcelorMittal case settled in 2014.[16] Interestingly, these cases were settled and the award successfully enforced.[17] Thus enforcement of arbitral awards locally requires further careful analysis.

[12] The report further indicated that gold output had fallen drastically amid various disputes and violence in the mining sector. https://www.sarwatch.co.za/wp-content/uploads/2020/11/Zim-Gold-Robbery-Report-Final_compressed-1.pdf

[13]Amaplat Mauritius Limited, Amari Nickel Holdings Zimbabwe Limited v. Zimbabwe Mining Development Corporation, The Chief Mining Commissioner, Ministry of Mines, Zimbabwe, ICC Case No. 17720/AMP/MD/TO. https://jusmundi.com/fr/document/decision/en-amaplat-mauritius-limited-amari-nickel-holdings-zimbabwe-limited-v-zimbabwe-mining-development-corporation-the-chief-mining-commissioner-ministry-of-mines-zimbabwe-final-award-sunday-12th-january-2014

[14] See *Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15*

[15] The Zimbabwean government missed the deadline to pay the claims on several occasions while trying to discredit the panel.

[16]International Quantum Resources Limited, Frontier SPRL and Compagnie Miniere de Sakania SPRL v. Democratic Republic of Congo, ICSID Case No. ARB/10/21 https://www.italaw.com/cases/567 ;

[17] Quantum Resources indicated through a press release on 12 March 2012 that the claims against the DRC government had all been settled.

This is so given that the arbitral award enforcement aspect is a critical one as it interacts with the willingness of investors to invest locally. Where such enforcement is deemed ineffective and difficult, investors may see it as an impediment in the context of ease-of-doing-business and may be discouraged from investing locally.[18] The importance of an effective arbitral award enforcement regime is thus beyond doubt. While extant academic literature on enforcement of arbitral awards is rich, the same is dated and in some cases circumstantial and country differences are apparent. Further, given the evolution of legal systems and the related laws and processes, a contextual analysis of the arbitral awards enforcement and the effectiveness of the same in the local mining sector are necessary. Pursuant to this, the current study examines the arbitral awards enforcement and its effectiveness in the mining sector in Zimbabwe.

1.2 Statement of the problem

Disputes have been rampant in the Zimbabwean mining sector where some of these have turned violent particularly in the small-scale mining sector. While disputes are common in human relations, their resolution is important and has to be optimised. However, arbitration which is the preferred resolution method is evidently sub-optimal in functionality particularly enforcement of arbitral awards in Zimbabwe. Various examples in case law show that enforcement of mining sector arbitral awards in Zimbabwe has often proven difficult which has seen the effectiveness of enforcement of arbitral awards locally being called into question. Further, there is a paucity of empirical evidence on the enforcement of arbitral awards and its effectiveness in Zimbabwe despite its importance in the context of the mining sector. It is important that the enforcement of arbitral awards in Zimbabwe is clearly understood together with its effectiveness and the current study examines the arbitral awards enforcement and its effectiveness in the mining sector in Zimbabwe with a view to produce a model framework for the effective enforcement of arbitration awards.

[18] This interacts with contract enforcement which is important as shown by its inclusion under Ease-of-Doing-business.

1.3 Research objectives

1.3.1 Main objective

To examine the arbitral awards enforcement and its effectiveness in the mining sector in Zimbabwe with a view to come up with a model framework for the effective enforcement of arbitration awards.

1.3.2 Sub-objectives

1. To establish the legal and institutional framework for the enforcement of arbitral awards in the mining sector in Zimbabwe.
2. To determine the current arbitral award enforcement practices in the mining sector in Zimbabwe.
3. To identify challenges faced in the enforcement of arbitral awards in the mining sector in Zimbabwe.
4. To suggest measures for ensuring effective arbitral award enforcement in the mining sector in Zimbabwe.

1.4 Research questions

1. What is the legal and institutional framework for the enforcement of arbitral awards in the mining sector in Zimbabwe?
2. What are the current arbitral award enforcement practices in the mining sector in Zimbabwe?
3. What are the challenges faced in the enforcement of arbitral awards in the mining sector in Zimbabwe.
4. What measures can be implemented to ensure effective arbitral award enforcement in the mining sector in Zimbabwe.

1.5 Significance of the study

The study may help provide a model framework for the effective enforcement of arbitration awards in Zimbabwe. This is important in shading some light on any challenges in this regard and calling the attention of policy makers who may find the study and its findings important in policy decision making. The study and its findings can thus effectively inform policy makers' action in this regard. Business leaders and investors in the mining sector may also find the study important in their own

decision-making regarding resolution of disputes in the course of their projects and operations. Decisions regarding the resolution methods to pursue can be made from an informed position. Further, the current study addresses important identified gaps in knowledge and literature. As noted in the background, there is a dearth of evidence on arbitral award enforcement and its effectiveness in Zimbabwe. The study precisely endeavoured to avail this evidence thereby filling the gaps. Should the study meet the conditions set by the institution, it may add depth to the repository at the university where it will benefit learners and educators that have interest in the subject matter.

1.6 Scope of the study

The study focuses on the mining sector in Zimbabwe and this is to ensure that the same is effectively studied with little deviation from the stated aims of the study. The study is also undertaken in Harare which is the administrative capital of the country. This meant that data collection and access to institutions of interest was easier to arrange and execute. The study also focuses on the concept of arbitral award enforcement though it makes reference to related concepts for argument purposes. This is important in ensuring that the study effectively focuses on its aims and objectives.

1.7 Literature review

This section of the chapter focuses on a review of available relevant literature on the enforcement of arbitral awards and its effectiveness. This is meant to provide important insights to enforcement of arbitral awards based on the work of other writers. This is handy in locating the current study in the discourse around the subject matter. Arbitration has been shown to be a preferred way of resolving disputes including in contracts.[19] Gaillard and Edelstein note that arbitration is *inter alia* cost effective, efficient, neutral, binding, flexible and expeditious as opposed to litigation.[20]

[19] Mahapa and Watadza (n3 above) 4

[20] E Gaillard and J Edelstein 'Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat' (2000) 3(2) *International Arbitration Law Review* 37, 41.

As such the same has been applied at both domestic and international level. It isn't unreasonable for a successful party in arbitration to have expectations to the effect that an award will be voluntarily executed by the unsuccessful party.[21] This is so given that the choice to resolve a dispute by arbitration arises from the agreement between parties to be bound by the outcome.[22] In the same vein, the UNCITRAL Arbitration Rules 2013 make a provision for carrying out an award without delay.[23] It is for this reason that arbitral awards are held to be self-executing. However, issues arise when the unsuccessful party is reluctant to execute an award. While the actual arbitration processes have been less contentious, it is the enforcement of subsequent arbitral awards that has been contentious.[24] O'Connell argues that various factors including variations in legal and institutional frameworks for the enforcement of such awards have contributed to this contentious nature of the enforcement of arbitral awards.[25] Withal, monumental challenges are faced when successful parties in arbitration procedures seek to enforce arbitral awards including in international arbitration where enforcement in other states may be difficult even where the states belong to the same regional block like SADC.[26] O'Piya notes that enforcement of arbitral awards particularly in international arbitration is a complex process with various factors at play.[27]

Deficiencies in national legislation, corruption, political interference, variation in instruments for enforcement as well as failure to harmonise and standardise such

[21] Non-compliance with the requirements may not only amount to misconduct, but may give justifiable grounds for setting aside or refusal of recognition or enforcement of the award by the relevant courts; see ACA, ss 29, 30 & 52. For instance, the courts may refuse to recognize and enforce an award under section 52(2)(a)(iii) of the ACA or article V(1)(b) of the New York Convention where a party proves that he was not given a fair opportunity to answer or present his case.

[22] UNCITRAL Arbitration Rules 2013, art 34(2).

[23] P O Idornigie, *Commercial Arbitration Law and Practice in Nigeria* (Lawlords Publications, 2015) 122

[24] B Garry, *International Commercial Arbitration*, Kluwer Law International. Black, Henry Campbell, M.A. (1991). *Black's Law Dictionary*, St.Paul: West Publishing Co. Cambridge. 2009. 223

[25] ME O'Connell 'The Prospects of Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgement against the United States' (1990) 404 *Scholarly Works*, available at http://scholarship.law.ndu.edu/law_faculty_scholarship/404

[26] *See Mike Campbell (PvT) Limited and Others v The Republic of Zimbabwe* [2008] SC 2 (28 November 2008)('*Campbell*').

[27] R O'Piya, Recognition and enforcement of international arbitral awards: A comparative study of Ugandan and UK law and practice", LL.M Thesis, Oxford Brookes University, 2012, 14.

instruments has contributed to this state of affairs.[28] The foregoing explains variation in effectiveness of enforcement of arbitral awards across states. Award enforcement may bring together various legal systems. The intercourse between legal systems that characterises international arbitration necessitates development and harmonisation of legal infrastructure.[29] Rosenne cites East Africa where different legal traditions and legal systems subsist in partner states with some municipal laws in states not being aligned to the 1958 New York Convention as well as the UNCITRAL Model Law on arbitral awards enforcement.[30] Further complications arise from uncertainties in the New York Convention which may see states under certain circumstances making reservations as well as renounce the Convention as being inapplicable to the state.[31]

Successful parties often have to seek the advice of lawyers in order to determine whether enforcement is possible and the process may see them approaching courts. Opiya cites scattered debtor assets which may be in different jurisdictions thereby presenting challenges for those seeking enforcement and execution.[32] As noted earlier in the review, deficiencies in national legislation for arbitration may also see enforcement being a challenge. In East Africa for instance, Blackaby notes that most national legislation are not facilitative and supportive of enforcement and this mostly affects international commercial arbitration.[33] This is despite states in the region adopting the Model Law and ratifying the New York convention. The judicial attitude in these countries isn't pro-enforcement. Bokstiegel notes that municipalities in Eastern Africa have also broadly interpreted grounds thereby

[28] N Blackaby & C Partasides, A Redfern and M Hunter, *Redfern and Hunter on International Arbitration, 5th ed.,* Oxford University Press, Oxford, 2009, 513.

[29] R Rana, The Tanzania Arbitration Act: Meeting the challenges of today with yesterday's tools? *Alternative Dispute Resolution Journal* (2014), 232-233.

[30] S Rosenne The International Court of Justice: An Essay in Political and Legal Theory (1957) 102.

[31] These are found under Article I (3) of the Convention as follows: A State can restrict the applicability of the convention or some Articles thereof to awards made only in the territory of another Contracting State; and, the entitlement to a contracting state to indicate that it will only apply the convention to difference arising out of a legal relationship whether contractual or not, which are considered as commercial under the national laws of the country making such declaration.

[32] Opiya (n27 above) 32.

[33] Blackaby, Redfern and Hunter (n28 above) 14.

frustrating enforcement of foreign awards and sometimes overstepping their mandate.[34]

Far afield in China, problems have been reported in the system for enforcement of arbitral awards which have seen enforcement being an uphill task for prevailing parties.[35] Weaknesses in the judicial system itself including the tendency by courts to protect local interests have been cited as the main challenges in the enforcement of arbitral awards.[36]

The foregoing review shows that enforcement of arbitral awards has often been marred by difficulties that those seeking enforcement have faced. Evidence abounds in extant literature that such challenges have been faced in different jurisdiction with most of these being in foreign arbitral awards from international arbitration. However, most of the literature is in different contexts and despite challenges being identified, there remains little on the actual effectiveness off arbitral award enforcement in the mining sector in Zimbabwe. Moreover, there is a lack of empirical evidence on the actual procedure of enforcement of arbitral awards in the mining sector in Zimbabwe. Variations across contexts are also evident in literature which necessitates a contextual analysis of the enforcement of arbitral awards and its effectiveness in Zimbabwe with a goal to come up with a more effective model for enforcement. The study addresses these gaps by contextually analysing the procedure for enforcing arbitral awards in the mining sector in Zimbabwe. This means that an in-depth analysis of the procedure is undertaken to determine its effectiveness and identify any challenges.

1.8 Research methodology

The study is a desk research that is based on secondary data. In this regard, the study makes use of secondary data sources including journals, books, e-books, online papers, reported judgements, legal statutes, reports and other publicly available

[34] G Böckstiegel, "Role of the state on protecting the system of arbitration," 2-3.
[35] M Chi, Time to Make a Change? A Comparative Study of Chinese Arbitration Law and the 2006 UNCITRAL Model Law and the Forecast of Chinese Arbitration Law Reform,(2009); Christopher Shen, International Arbitration and Enforcement in China: Historical Perspectives and Current Trends, 14
[36] Randall Peerenboom, Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the PR.C., 49

sources. The study thus relies mostly on extended literature review in pursuit of its stated research objectives. The use of this approach is deemed suitable as it allows the researcher to consider various sources and address issues in-depth.

1.9 Outline of the study

Five different chapters constitute the study.

Chapter one

This chapter provides a detailed introduction of the current study. The background of the study is provided with a view to contextualise the problem under study. The chapter also articulates the statement of the problem together with the study objectives. Research questions that the study sought to answer are also stated in the chapter together with the study significance to various stakeholders. Moreover, the chapter also deals with the delimitations of the study as well as the outline of the study.

Chapter two

The chapter focuses on the theoretical framework as well as the concept of arbitration. In this chapter the researcher articulates clearly the theoretical framework that underpinned the study. The theoretical framework is explained with reference to the current study and its relevance to the same. In the same chapter, the concept of arbitration is addressed fully and contextualised to the current study and its needs.

Chapter three

The chapter is the legal and institutional framework for the enforcement of arbitral awards in the mining sector in Zimbabwe. The researcher critically evaluates the current framework for the enforcement of arbitral awards in Zimbabwe including the implications of the available international instruments. A comparative approach to the analysis is also taken with frameworks applied somewhere else being analysed in comparison with those in Zimbabwe.

Chapter four

This is the study's penultimate chapter in which the researcher critically examines literature on best practices in the enforcement of arbitral awards. Challenges encountered in the current framework will also be alluded to so that best practices are addressed with the benefit of hindsight.

Chapter five

The chapter focuses on conclusion and recommendations based on the objectives and findings of the study.

1.10 Chapter summary

This was the first chapter of the study and it gave a detailed introduction of the current study. In this regard, a background of the study was provided with a view to contextualise the problem under study. A concise statement of the problem was also provided in the chapter together with the study objectives. The precise questions that the study sought to answer are also articulated in the chapter which also explain the study significance to various stakeholders. Moreover, the chapter also deals with the delimitations of the study as well as the outline of the study. In the next chapter, the researcher deals with the theoretical framework as well as the concept of arbitration.

CHAPTER TWO: THEORY AND PRINCIPLES OF ARBITRATION

2.0 Introduction

The chapter focuses on the theoretical framework as well as the concept of arbitration. In the chapter, the researcher articulates clearly the theoretical framework that underpinned the study. The theoretical framework is explained with reference to the current study and its relevance to the same. The concept of arbitration is addressed fully and contextualised to the current study and its needs. The foregoing sets the stage for a more focused and detailed analysis of literature guided by the current study objectives.

2.1 Theoretical framework

There has been a raging debate regarding the real underlying nature of arbitration and the theoretical dilemma sometimes creates real problems in the application of arbitration which obviously extends to the arbitral awards whose enforcement is the main focus of the current study. Different conceptions of arbitration may influence the understanding of the rights of the parties involved. The current section presents the theoretical framework which informs the current analysis. The study is informed by the contractual and jurisdictional theories of arbitration. The use of the two is based on the notion and reality that neither of the two systems covers a full spectrum of the important elements of arbitration. In actual fact, the two theories are complementary to each other.[37] Arbitration as a concept is dependent on

[37] E Sundari, The limitation of final and binding arbitral awards: How far in supporting the autonomy of arbitration? Faculty of Law, University of Amta Jaya Yogyakarta, Indonesia.2019.

elements that are encompassed in both theories. While contractual parties do control certain aspects of the process of arbitration including terms of reference and timeline, arbitration is jurisdictional as states have power over arbitrability. In reality arbitration ought to be understood as an interaction of its consensual basis and support and legitimacy that national legal systems confer on the arbitration process.[38]

2.2 The contractual theory

The contractual theory of arbitration holds arbitration to be by nature contractual.[39] This is predicated on the notion that all the process including the setting up of the tribunal to hear a dispute to the authority that is rendered to arbitrators on the tribunal as well as the binding effects of the subsequent arbitral awards can be taken to be the product of parties to dispute agreement.[40] The contractual theory has its basis in the statement to the effect that an award is a contract that is produced by the arbitrator who is an agent of the parties to the dispute concerned.[41] In this regard, the state does not play any role in this contractual nature of arbitration though there may be exceptions where one of the parties attempts to avoid their contractual obligations. Here the state will intervene in a bid to enforce the agreement or deal entered into by the parties which is at this point an unexecuted contract.[42]

Makaramba indicates that arbitration is a consensual mechanism for dispute resolution which is initiated by private parties through the invitation of a third party to intervene outside of the courts.[43] Widespread criticism has been directed at the theory with the main point of criticism being that an arbitrator may not be viewed

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[38] D A Farber, The Supreme Court, the law of nations, and citations of foreign law: The lessons of history. *Calif. L. Rev.*200.p.1335

[39]A Barraclough and J Waincyme , Mandatory rules of law in international commercial arbitration, *Melbourne journal of international law*,*6*(2).2005.pp.205-244.

[40]H A Grigera Naón, Arbitration and Latin America: Progress and Setbacks Freshfields Lecture. *Arbitration international*, *21*(2).2005.pp.127-176.

[41]A Sklenyte, *"International Arbitration: the Doctrine of Separability and Competence-Competence Principle"*. The Aarhus School of Business.2003.p57

[42]I R Macneil, Contracts: adjustment of long-term economic relations under classical, neoclassical, and relational contract law. *Nw. UL Rev.*1977.p.854.

[43]R V Makaramba Curbing delays in commercial dispute resolution: arbitration as a mechanism to speed up delivery of justice. In *International Conference Centre, Organised by the High Court of Tanzania, Dar es Salaam*.2012

as an agent of either of the disputing parties. This is buttressed by the law of agency which stipulates that an agent does not have the capacity to perform tasks which the principal couldn't possibly perform.[44] Similarly, the theory has been criticised for ignoring the logic that parties cannot settle a dispute they are involved in as they are not impartial on the disputes' merits.[45] In the same vein, it has been argued that in real sense, an arbitrator owes the parties a duty to make decisions that are unbiased on the subject matter of the dispute which cannot be said in the case of an agent who has an obligation to conform to the wishes of and further the interests of the principal making it incompatible with the obligations of the arbitrator.

Lastly, the theory has been questioned on the basis that the arbitrator's authority could be rendered irrevocable, which is not the case with an agent's authority. Despite the notable shortcoming, the theory saliently encapsulates the important elements of the arbitration. It is adopted in the current study as it explains the mechanics through which arbitral awards are held to be irrevocable and enforceable which is an important aspect in the current study. However, it is also necessary to theoretically explain the role of the state which the contractual theory alluded to by indicating that the state is sometimes handy in enforcing an agreement.[46] For this, the study adopts the jurisdictional theory which is discussed below.

2.1.1 Jurisdictional theory

The theory's emphasis on the sovereignty of nation states is its salient feature.[47] In effect, all the activities that occur in a territory or within the borders of a certain state are necessarily subject to the state's jurisdiction. The jurisdictional theory has its roots in the argument that the arbitrator's task is to judge as well as the award that they produce should be treated as a jurisdictional act. The arguments for the jurisdictional theory are cemented and buttressed by the argument that the entirety

[44]I Oboarenegbe, *"The legal regime of International Commercial Arbitration"*. A thesis in the Faculty of Law Submitted to the School of Postgraduate Studies, University of Jos.1997

[45]A Sklenyte, *"International Arbitration: the Doctrine of Separability and Competence-Competence Principle"*. The Aarhus School of Business.2003.p55-59

[46]K Falahati, Time, Arbitrage, and the Law of One Price: The Case for a Paradigm Shift. *Journal of Economic Issues*, *53*(1).2019.pp.115-154.

[47] A Barraclough and J Waincymer, Mandatory rules of law in international commercial arbitration. *Melbourne journal of international law*, *6*(2).2005.pp.205-244.

of the aspects of arbitration including setting up of the tribunal, the enforcement of the arbitral awards and the arbitral awards issued themselves fall within the regulatory bounds of the laws and regulations relating to the dispute and arbitration in general. In the current context, these would be deemed to be subject to the Mines and Minerals Act. [Chapter21:5] as well as the Arbitration Act [Chapter 7:15].[48]

Effectively, in the course of their determination of the merits of a certain case, arbitrators have to act in the same manner that judges do and will have the same recourse that judges have to the national statutes applicable to the disputes are under which the disputes fall including the context of the current study the aforementioned legal instruments and their provisions. This is what makes arbitration jurisdictional in nature. The theory has however not escaped the ire of critics as it has itself been criticised for equating arbitrators to judges.[49] Sklenytre argues that reference made to judges is untenable as holding such a position would entail that arbitrators would have powers conferred by the state which is not the case.[50] Rather an arbitrator derives his/her powers from the parties that appoint them as opposed to the state. The same can be said about an arbitral award which cannot be equated to a court judgement. The argument is however faulty as it conflates the "judging" aspects with the source of powers to judge which are distinct. The argument falls short and therefore does not debunk the argument that arbitrators act as judges when they arbitrate over certain disputes which is a jurisdictional act.

On the other hand, the jurisdictional theory has been criticised for exaggerating the arbitrators which is always limited by the agreement between parties to a dispute. More importantly, the parties can at any time revoke the same authority by consent. Arbitrators are thus not as free as judges but rather follow the agreed procedure albeit subject to the laws under which purview the area of dispute fall, in this case the Mines and Minerals Act [Chapter 21:5]. Non-adherence may see a party invoking Article V (1)(d) of the 1958 New York Convention.

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[48] Mines and Minerals Act. [Chapter21:5] as well as the Arbitration Act [Chapter 7:15].

[49] A Sklenyte, *"International Arbitration: the Doctrine of Separability and Competence Competence Principle"*. The Aarhus School of Business.2003.p55-59

[50] Sklenyte (n49 above)

The theory is important in explaining the importance of national legislation in the context of enforcement of arbitral awards. This is important as it in turn interacts with the effectiveness of the incumbent enforcement practices.

2.2 The concept of arbitration

Arbitration is an alternative model for dispute resolution. Historically, arbitration saw use between 2500 BC and 2300 BC amongst Egyptians as a mechanism applied in dispute resolution. Similarly, the mechanism was applied in the same manner in Ancient Greece around 800 BC.[51] Modern day arbitration quickly evolved between the 18th and 19th century today. Arbitration has served as an alternative to litigation in resolving disputes and the same has some important principles that make it a preferred mechanism over litigation. The financial and binding nature of arbitral awards is one of the main features that have seen arbitration being a preferred alternative in commercial disputes.[52]

Final arbitral awards conclusively determine the subject matter and they generally leave nothing undone to serve for the execution and carrying out of terms of a given award.[53] The finality of the arbitral awards means that none of the parties involved can appeal against the award. One can make no grounds for appealing an award or have an award reviewed judicially.[54] On the other hand, the binding aspect relates to the obligation of parties to a dispute to recognise and implement an arbitral award in good faith. However, an arbitral award ought to be held to be valid, enforceable, irrevocable and enforceable on equitable or legal grounds for contract revocation.[55] Questions have been posed as to whether it was right to take away from parties the right to appeal an arbitral award.[56] Such questions may be expected

[51]G B Born, The law governing international arbitration agreements: An international perspective. *SAcLJ*, *26*.2014.p.814.
[52]Article 34 Paragraph 2 of UNCITRAL Arbitration Rules provides that an arbitration award is final and binding.2013
[53] B Black, Making It Up As They Go Along: The Role of Law in Securities Arbitration. *Cardozo L. Rev,* 1999, p.991
[54] S Mentschikoff, Commercial arbitration. *Columbia Law Review*, *61*(5).1961.pp.846-869.
[55]M A Smith M Couste T Hield and R Jarvis, Arbitration of patent infringement and validity issues worldwide. *Harv. JL & Tech*.2005.p.299.
[56]E Sundari, The limitation of final and binding arbitral awards: How far in supporting the autonomy of arbitration?. Faculty of Law, University of Amta Jaya Yogyakarta, Indonesia.2019

as the finality of awards is a departure from the practice in litigation where there is a bit of leeway for appealing judgement albeit finitely.[57] However, the International Chamber of Commerce (ICC) expressly holds that every arbitral award shall always be binding on the involved parties. The submission of disputes to arbitration under the provisions of the applicable laws, parties undertake to implement any awards expeditiously and will be deemed to have impliedly waived their rights to any sort of recourse as far as the waiver may be made valid.[58]

The final and binding nature of arbitral awards has been applied in different contexts and has been cemented as an integral and defining feature of arbitration. For instance, in Singapore, arbitral tribunals are prohibited from amending, varying, correcting, adding to, revoking or setting aside arbitral awards.[59] In the same vein, courts are not given any jurisdiction to set aside, vary, confirm or remit arbitral awards. However, to say that the final and binding nature of awards has not been somewhat altered or limited in certain countries would be inaccurate as various countries have in a way limited this.[60]

The limiting of the finality and bindings aspects may have its basis in the variation of the harmonisation instruments and national legislation relied on. A more detailed analysis of the current state of affairs will be undertaken later in the study. This section provided a generic view of the concept of arbitration and its evolution over time.

2.2.1 The normative framework for arbitration

The normative foundation of arbitration emerged during the second half of the 20th century with the same being subject to various legal regimes at various levels including national level. At global level, the normative framework for commercial arbitration is based on the Geneva Protocol of 1923 as well as the Geneva Convention

[57]Decisions made by certain courts can be appealed through the admission of an appeal based on the merits of the appeal and potential to succeed.
[58]London Court of International Arbitration (LCIA), Rules, *ICC Arbitration Rules, Article 35.6. 2014 LCIA Arbitration Rule 26.* 2017
[59]Article 44 Pharagraph (2) of Singapore Arbitration Act 2001
[60]U P Emelonye and U Emelonye, Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria. Beijing Law Review, 11, 266-286. https://doi.org/10.4236/blr.2021.121016.2021

of 1937.[61] The case for a new instrument was based on the noted shortcomings of the Geneva Conventions and this culminated in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to simply as the New York Convention).[62]

Article I (1) of the New York Convention provides that the Convention shall be applied in cases of recognition and enforcement of arbitral awards which are made in the "territory" of a nation state which is outside the jurisdiction of the state in which parties seek to have an award recognised and enforced.[63] Another part of the provision provides for the application of the Convention to arbitral awards which are not considered domestic in a given state where one seeks to have the award recognised and enforced.[64] The Convention represents a milestone in the history of arbitration as a dispute resolution mechanism and the same provides for the universal enforceability of arbitral awards. The Convention laid the foundation for national courts as well as other tribunal to come up with efficient mechanisms for the enforcement of international arbitral awards and related agreements.[65]

The promulgation of the Convention as well as the related lower-level frameworks saw arbitral award recognition and enforcement being dealt with in parallel. The Convention came into force at a time when international arbitration was growing in prominence as a mechanism for resolving international commercial disputes. The conventions still stand and it is one of the most ratified conventions globally.[66] The New York Convention seeks to proffer legislative standards applicable in the recognition of arbitration agreements as well as court recognition and enforcement of non-domestic and foreign arbitral awards. The convention requires contracting states to ensure that arbitral awards are granted due recognition and enforcement

[61]The latter is a product of appeals by the ICC for the adoption of a new arbitration instrument to replace the 1927 one. Born, 2011

[62]E Gaillard, J Savage, J Fouchar and *G Goldman on International Commercial Arbitration, The Hague/Boston/London*.1995.

[63]E P Wheeless, Article V (1)(b) of the New York Convention.1993.p.25

[64]S Mentschikoff, Commercial arbitration. *Columbia Law Review*, *61*(5).1961.pp.846-869.

[65]A Baykitch and L Hui, Celebrating 50 Years of the New York Convention. *UNSWLJ*. 2008.364.

[66]J Paulsson, *The idea of arbitration*. OUP Oxford. 2013.

regardless of whether they are domestic or foreign. Such states are thus expected to implement arbitral awards whenever those are presented.

Complementing the New York Convention is the United Nations Commission on International Trade Law (UNCITRAL Model Law) which provides universal enforceability of arbitral awards so as to ensure that there is no discrimination against non-domestic and foreign arbitral awards.[67] Under the Model Law, member states are obliged to guarantee recognition and enforcement of foreign arbitral awards in the same way they guarantee enforcement of domestic arbitral awards. While other relevant international and regional conventions contributed to the global arbitral processes' consolidation, national legislations and courts have played an important role in expanding as well as consolidating arbitral awards thereby providing jurisprudence in which implementation of international arbitration is possible at domestic level.

The national legal systems can be understood to be the epicentre amongst all these differentiated levels of international and national normative governance of arbitration. This is so given that national legal systems serve to domesticate arbitral conventions while also determining the effect and extent of individual arbitral agreements and awards. Though international frameworks for arbitration are standalone frameworks, they are complementary and mutually reinforcing. This as international arbitration agreements can only be effective to the extent that is granted by the national frameworks in the local context.[68]

The normative framework of arbitration has clearly evolved with the concept itself with notable developments in the same being evident. The normative framework has been widely embraced and it remains the framework on which countries have relied in crafting national legislative provisions for arbitration and related processes. Zimbabwe adopted the 1985 UNCITRAL Model Law through Section 2 of the

[67]A Baykitch and L Hui, Celebrating 50 Years of the New York Convention. *UNSWLJ*. 2008.364.
[68]G B Born, The law governing international arbitration agreements: An international perspective. *SAcLJ*, *26*. 2014.814.

Arbitration Act albeit with some modifications.[69] The international instrument was incorporated as a Schedule to the act. As such all processes of arbitration in Zimbabwe should conform to the provisions of the Model Law which applies to both domestic and international arbitration. Zimbabwe however, modified the text of the Model Law with particular focus on the public policy exception to enforcement of awards. Through the Arbitration Act, the text is supplemented through Article 34(5). The main import in this regard is that the public policy defence is restrictively construed as demonstrated in Zesa v. Maposa (2) ZLR 452(S) (1999).[70]

The enforcement framework in the Zimbabwean context will be fully dealt with later in the study.

2.3 Principles of arbitration

In this section, the principles of arbitration are dealt with and these are espoused mostly in the normative framework that has been dealt with above.

2.3.1 Party autonomy

Party autonomy is one of the most basic principles of international arbitration and it should be applied to undertaking of arbitral proceedings. Redfern and Hunter describe party autonomy as the guiding principle in the determination of the procedure that is to be followed in an arbitration process.[71] The principle has been widely endorsed beyond national laws including by international organisations and institutions for arbitration. The Model Law legislative history indicates that the principle was adopted unopposed. Arbitration offers the parties involved great autonomy as well as control over the whole process which is to be utilised in resolving a dispute. This is an important point particularly in international

[69]The Arbitration Act [Chapter 7:15] was put in place to give effect to both international and domestic arbitration agreements as well as to apply the modified Model Law as well as repeal the Arbitration Act [Chapter 7:02].

[70]The court held that the public policy defence should be restrictively construed so as to preserve and recognise the basic aim of finality as applied in arbitration. Thus the defence should only apply where the fundamental law and morality principles are violated.

[71]Redfern and hunter Alan. Redfern & Martin. Hunter, Law and Practice of International Commercial Arbitration, pp. 186-187 (Sweet and Maxwell (London), 3rd edn. 1999). http//ssrn.com/abstract=1942525. 4 Electronic copy available at: https://ssrn.com/abstract=3895574

commercial arbitration as parties are unwilling to be subject to each other's court systems' jurisdiction. The home court advantage is feared and as such parties are not willing to subject to these court systems. Arbitration is a more neutral forum that provides each side with the comfort of believing that they will get a fair hearing. Further, arbitration offers parties the flexibility of tailoring the dispute resolution process to their needs as well as an opportunity to choose their own arbitrators whom they feel are knowledgeable with regards to the subject matter of the dispute at hand. This makes arbitration attractive as an alternative dispute resolution mechanism.

The whole scheme of the UNCITRAL model law makes provisions for a wide scope of party autonomy which reflect the significance of the principle of arbitration as defined by the model law. The freedom of parties to tailor arbitration processes and the applicable rules to their needs is the most important principle upon which the model law ought to be based. The model law expressly allows parties to do the following:

- Specify the kind the arbitrable subject matter;[72]
- Choose institutionalised rules and arbitration;[73]
- Agree on the conditions under which written communications are deemed to have been received;[74]
- Determine how many arbitrators will be involved in the arbitration process;[75]
- Determine how arbitrators are appointed;[76]
- Agree on a procedure arbitrators challenge;[77]
- Determine the procedure according to which arbitral proceedings are undertaken;[78]
- Determine the language that is to be used;[79]
- Agree on the manner as well as timeframes for the presentation of claims;

[72] UNCITRAL Model Law, Art. 1(3)(c).
[73] Art. 2(d) (n72 above)
[74] Art. 3(1) (n72 above)
[75] Art. 10(1) (n72 above)
[76] Art. 11(2) (n72 above)
[77] Art. 13(1)); 5 Id at 315
[78] Art. 21(n72 above)
[79] Art. 22(1) (n72 above)

- Agree to holding of oral hearings;[80]
- Agree on defaults and experts to be appointed by the tribunal;[81]
- Choose laws according to which proceedings will be held;[82]
- Authorise arbitrators to make decisions *ex aequo et bono* or as *amiable compositeur*.[83]

Before arbitration commences parties enjoy great freedom in the construction of their choice of dispute resolution system. The arbitrators who normally number between one and three are appointed the parties to dispute. Parties also decide on whether an international arbitral institution will administer arbitration or the same will be ad hoc (with no institution involved).[84] The choice of the law to govern proceedings is also enjoyed prior to the commencement of the process.

However, upon commencement of the arbitration process the freedom to determine proceedings may actually be circumscribed. By constituting an arbitral tribunal, a new set of contractual relationships regarding arbitrators comes into existence. The main limitation to the freedom to agree on an arbitration regime as well as prescribe a procedure for the same is that the agreed regime should be in accordance with the applicable law.[85] Similarly, the arbitration procedure should be compliant vis-à-vis the law of lex arbitri.

2.3.2 Separability and competence-competence

Not 'dying' with the main contract is another interesting thing about arbitration. The autonomy doctrine prescribes that the agreement to go to arbitration is at law a different agreement from the main contract concerned.[86] As such, an arbitration agreement may outlive the main contract itself. This also implies that the arbitration clause remains valid even after voidance of the main contract. This feature is known as the separability doctrine in the context of arbitration. However, the doctrine

[80] Art. 23(1) (n72 above)
[81] Art. 24(1) (n72 above)
[82] Art. 25) and experts appointed by the tribunal
[83] Art. 28(1) (n72 above)
[84] Art. 18, UNCITRAL Model Law on International Commercial Arbitration, 1985.
[85] The law here applies to the contract within which an arbitration agreement is appended.
[86] Fouchard, Gaillard, Goldman, International Commercial Arbitration 212 (Edited by Gaillard and Savage, 1999). 9 Id at 635

doesn't go alone but is complemented by the competence-competence principle and the principle means that an arbitrator can make a decision regarding their own competence. The two principles are meaningless alone and always find meaning when combined. Various international trade disputes are resolved through arbitration as opposed to litigation. The separability doctrine was long established from 1940.[87] An arbitration agreement should be capable of operationalising the separation as it is the foundation upon which arbitration is founded. Given that most arbitration claims are brought about in the wake of the expiration of a contract, it is only logical that the arbitration agreement outlives the contract.[88] The ICC has also recognised the doctrine of separability back in 1955. Article 6(4) holds that *"Arbitral tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be non-existent or null and void".*

In the same vein, Article 23.1 of the LCIA Rules makes provisions for the treatment of an arbitration clause put in place to form part of another agreement as an arbitration agreement that is independent of that other agreement. No direct reference is made to the separability principle in the 1958 New York Convention. The UNCITRAL Model however reproduces terms of Article 21(2) of the UNCITRAL Arbitration Rules providing that an arbitration clause which is part of a contract will be treated as an independent agreement from the other provisions of the contract. Thus, should a tribunal declare a contract void, it does not mean ipso jure that the arbitration clause is invalid.

The aforementioned principles are important in the context of arbitration as they provide important guidance regarding the rights of parties as well as their actual role. Limitations to these rights and roles have also been clearly explained in the above section.

[87] The doctrine of separability in England was first established in Heyman v. Darwins Ltd. [1942] App Cas 356.
[88] E Gaillard & J Savage, Fouchard Gailard, Goldman on International Commercial Arbitration, 197 (Kluwer Law International, The Hague.1999.p.34

2.4 Overview of the mining sector in Zimbabwe

The mining sector in Zimbabwe has been around for years and it predates the country's independence. Mining in Zimbabwe goes as far back as the 1800s and the same has evolved to this day where the country mines various minerals. In 1989, the total value of mineral production in the country was ZW$1 195 (US$570) and this excluded pig iron, ferro chrome, steel, ceramics, cement and coke.[89] The principal minerals produced in 1989 were copper, iron, tin, gold, chromite, asbestos, coal, nickel phosphate rock, gold and limestone. Mineral exports at this point represented 43.5% of the total exports and equalled those from the agriculture sector. Gold, ferro-chrome and asbestos were the principal foreign currency earners. Improved mineral prices over time have seen an increase in mining investment in Zimbabwe.[90] Most of the mineral production in Zimbabwe is for export and this makes the output and growth of the mining sector vulnerable to the fluctuations in mineral prices on the global market. This makes mineral prices an exogenous variable in determining the predominance of the sector in the Zimbabwean economy.

Besides serving to provide basic inputs on which the manufacturing sector depends for its supply to the economy as a whole including the mining sector, a substantial portion of the manufacturing sector's ferro-alloys and steel products are supplied by the mining sector.[91] The mining sector therefore offers important backward and forward linkages across the Zimbabwean economy and as such its significance cannot be overemphasised. The sector plays an important role in employment creation for both skilled and unskilled labour.[92] In the same vein it provides important inputs to other sectors including phosphates which are important in other manufacturing processes including in fertiliser manufacturing. To date mineral exports in Zimbabwe account for almost 60% of the country's Gross Domestic Product (GDP).[93] However,

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[89]W Malinga, 'From an Agro-Based to a Mineral Resource Dependent Economy': A Critical Review of the Contribution of Mineral Resources to the Economic Development of Zimbabwe, Forum for Development Studies, 45:1, 71-95, DOI: 10.1080/08039410.2017.1378711. 2018. 12

[90]T Murombo, 'Regulating mining in South Africa and Zimbabwe: communities, the environment and Perpetual exploitation', 9/1 law, environment and development Journal. 2013. 31 available at http://www.lead-journal.org/content/13031.pdf

[91]Murombo (n 90 above)

[92]J F Bertincourt, Zimbabwe - State of the Mining Industry. November 2018. 2

[93]Zimbabwe Chamber of Mines: https://www.chamberofminesofzimbabwe.com/index.php/en/production-statistics

Artisanal and small-scale miners dominate the contributions to the total gold output nationally with 63% of the total gold being from ASMs. The dominance of ASMs has been attributed to various reasons including the characteristics of the bodies from which ore is extracted which are small and in most cases not conducive for industrial extraction of ore and the nature of the operating environment in Zimbabwe which is plagued by political interference.[94] The dominance of the informal sector in Zimbabwe has also seen people from all walks of life engaging in ASMs activities with 1.5 million people being said to be in the mining value chain.

While the ASMs sector dominates the mining industry in Zimbabwe, Industrial mining has also flourished with major mining companies like Zimplats, Falcon Gold, Rio Zim and Kuvimba mining House having a strong holding on the extractive sector locally. There has been a resurgence in investment in the local mining sector driven mostly by rising gold, diamond and platinum group metal prices on the global market. While the Zimbabwean government has no carry free rights under local laws, the government participates in mining through ZMDC. Seldom does the government go it alone, choosing instead to sign agreements with different foreign investors. This is a common practice amongst African countries as joint-ventures are a common feature in mining on the continent. Foreign investors bring in funding while the government brings mining rights. However, this practice breeds various disputes which often are centred on the shifting balance of partner contributions and revenue as projects enter the production phase. Such disputes have become common in African countries including Zimbabwe.[95] These often cripple projects leaving none of the partners in a better position. More importantly, potential revenue is lost on the part of the state which is detrimental to economic growth and development. As indicated earlier in the paper, disputes are common in contractual relations and how these are dealt with matters more. The current study considers the effectiveness of arbitral award enforcement in the local context. It was thus important to set the stage for this by providing an overview of the local mining sector and how it has evolved over time.

[94] https://www.mining-technology.com/features/mining-in-zimbabwe-time-to-use-it-or-lose-it/

[95]Global Arbitration Review: The Guide to Mining Arbitrations. 2021. 4

2.5 Conclusion

The chapter addressed the theoretical framework as well as the concept of arbitration. The chapter provided a detailed analysis of the theoretical framework that underpinned the study. The theoretical framework was explained with reference to the current study and its relevance to the same. The concept of arbitration was also addressed fully and contextualised to the current study and its needs. The study is underpinned by the contractual and jurisdictional theories. The two theories have been applied in order to ensure that all the important aspects of arbitration and being analysed in the study are covered. The two theories are evidently complementary in this regard with the jurisdictional theory providing the necessary balance through explaining the role of the state jurisdiction. The concept of arbitration is an old one and has seen use over time. The concept has evolved over time thereby finding use in commercial disputes. Use in this area has resulted in arbitration becoming more systematic. The normative framework for arbitration has as a result evolved over time and the same has effectively guided states in promulgating nation legislation for arbitration and the enforcement of arbitral awards which is at the centre of the current study. The current study considers enforcement and its effectiveness in the mining sector. The sector is of strategic importance to Zimbabwe in its pursuit of economic growth and development. The sector has become the backbone of the economy and it is expected to grow more in the next few years. However, the ownership structure in industrial mining is susceptible to disputes usually due to the involvement of the government as a joint venture partner and custodian of mining rights. As arbitration has been applied as a dispute resolution mechanism, the enforcement of arbitral awards is important and its effectiveness is examined in the study.

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE ENFORCEMENT OF ARBITRAL AWARDS IN THE MINING SECTOR IN ZIMBABWE

3.0 Introduction

The previous chapter addressed the concept and theory of arbitration. The current chapter analyses the legal and institutional framework for the enforcement of arbitral awards in Zimbabwe.

3.1 Enforcement of arbitral awards

Results are the hallmark of a process that is effective.[96] Thus the enforceability of arbitral awards in a given jurisdiction is an important aspect of arbitration in the same context. Thus, the enforcement of arbitral awards under consideration in the current study as applied in the mining sector is an important indicator in that regard. Zimbabwe has put in place mechanisms that are meant to enable parties to successfully register and enforce foreign arbitral awards within the Zimbabwe jurisdiction.[97] Since 29 September 1994, Zimbabwe has been a contracting party to the New York Convention. Just like any other contracting states, courts in Zimbabwe are required to enforce private arbitral agreements including awards granted or made in other states that are contracting states to the Convention.[98] This includes enforcement of arbitral awards in the mining sector under study in the current context. The Arbitration Act [Chapter 7:15] was enacted upon ratification of the New York Convention. Suffice to say the national legislation on arbitration does mirror the UNCITRAL Model Law.[99]

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[96] P Maitireyi P and R, Labour arbitration effectiveness in Zimbabwe: fact or fiction? African Journal on Conflict Resolution. 2011.135-58.

[97] M Mahapa and C Watadza, The dark side of arbitration and Conciliation in Zimbabwe. Journal of Human Resources Management and Labour Studies, 3(2).65-76.

[98] N F Chanaka, An Evaluation of the effectiveness of the Labour Arbitration System in Zimbabwe.2017.40-45

[99] UNCITRAL Model Law, Art. 1(3)(c).

3.1.1 Enforcement under the New York Convention

Parties to a contract expect that their disputes will be dealt with and resolved and that their contracts will be honoured and enforced by the court of law. Upon rendering of an award, the awarding tribunal cannot enforce the award and enforcement of the same is sought through separate procedures particularly in a jurisdiction where a sizable quantity of the debtor's assets in relation to the quantum of the award is domiciled.[100] As opposed to judgement passed in national courts, arbitral awards are held not to be self-executing.[101] Article III of the New York Convention regulates enforcement of arbitral awards and the Convention transfers the recognition and enforcement of these to the respective legislations at national level.[102] Under Article III, it is provided that each contracting party "shall recognise arbitral awards as binding and enforce them in accordance with the rules and procedures of the territory where the award is relied upon, under the conditions laid down in the following articles.[103] However, the enforcement under the New York Convention is conditioned with the party seeking enforcement being expected to fulfil certain conditions laid out in Article IV of the convention.

The Article stipulates that the party applying for enforcement ought to produce the original award or instead of it, a duly certified copy of the award. Thus, in their quest for enforcement, the party concerned is to *prima facie* produce evidence that entitles them to the enforcement. Adekoya notes that should these conditions be satisfied; the onus is on the other party to prove why enforcement shouldn't be granted on these grounds.[104]

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[100] J Reid-Rowland, Arbitration in Zimbabwe: the UNCITRAL Model Law in Practice in a Developing Country. Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.73 (2). 2007

[101] TV Mudoni, An analysis on the effectiveness of conciliation and arbitration as labour dispute resolution mechanisms Zimbabwe.2017.100-10.

[102] Art. 03, UNCITRAL Model Law on International Commercial Arbitration, 1985.

[103] Art. 03, UNCITRAL Model Law on International Commercial Arbitration, 1985.

[104] F Adekoya, The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun. *BCDR International Arbitration Review*, 2.2015.203-222.

Besides the New York Convention, the UNCITRAL Model Law on International Commercial Arbitration (1958) is another relevant international instrument that guides the enforcement of arbitral awards.[105] The Convention was adopted as a uniform or model law for revising the New York Convention as well as harmonisation of arbitral award enforcement. Its adoption represents an attempt to address the different obstacles to both recognition and enforcement of arbitral awards and the UNCITRAL actually made arbitration progress much simpler as its rules have been widely embraced across many jurisdictions.[106] The UNCITRAL bears uniform rules that serve to eliminate national peculiarities that present challenges with regards to consistency in certain legal areas. The year 2006 saw the UNCITRAL being revised to add certain features while also enhancing the legislative framework of the instrument.[107] Article 35 and 36 of the Model Law make provisions for the recognition and enforcement of arbitral awards regardless of the country within which the award was made.[108] However, it is important to note that the Model Law also provides ground for refusal to recognise and enforce arbitral awards.[109]

The non-self-executing nature of arbitral awards is predicated on the arbitration as a dispute resolution mechanism is transnational in nature and as such the scope of arbitral tribunals in international arbitration isn't a local court in a certain country whose jurisdiction is limited to that particular country. On the contrary, Article III of the New York Convention shows arbitral award enforcement to nationals in its orientation and this makes it subject to the applicable procedures and rules for enforcement as well as other applicable grounds like public policy.[110] In the absence of any objections to enforcement, a national court is enjoined to issue a court order

[105] See Report on UNCITRAL-Insol Judicial Colloquium on Cross-Border Insolvency, U.N. GAOR, 28th Sess., U.N. Doc. AICN.9/413 (1995)

[106] A J Berends, The UNCITRAL Model Law on cross-border insolvency: a comprehensive overview. *Tul. J. Int'l & Comp. L.*, *6*.1998.309.

[107] C Manjiao, Is It Time For Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law. Asian International Arbitration Journal 5(2).2009.100-150.

[108] Model Law, art. 35 and 36.

[109] UP Emelonye and U Emelonye, Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria. Beijing L. Rev.2021.50-65.

[110] AA Altawyan, Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization. In 4th Academic International Conference on Interdisciplinary Legal Studies.2016.101-105.

or decree allowing enforcement in favour of the party that's seeing enforcement subject to satisfaction of set conditions.[111] Despite an arbitral award being enforceable under Article V (2) (b) of the New York Convention, there exists express exceptions that render arbitral awards unenforceable even by a national court by own notion.[112] The onus is on the party that is resisting enforcement to prove why an award ought not to be enforced as provided for in Article V.

Chapter VIII of the Arbitration Act [Chapter 7:15] (hereinafter the ZAA) is a replica of the Article 35 and 36 of the Model Law and provides for both recognition and enforcement of foreign arbitral awards. The High Court in Zimbabwe will under Article 35(1) recognise and enforce an arbitral award provided that the grounds for refusal contained in Article 36 are not engaged. The provision is an important one and demonstrates the possibility of enforcement of awards made in any country.

3.2 Procedure for enforcement

The general approach in the Zimbabwean context is to give effect to an arbitral award for enforcement purposes.[113] The ZAA effectively does away with the double *exequatur* requirement by operation of Article 35 (2). Based on the same a party that's seeking enforcement needs to submit an application accompanied by the original or authenticated copy of the arbitration agreement or the award.[114] Where the award is in a foreign language, a translation of the award if also required with the application. The party that seeks enforcement makes an application to the courts upon notifying the other party. The 1971 High Court Rules and the SI 2021 202 High Court Rules, 2021 provide the necessary guidance for the application process.[115] An affidavit should accompany the notice to the other party and the affidavit provides an explanation of the cause of action. The respondents should be given 10

[111] EN Torgbor, *A comparative study of law and practice of arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya* (Doctoral dissertation, Stellenbosch: Stellenbosch University).2013.10-12.

[112] KT Roy, New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, The. Fordham Int'l LJ.1994.200-205

[113] See: Ndlovu v. Higher Learning Centre HB 86- 2010

[114] See: Mandikonza & Another v Cutnal Trading (Pvt) Ltd & Others HH 19-2004

[115] High Court Rules 1971

days to respond in case they want to oppose the enforcement[116] and this is also afforded to any other parties with interest in the matter.[117] Failure to respond or oppose will see the Court enrol the matter on unopposed motion roll. Should the matter be opposed, interested parties should file notice of opposition and this should be accompanied by an affidavit that sets out ground upon which opposition is made.

Opposing papers should be lodged within ten days of service of the application.[118] The applicant may decide to file answering affidavits and heads of argument and the matter is set down after answering affidavits from both sides are filed. The court will hear the matter and pass judgement. In hearing such matters, courts are not concerned with the merits of the matter.[119] It is important to state that the party seeking to enforce an award has a year from the day of the court judgement to enforce the award in Zimbabwe. Upon expiration of the 1-year period, enforcement in Zimbabwe will not be possible.

3.2.1 Grounds for refusal to recognise and enforce arbitral awards

These are laid out in Article 36(1) (a)(i) of the ZAA which very much mimics Article V(1)(a) of the New York Convention. ZAA gives local national courts the discretion to refuse the recognition or enforcement of foreign arbitral awards.[120] One of the circumstances is where an agreement is invalid. An agreement is invalid where parties to the matter failed to conclude an agreement under laws applicable to the parties. Similarly, an arbitration agreement will be adjudged to be invalid if it is valid under the law to which parties subjected it or where not indicated, it is invalid under the law under which a tribunal made the award.[121] Further, improper notification of arbitral proceedings constitutes grounds for refusal. Article

[116] L Madhuku, The alternative labour dispute resolution system in Zimbabwe: Some comparative perspectives. U. Botswana LJ.2012.101-112.

[117] The courts in Zimbabwe have defined 'interested party' as a party who has a direct and substantial interest in the subject matter and outcome of the application.

[118] This is in line with the requirements of the High Court.

[119] See: Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H)

[120] Article 36(1) of the ZAA provides the discretion to refuse the recognition or enforcement of foreign arbitral awards

[121] C Watadza, The effectiveness of conciliation and arbitration as an alternate dispute resolution mechanism in the ferro–alloy industry: a case of Zimasco and Zimbabwe Alloys International.2015.10-15.

36(1)(a)(ii) of the ZAA provides that national courts may refuse recognition or enforcement where the party against whom enforcement is sought was not notified properly of the arbitrators' appointment or the proceeding or was not able to present their case in the arbitration proceedings.[122]

Courts may also refuse recognition and enforcement if issues resolved are not contemplated by the arbitration agreement. Article 36(1)(a)(iii) of the ZAA holds that the Court may reject an application for enforcement if the award concerned deal with a matter that is neither accommodated nor contemplated by the arbitration agreement. Similarly, where the decisions in an award fall outside the scope of the arbitration agreement, refusal by the Court may result. However, it should be noted that the Act provides for partial enforcement whereby matters that are accommodated and contemplated by an agreement are enforced. In the same vein, should there be any irregularities in the arbitral tribunal or the procedure, the Court may refuse enforcement and recognition. More specifically by operation of Article 36(1)(a)(iv), where the composition of an arbitral tribunal or the actual arbitral procedure were not in accordance with the arbitration agreement or the law of the country of the seat of arbitration recognition and enforcement can be refused. Moreover, the ZAA provides that annulled, non-binding or suspended awards cannot be enforced in Zimbabwe.[123] This incorporates wards that have been set aside, suspended by a competent authority in a jurisdiction or where an award is not yet binding on parties. The same refusal can be expected where a matter is deemed non arbitrable under the law of Zimbabwe. More importantly and lastly, awards in violation of public policy are not enforceable. This is an important aspect and as such it is discussed in detail below.

3.2.2 Public Policy Exception to the implementation of arbitral awards

For a clearer understanding this ought to be tackled from the international instruments. While various conventions including the New York Convention govern the recognition and enforcement and have been put in place to ensure the

[122] Provision of Article 36(1)(a)(ii) of ZAA

[123] Article 36(1)(a)(v) of the ZAA provides that the court may refuse recognition or enforcement if the award.

international respect needed for national courts to enforce international arbitral awards is available, reality is that there are exceptions under which enforcement of arbitral awards may be legally refused by national courts and this is applicable also to international arbitral agreements.[124] One of the most outstanding exceptions is the Public Policy Exemption.[125] The public policy exception to the enforcement of arbitral awards is dependent heavily on the motions of the courts regarding what qualifies as "public policy".[126] Pursuant to this, the New York Convention contains a public policy exception which allows courts to refuse enforcement of a foreign arbitral award where the award is deemed to be in violation of the public policy of the country in which enforcement is being sought.[127] This has been a contentious exception to the recognition and enforcement of arbitral awards. This is owing to two main issues. The first one relates to the exception leaving the decision as to whether an award violates public policy in a certain country where enforcement of the award is sought in the hands of national courts.[128]

National courts are held to be competent to decide whether an award is in violation of "public policy" which is grounds for refusing enforcement. The second one relates to the lack of codification of any particular group of matter which should be held as applicable public policy.[129] The public policy exception is arguably the most controversial one given that it is vulnerable to abuse by national courts who may take advantage of the lack of a precise definition of the public policy ground as well as variations in what constitutes public policy across countries. [130] Sheppard indicates that public policy has been widely described as being open-textured,

[124] R A Barry, Application of the public policy exception to the enforcement of foreign arbitral awards under the New York Convention: a modest proposal. *Temp. LQ, 51*.1978.832.

[125] T L Harris, The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes. Journal of international arbitration 24(1).2007.101-105.

[126] A G Maurer, *Public Policy Exception Under The New York Convention: History, Interpretation, and Application-Revised Edition*. Juris Publishing, Inc.2013.10-12

[127] Article V (2)(b) of the New York Convention

[128] AS Akoto, Public policy: an amorphous concept in the enforcement of arbitral awards. Journal of Liberty and International Affairs 7(1).2021.51-69.

[129] F A San, The Public Policy Defence to Enforcement of Arbitral Awards: Rising Star or Setting Sun? *BCDR International Arbitration Review*, *2*(2).2015.105-110.

[130] A C Hodges, Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. Ohio St. J. Disp. Resol.2000.120-130.

flexible and multi-faceted and that it is characterised by various guises and vast variety in vocabulary as well as ambiguities.[131]

A thorough description of public policy has been conspicuously missing owing to the reasonable hesitancy of national courts and legislatures in describing public policy. Both the party contesting enforcement of arbitral awards and the national courts in the host country can raise an estoppel against such enforcement based on the public policy defence.[132] Elements of the public policy exemption are also contained in the UNCITRAL Model Law and these are to the effect that international arbitral awards are only valid subject to certain grounds for annulment applicable to international arbitral awards and such grounds mimic those of the public policy exception in the New York Convention.[133] Article 34 provides that "public policy" is ground for an award to be set aside by a court at "the seat of arbitration" it is important to note that despite the public policy exception being contained in both the New York Convention and the UNCITRAL Model law, none of the two policy instruments attempt to harmonise the term definition of public policy as well as the related application.[134] In the context of the two instruments, public policy does extend to the principles that are fundamental to law and justice in both procedural and substantive respects. Elgueta notes that the two conventions are based on broad interpretation of public policy exemptions that have the capability to undermine both their effectiveness and strength.[135]

Expectedly, various academic debates have emanated from the public policy provisions that are contained in the two instruments and this kind of disagreements and debates have been the most striking of all the other provisions of the instruments. In explaining this, Strong notes that it may be due to the fact that the

[131] A Sheppard, Interim ILA report on public policy as a bar to enforcement of international arbitral awards. Arbitration International.2003.217-48.

[132] S R Cole, Fairness in Securities Arbitration: A Constitutional Mandate. Pace L. Rev.1986.100-120.

[133] G B Born, The law governing international arbitration agreements: An international perspective. *SAcLJ*, *26*.2014.814

[134] Article 34 of the New York Convention

[135] GR Elgueta, Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators. *Harv. Negot. L. Rev.*, *16*.2011.165.

application of the public policy exemption is based on the determination and interpretation of national courts within the country of enforcement.[136] In the same vein lack of codification with regards to the precise group of matter that can be deemed to be applicable public policy in the context of foreign arbitral awards under both the Convention and the Model Law.[137] Public policy as referred to in Article V 2(b) of the New York Convention is that of the country in which enforcement is sought and that of the country in which the award was made has no relevance. Despite this clarity some legal scholars have sought to argue that public policy relates to international public policy.[138] However, if the public policy in this regard was international, then there wouldn't be any need for national courts to weigh in on whether awards are in violation of public policy in the country of enforcement. Other conventions also make reference to public policy including the Geneva Convention of 1927 stated that an award would be enforceable save for cases where the same is in violation of public policy in Article 1(e). In the same vein, the Panama Convention of 1975 makes reference to "public policy exception of that State".

As noted earlier, Zimbabwe has in place the modified UNCITRAL Model Law on public policy exception to arbitral awards enforcement. However, this particular modification of the Model Law has been construed to have placed emphasis on the limited nature of the public policy exception.[139] In supplementing the wording of the Model Law, Arbitration Act (Chapter 7:15) Article 34(5), for the avoidance of doubt states that an award is deemed to be in violation of the Zimbabwean public policy if;

a) The making of the award was induced or effected by fraud or corruption; or
b) A breach of the rules of natural justice occurred in connection with the making of the award.

[136] S I Strong,. Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration. *J. Disp. Resol.2012.1-10.*

[137] R A Barry, Application of the public policy exception to the enforcement of foreign arbitral awards under the New York Convention: a modest proposal. Temp. LQ.1978.30-40.

[138] L Racine, L'Arbitrage Commercial International et l'Order Public.1999.441

[139] J Reid-Rowland. Arbitration in Zimbabwe: The UNCITRAL Model Law in Practice in a Developing Country. Arbitration: The International Journal of Arbitration, Mediation and Dispute Management.73(2). 2007

In *Zesa v. Maposa*, the Supreme Court of Zimbabwe relied on the additional wording in construing the public policy exception in a restrictive manner albeit in line with the New Convention's pro-enforcement orientation.[140] The court held that an award could be refused on the basis of public policy only if it had its basis on an error so fundamental that it constituted inequity which is so far-reaching in effect and outrageous in its defiance of logic or acceptable moral standards that any sensible and fair-minded individual would deem the same intolerably hurtful on the conception of justice in Zimbabwe.[141] He very much sums the stance of the Zimbabwean courts with regard to the public policy exception. Describing the stance as pro-enforcement in orientation is a fair assessment of the same.

3.3 Comparison with the application of the public policy exception in UK and Kenya

The UK on the other hand, a contracting party to the New York Convention though subject to the reciprocity reservation and governed by the Arbitration Act of 1996 that covers both domestic and international arbitration. The UK is pro-enforcement and pursuant to the New York Convention, the country's Arbitration Act Section 103(3) deals with the public policy and its role as one of the grounds for refusal of enforcement and recognition of foreign arbitral awards.[142] There has been a general reluctance by the UK courts to refuse enforcement on the basis of public policy.[143] Courts in the UK are under obligation to enforce awards that are made in contracting parties to the New York Convention. In Soinco & Anor v. Novokuznetsk Aluminium Plant & Ors., it was held that enforcement was not permissible as it would offend the laws of the place in which the respondent company was incorporated.[144] Similarly, in the case of Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd, it was held that a contract that involves bribes would be contrary to the English domestic public policy where it is in contravention of the domestic public policy of the country of performance.[145]

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[140] See Zesa vs Maposa 1999 (2) ZLR 452 (S).
[141] N 140 above
[142] UK Arbitration Act Section 103(3)
[143] N140 above
[144] Soinco SACI & Anor. v. Novokuznetsk Aluminium Plant & Ors.Court of Appeal, England and Wales (Dec. 16, 1997) [1998] CLC 730.
[145] Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. [1999] 3 ALL ER.

Enforcement was also refused in the case of Soleimany v. Soleimany with the English Court of Appeals holding that private agreement between parties is insufficient in overriding the public policy exception.[146] Public policy would thus not allow for an illegal contract to be enforced even where an arbitral agreement subsisted. The supreme role of the public policy of the *lex fori* was cited in passing judgement.[147] While the stance here is pro-enforcement, the interpretation of public policy is clearly wider and more flexible than that in Zimbabwe. The Zimbabwean approach is much more restrictive in this regard. Lastly, Kenya is a member of the Commonwealth of Nation and has a Common Law legal system in place.[148] The country has domesticated both the UNCITRAL Model Law and the New York Convention. In his definition of "public policy", then Justice Ringera, J, stated that an arbitral award could be set aside in accordance with Section 35 (2) (b) (ii) of the Kenyan Arbitration Act on the basis of violating public policy where it is proven that the award is inconsistent with the Constitution as well as other written and unwritten laws of the Republic of Kenya.[149]

Further where an award was adjudged to be inimical to national interest and contrary to justice and morality, the same could be set aside. In Kenya Shell Limited v. Kobil Petroleum Limited, it was held that as a matter of public policy, it was in the public interest that there be an end to litigation and that the Arbitration Act under which proceedings were conducted in the matter.[150] Here public interest was relied on as ground for ending the proceedings thereby dismissing a petition. The Kenyan stance can be held to be anti-enforcement in orientation. The grounds for refusal are wider than observed in the Zimbabwean and UK contexts. This may actually mean that a party will have more difficulty enforcing an award in Kenya than in Zimbabwe.[151]

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[146] Soleimany v. Soleimany [1998] APP.L.R. 02/19.

[147] F Adekoya, The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun? BCDR International Arbitration Review.2015.203-222.

[148] Within the African continent, Kenya is a member of the Commonwealth of Nation and it has domesticated the UNCITRAL Model Law.

[149] See Section 35 (2) (b) (ii) of the Kenya Arbitration Act

[150] Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR.

[151] G Born, International Arbitration: Cases and Materials. Hague: Kluwer Law International.2011.27

3.4 Conclusions

Enforcement of arbitral awards is an important aspect as it is the defining feature of arbitration. Further it is also the metric against which the effectiveness of arbitration can be effectively assessed. Thus, the enforceability of arbitral awards in a given jurisdiction is an important aspect of arbitration in the same context. In the context of the current study, the enforcement of arbitral awards under consideration in the current study as applied in the mining sector is an important indicator. The High Court in Zimbabwe under Article 35(1) recognises arbitral award on condition that the grounds for refusal contained in Article 36 are not engaged. The enforcement procedure requires an application for recognition and enforcement to be made to the courts which will then afford the losing party an opportunity to respond if need be. The provision is an important one and demonstrates the possibility of enforcement of awards made in any country. Certain documentation is required with the application including the arbitral award and the arbitration agreement. There are also grounds for opposing recognition and enforcement that are available to the losing party. The grounds for refusal include where an invalid arbitration agreement (including those concluded outside the laws that govern the parties), improper procedure, improper notification of the losing party and failure to give a party an opportunity to make their case before a tribunal may constitute grounds for refusal. Other issues that may constitute grounds for courts to refuse enforcement include lack of arbitrability, status of an award in relation to whether it is already binding on parties as well as public policy violation amounts others. Zimbabwe also has in place limited grounds for the public policy exception. This is based on the modification to the wording of the Model Law. Zimbabwe however has a pro-enforcement approach to the public policy exception as it limits the scope and ground for refusal based on the exception. This is evident if one considers the state of affairs in other countries. The next chapter critically analysis potential detractors to arbitration and best practices in the enforcement of arbitral awards.

CHAPTER FOUR: GOOD PRACTICES AND CASE STUDIES IN ENFORCEMENT OF ARBITRAL AWARDS IN THE MINING SECTOR

4.0 Introduction

The previous chapter considered the enforcement of arbitral awards in Zimbabwe. The current chapter analyses critically the current issues in arbitral award enforcement and best practices in the enforcement to arbitral awards. The issues in arbitration are generically analysed with a view to identify potential detractors to effective arbitration. On the other hand, good practices offer insights on potential ways of enhancing the arbitration processes locally. It also magnifies issues relating to effectiveness of enforcement locally.

4.1 Possible challenges in adhering to the international instruments on the enforcement of arbitral awards: The Model law

As noted earlier in the study, Zimbabwe is a contracting state to the UNCITRAL Model Law which has been adopted to guide enforcement of arbitral awards in Zimbabwe.[152] Despite the adoption of a standard international instrument, challenges may still be faced in adhering to such instruments.[153] It is important in the current study that potential challenges in adhering to the Model Law are analysed. Arbitration is held to be a consensual mechanism in the context of dispute settlement. The same is part of the alternative dispute resolution (ADR).[154] However, as noted, ADR isn't without its own issues. It has been widely argued amongst scholars that contradictions in the informal justice systems mostly in developing countries are one of the main sources of the aforementioned issues. notably, on one mechanisms like arbitration are widely presented and touted as being viable alternatives to litigation, simple models and ones that are capable of reducing the interference of the state thereby allowing for a fairer and fairer dispute resolution process.[155] In reality however, the processes involved in including in ADR in general may be highly ambiguous and thus open even more avenues for the dreaded state

[152] N3 above
[153] N3 above
[154] A Redfern & M Hunter, Law and Practice of International Commercial Arbitration, 3rd ed. (Sweet & Maxwell, London). 1990. 642
[155] Ibid 647

interference and control which further fosters capitalism.[156] Resultantly, arbitration may actually end up favouring parties with more bargaining power, disregard for interests of third parties, subversive of public interest and oppression.[157]

Moreover, arbitration is getting closer to the process of mainstream litigation which is characterised by zero-sum outcomes. Certain scholars have indicated that the international commercial arbitration system bears a configuration that makes it consistently favourable to the developed world's economic interests.[158] Similarly, Lynch argues that the only advantage that arbitration offers to parties that choose it over litigation is that it serves as a legitimate mechanism that effectively disempowers national legislation by way of delimiting the powers and role of national courts in the process of arbitration.[159] Similar views have been identified in literature as a party contributing to slow ratification of the UNCITRAL Model Law particularly on the African continent.[160] Many regions in Africa have applied the Model Law with modifications while others have modified national legislation in line with the UNCITRAL Model Law rules despite the widespread scepticism across the continent regarding the adoption of the model texts.[161] Resultantly, the adoption of the model texts like the UNCITRAL has not been uniform across the African continent and the respective regions.[162] The mistrust observed in this regard has been partly attributed to the idea that the model rules of arbitration may be an imposition of the foreign standards of arbitration on states that are unwilling and ready to adopt

[156] Organisation for the Harmonisation of Business Law in Africa Treaty (OHADA). 1993. Reviewed. 2008.
[157] K Lynch, The Force of Economic Globalization: Challenges to the Regime of International Commercial Arbitration, Kluwer Law International. 2003. 264-264.
[158] K Sarkodie, "International Arbitration in Sub-Saharan African Context", Mayer Brown (July 31, 2014), available at: https://www.mayerbrown.com/files/News/469b450b-52cd-470d-bad6-425cb4203bbf/Presentation/NewsAttachment/799d0574-6bba-43c1-9b22-445a67b5be38/art_sarkodie_jul3114_Intarb-Sub-Saharan-African-context.pdf. Accessed on …..
[159] AA Asouzu, International Commercial Arbitration and African State: Practice, Participation and Institution Development, (CUP, 2001), 14.
[160] RR Babu, "International Commercial Arbitration and the Development Countries", AALCO Quarterly Bulletin Vol 2(4) (2006) 385-396.
[161] N159 above. 13
[162] NJ Arentsen & MS Weber, "UNCITRAL Model Law: Still a Model or Second Best:" Kluwer Arbitration Blog (1 July, 2014) available at available at: <http://kluwerarbitrationblog.com/2014/07/01/uncitral-model-law-still-a-model-or-second-best/>.

these in the name of harmonisation.[163] Sempasa argues that regarding the harmonisation of the rules applicable to international arbitration, any approach in this regard ought to take into consideration the particular prescription in different states which may be at variance or in conflict with those in place in the Western countries.[164]

These may have their basis in varying political dynamic and cultural characteristics between Africa and other continents particularly the West.[165] Another potential hurdle to effective harmonisation of the arbitration rules including the International Commercial Arbitration (ICA) is the position of the African governments with regard to the involvement of the state with a view to ensure national development.[166] This runs contrary to the Western doctrine of maximum autonomy of parties to contractual relations.[167] Most African countries do pace emphasis on certain aspects in transnational contracts which have implications for their national development.[168] Coupled with this is the wide and strong contrast between the West's strong preference for formalised procedures in arbitration and Africa's strong tendency for information sort of conciliation and negotiations methods of dispute settlement.[169]

This is an important matter particularly in the context of the mining sector under study here. Mining is an important industry in the context of economic development in Africa. Suffice to say the stakes in mining are high and it is no coincidence that various disputes have arisen in the industry. Interestingly these have largely pitied states and foreign investors with some emanating from actions that saw states cancel concessions awarded to such investors and passing them on to other investors. Such

[163] The framing of most of the model rules (including UNCITRAL based rules) have been largely exclusive to developing countries, moreso those from Africa.
[164] SS Sempasa, "Obstacles to International Commercial Arbitration in African Countries", The International Comparative Law Quarterly, Vol, 41(2) (1992). 392.
[165] Sempasa (n165 above)
[166] N162 above
[167] AA Shalakany, "Arbitration and the Third World: A plea for Reassuring Bias under the Spectre of Neoliberalism", Harvard International Law Journal, Vol. 21(2)(2000). 424
[168] Shalakany (n 168 above)
[169] N164 above. 19 K.B. Asante, "The Perspectives of African Countries on International Commercial Arbitration", *Leiden Journal of Internal Law*, Vol. 6 (1993), p. 331, and Amazu A. Asouzu, International Commercial Arbitration and African State: Practice, Participation and Institutional Development, (CUP, 2001).

undertakings by states are arbitrary in nature and the subsequent arbitration proceedings and the outcomes are likely to equally be compromised. Certain cases provide perspective on this matter and some of these have been alluded to already in the paper.

One of the highly publicised cases is the Amaplat and Amari v. Zimbabwe Mining Development Corporation case.[170] The case related to the cancellation of mining grants that were held by the claimants. The cancellation was owing to allegations of corruption and other malpractices that the ZMDC claimed ran contrary to the values held by the firm and the Zimbabwean government. The grants were passed on to Bravura, run by Nigerian business magnet Benedict Peters. So, companies that were linked to Amari Holdings, a company based in the British Virgin Islands won the right to seize ZMDC's assets worth US$65.9 million, of greater importance are the events that took place in the aftermath of the arbitral award in favour of the mining company against the Zimbabwean government. Enforcement has proven difficult for the company. This is one of the most striking cases in which a state arbitrarily cancelled an investment agreement and passed on the mining rights to a different entity. The company has south enforcement in countries like Zambia and the United State with little success. The Zimbabwean government has continued to frustrate efforts to enforce the award. At one point the company was even empowered to seize the Zimbabwean Mining Development Corporation's assets including minerals in transit. It is important to note that mining in Zimbabwe occupies a position of strategic importance and as such various factors may have interacted to bring about the actions of the Zimbabwean government both prior to the arbitration process and in the aftermath.

Another case in this regard is the First Quantum v. Democratic Republic of Congo which is equally an interesting case. The case relates to the revocation of copper

[170] Amaplat Mauritius Limited, Amari Nickel Holdings Zimbabwe Limited v. Zimbabwe Mining Development Corporation, The Chief Mining Commissioner, Ministry of Mines, Zimbabwe, ICC Case No. 17720/AMP/MD/TO

mining permits and titles granted to a Canadian Company by the DRC.[171] This was a multifaceted and complex case. The DRC government cancelled exploration permits held by First Quantum, subsequently ordering closure of the site. Contractual violations were cited in this regard. An ICC arbitration was launched by the investors against the DRC government in 2010.[172] First Quantum was fighting on two fronts, having to stop the onward sale of its exploration's rights by a third party to whom the cancelled permit had been granted. Further cancellation of other permits by the government saw First Quantum launch another ICSID claim against the government. While there are not details of the actual enforcement, settlement was completed in 2012 with the DRC government paying US$1.2 billion to First Quantum.[173]

The case resembles that of the Amari v ZMDC in the DRC acted arbitrarily in cancelling mining rights given to a foreign mining company before passing these on to a different mine that sold them on to another party. The DRC has proven to be an unstable state with conflict having subsisted in the countries for close to three decades.[174] Despite the country being rich in natural resources, these have proven to be a curse with various foreign entities and even the government having been accused of looting minerals during the first and second Congo wars. As such the environment in the countries may not be as permissible for mining operation which brings to the fore the role of the earlier mentioned political dynamics. Paradoxically, settlements in cases involving the DRC government were effectively reached.

A similar case is that of Miminco v. Democratic Republic of the Congo which was also heard before the ICSID and the ICC.[175] A Delaware based mining company that had invested in the DRC accused the DRC government of seizing the mining sites through

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[171] International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo (ICSID Case No. ARB/10/21)

[172]KB Asante, "The Perspectives of African Countries on International Commercial Arbitration", *Leiden Journal of Internal Law*, Vol. 6 (1993), p. 331, and Amazu A. Asouzu, International Commercial Arbitration and African State: Practice, Participation and Institutional Development, (CUP, 2001).

[173]Asante (n173 above)121

[174] Shalanky (N168 above) 125

[175] Miminco LLC and others v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14, cf. https://www.italaw.com/cases/3586 (last visited: 22 May 2022)

local officials and soldiers. Further, it was alleged that the company's mining equipment had been seized. Further, the company accused the DRC government of seizing its offices in the capital Kinshasa. All this had taken place during the war and the company further alleged that it had endured the invasion of its mines and illegal operation of the same by civil and military authorities in Congo. Damages amounting to US$35 million were sought by Miminco. The ICSID ruled in favour of Miminco. More importantly Miminco was able to enforce the subsequent arbitral award with the parties settling for US$13 million.

While the details regarding the enforcement of the arbitral awards may not be publicly available due to the confidential nature of arbitration, what is clear is that enforcement was effectively and successfully sought as evidenced by the ability of the parties to settle the matter. Closed economic systems and strategies that have a tendency of emphasising less on international or cross-border transactions and the importance of international investors may be another hurdle in the efforts to harmonise enforcement and other aspects of arbitration.[176] As noted earlier, schemes like the Model Law are associated largely with the resolution of international transaction-related disputes. As long as there is a low level of international trade within an economy, there is a low likelihood that a country may hold the Model Law to be a priority and of paramount importance in the context of the country. It is important to note that countries by actually encouraging foreign investment by embracing arbitration and the related rules like those provided for in the Model law and other instruments.[177] This is predicated on the notion that the flexibility, neutrality and international enforceability of arbitral awards would attract investors as they may feel that their investment will be safe. The inclusion in the doing business indices of Contract enforcement is not unfounded or based on a fallacy as this has been shown to be material.[178]

It is important to state that Investment Treaty Arbitration is an important aspect in

[176] n164 above
[177] Quoted in F.S. Nariman, 'Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 7.
[178]FS Nariman, 'Redefining the Landscape of ADR in Asian Jurisdiction", Kuala Lumpur International ADR Week, 15 May 2017, p. 6-9.

commercial transactions and the general arbitration landscape on the African continent. This mostly materialises through bilateral investment treaties (BITs) or what have been dubbed 'photo-op agreements' in the words of Makhdoom Khan.[179] The latter are called by this name as they are often entered with little knowledge of their full implications and they are entered into on occasion by guests from other countries. Africa has had a dismal experience with bilateral investment treaties as these have been used to challenge disputes between investors and states including in cases where the policies or actions of host states were in public interest. Case in point is that of Piero Foresti et al. v. South Africa[180] is an interesting case which arose from the introduction and implementation of the Black Economic Empowerment (BEE). The provisions of the policy as contained in the South African Mineral and Petroleum Resources Development Act of 2002. The provisions favoured the historically disadvantaged natives of South Africa and as such required divestiture of equity by certain mining operators so as to allow the targeted beneficiaries of the policy to have access to the mining sector.

A tribunal at the ICSID dismissed claims by the Italian mining company under both the Italy-South Africa bilateral investment treaty as well as the Luxembourg-South Africa bilateral investment treaty. The reliance by the company on the two treaties was due to the fact that one of the complainants an Italian-based company that was incorporated under the laws of Luxembourg. The tribunal ordered the investor to offer South Africa reimbursement for arbitral costs and fees. However, South Africa's BIT with Italy subsisted though others with EU countries like Luxembourg ceased to exist. The South Africa government in this regard acted in the interest of its national development goals including empowerment of hitherto disadvantaged groups in the society. This was despite what Western or Capitalism principles dictate. This is thus a typical example of national development concerns reigning supreme in African countries.

Thus feeling threatened by multinational corporations from developing countries may see African countries acting arbitrarily and in some cases being unwilling to

[179] Mr.Makhdoom Khan is the former Attorney General of Pakistan.
[180] Piero Foresti, Laura de Carli and others v. Republic of South Africa(ICSID Case No. ARB(AF)/07/1)

fully embrace the process of arbitration and its role as a mechanism for dispute resolution.[181] In the same vein, the proliferation of such investment treaties has driven the dramatic increase in arbitration that involves state entities both before the International Centre for Settlement of Investment Disputes (ICSID) and the International Chamber of Commerce. The same is noted also in the case of ad hoc proceedings in accordance with international instruments like the Model Law which have also seen increased use. Just for perspective, it was reported that 26% of the disputes before the ICSID involved Africa even when just 25 of the total arbitrators are Africans. These BITs do confer on investors the rights to protect their investments which are enforceable directly against the host state. In the same vein, investors have the option of pursuing litigation in national courts or arbitration.

The foregoing makes it clear that arbitration as a part of ADR is not absolute in its utility as there are potential detractors which may have far reaching implications for ADR.

4.2 Good practices in enforcement of arbitral awards: Case study of the UK

Given that the study endeavoured to come up with a model for effective enforcement of arbitral awards in Zimbabwe, it is important that best practices in this regard are considered. Pursuant to this, the enforcement of arbitral awards in the UK is going to be critically analysed. An award that is made by arbitral tribunals in line with an arbitration agreement is enforceable immediately in the United Kingdom. Proceedings relating to enforcement are only necessitated by the refusal to comply with such an award by the losing part.

In the same context, enforcement refers to giving an arbitral award the same effect as a judgement in national courts. The UK Arbitration Act holds the process of enforcement as the initial step that serves to allow for further execution of a judgement.[182] This means that by successfully enforcing an award the winning party

[181] AA Asouzu 'The UN, the UNCITRAL Model Arbitration Law and the Lex Arbitri of Nigeria' (2000) 17(5) Journal of International Arbitration 85.

[182] B Eder, 'Does arbitration stifle development of the law? Should s.69 be Revitalised?', Chartered Institute of Arbitrators, London Branch, Essex Court Chambers. 2016. 33. [online] https://essexcourt.com/recent-keynote-address-chartered-institute-arbitrators-sir-bernard-eder (accessed May 2022).

becomes able to actually execute the respective judgement.[183] Failure to comply with an arbitration award on the part of the losing party will mean that the same has to be enforced. A court application is the first step in the enforcement process in the UK.[184] The application in this regard is meant to have the courts recognise the awards as a judgement or enter a judgement with respect to the award. The need for a court application as part of the enforcement processes has been noted in the case of Zimbabwe.[185] The recognition of an arbitral award in the United Kingdom is governed by the Arbitration Act 1996 (Hereinafter the Act). The court application for recognition/enforcement of an arbitral award should be accompanied by certain documents.

These include an original or certified copy of the arbitration agreement between contracting parties as well as the original or a certified copy of the arbitral award. This means that the courts in the United Kingdom are not rigid regarding the production of original arbitral agreements and the respective arbitral awards as copies of these may be utilised provided that they are duly authenticated.[186] The same is noted in the case of Zimbabwe where such authenticated copies can be used in filing an application for enforcement/recognition of arbitral awards before national courts.[187] The Act also provides that where an award is in a language other than English, translation into the English language will be required and this has to be certified.[188] It is important to note that such an application is made without having to notify the other party or parties. This is in contrast to the enforcement procedure in Zimbabwe that requires the party that seeks enforcement to write to the losing party and notify them of the cause of action being taken. This is a process that one may find onerous on the winning party and as such by leaving out the same,

[183] Bailii Lecture, Freshfields, London [online] https://www.judiciary.gov.uk/announcements/speech-by-the lord-chief-justice-thebailii-lecture-2016/ (accessed 19 May 2022).
[184] JG Wetter, 'The present status of the international court of arbitration of the ICC: an appraisal', Am. Rev. Int'l. Arb., Vol. 1, No. 1, 1990. 91.
[185] I Bantekas, An Introduction to International Arbitration, Cambridge University Press, Cambridge. (2016) 'Reforms will threaten London's place as a world arbitration centre', The Times, London. 58
[186] C Liebscher 'European Public Policy and the Austrian Supreme Court' (2000) 16(3) Arbitration International 357.
[187] Arbitration Act 1996 (Act)
[188] M Kim, "A Study on Revocation of Arbitral Award, England Arbitration Act", Seoul National University, 2014.

the procedure in the United Kingdom eliminates the administrative burden that an applicant would otherwise have had to contend with.[189]

More importantly, the enforcement procedure in the UK sees Court orders being made based on the papers submitted without any need for parties to attend court for a hearing.[190] This makes the arbitral award enforcement process much less costly and time consuming. Appearing in court for a hearing would have more legal costs which are undesirable. Upon securing such an order, the same is served on the defendant and if such a defendant if domiciled outside the jurisdiction, the claimant has to apply for permission to serve the order outside the jurisdiction.[191] The application for permission at first glance may sound like a lot of work in the context of the arbitral award enforcement. However, the process is highly simplified and does not require the applicant to go to court as such permission is granted based on the submitted papers.[192] The defendant on whom a court order is served has the right to respond by applying to have the enforcement or award set aside. Unlike in Zimbabwe where only 10 days are permitted from the day of service for the defendant to respond,[193] courts in the UK allow a period of between 20 and 30 days from the date of service. At the expiration of the time period, the order will become final, should the defendant not respond to have it set aside. The claimant will thus have the right to further enforce the award.

The Act offers parties three different options with regards to enforcement of arbitral awards. Firstly, enforcement can be sought or executed under the New York Convention as provided for in ss100 to 103 of the Act.[194] This option is highly recommended in the UK as it has limited grounds for refusal with regards to recognition/enforcement. This relates to the limited number and scope of exception in the New York Convention of the enforcement of arbitral awards. As such pursuing

[189] I Kang, "A Case Study on Arbitration in the UK", Korean Law School 2018 Justice Vol.- No. 167.
[190] WH Taft, 'Dawn of world peace', The Int'l. Conciliation, Vol. 1, p.857. lancing the relationship between the courts and arbitration', The Third Annual
[191] N Han and Y Huh, "A Study on the Relationship Between International Arbitration and Lex Arbitri Under the England Arbitration Act 1996", Trade and Commerce Research Vol. 76, 2017.
[192] Eder (N184 above*) 87*
[193] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46, per Lord Mance SCJ at paragraph 26*
[194] ss100 to 103 of the Act

this option may offer a higher chance of successfully executing enforcement. Enforcement under the New York convention is based on the status of the UK as a contracting state to the Convention and the enactment of the New York Convention in the national legislation of the UK.[195] Contracting states under the New York Convention are allowed to make certain reservations.[196] Reciprocity is the most popular ground for such reservations. This means that states are in a position to limit the Convention's applicability to awards that have been made in reciprocating states. Pursuant to this, the UK only applied the Convention in recognition of arbitral awards that are made in a reciprocating state (contracting state to the Convention). This means that where an award has been made in a contracting state and the losing party's assets are domiciled in a contracting state, then enforcement in the UK is a straightforward process. It is important to note that the only condition in this case is the giving of judgement by the courts based on the awards itself. Review of the awards is thus not permitted in this regard.

The defendant in this regard may oppose the enforcement and the Act makes provisions for such defences through Section 103 of the Act.[197] One of the ground for defence is if the arbitration agreement was entered with the losing party under any sort of incapacity be judged under the applicable statutes (s103(2)(a)). Thus where the party can prove that they had no capacity to be judged under the law applicable to them at the time of the agreement then the same can be argued for defence against enforcement. In the same vein, where an arbitration agreement was not valid under the law governing them or the law of the jurisdiction in which it was made, enforcement/recognition may be opposed (s103(2)(b)). The same can be achieved where no proper notice was given to the part regarding the appointment of a panel, arbitration proceeding or was not afforded a chance to make their case (s103(2)(c)).

Further ground for defence of opposing an enforcement include cases were the deal concerned was not contemplated by the terms of arbitration[198] or the composition

[195] ss100 to 104 of the Act).
[196] article I.3 of the NY Convention
[197] Eder (N184 above)
[198] (s103(2)(d)) (n187 above)

of the tribunal that issued the award was not compliant with the terms of the agreement or national legislation on arbitration.[199] Where an award is not yet binding to the parties involved in an arbitration process, the losing party may oppose the recognition/enforcement on these grounds. Moreover, enforcement of an award may be refused based on the public policy exception[200] or arbitrability grounds.[201] All these grounds are also applicable in the Zimbabwean context. This means that losing parities are afforded various grounds for defence or opposing enforcement of an award.

It is important to note that the courts have discretion when it comes to defence based on the aforementioned grounds.[202] Further, the onus is on the defendant to oppose enforcement to prove their case against enforcement save for defence on the grounds of public policy to arbitrability.[203] Thus the party that seeks to oppose enforcement has the duty of proving why the courts should refuse enforcement. Another important aspect in this regard is that defence may be taken in the UK even where the same wasn't challenged or appealed at the seat.[204] This provision is not made in the enforcement procedure in Zimbabwe.

4.2.1 Enforcement on 'without notice basis'

Enforcement can also be sought on a without notice basis (s66). This is similar to the procedure under CPR24 and as such it's available for foreign and domestic awards.[205] Enforcement under s66 (in England) this means that a winning party may be able by leave of the court to enforce an award in the same way that a court judgement may be enforced. Where leave is duly given, judgement would be entered in terms identical to an award. Care ought to be taken because merging an award with the judgement may prove difficult to exploit the provisions of a certain convention.[206] Due to its straightforward nature it is known as the 'summary procedure'. There are

[199] (s103(2)(e)) (n187 above)
[200] (s103(3)) (n187 above)
[201] (s103(3)) (n187 above)
[202] *China Agribusiness Development Corporation Balli Trading* [1998]
[203] *Roseel NV v Oriental Commercial Shipping Ltd*[1991] *Dallah v Ministry of Religious Affairs* [2010] UKSC 46.
[204] The method of enforcement is highly suitable for domestic awards.
[205] s66 (n187 above)
[206] E Gaillard 'Commentary' (2002) 18(3) Arbitration International 247.

however defences available to the defendant and these include mandatory grounds for refusal. Where the defendant is able to convince and prove to the court that the awarding tribunal has no substantive jurisdiction to make such an award, then the court may not grant leave to enforce an award.[207] Objections in this regard need to be raised within 28 days of the award as provided for in section 73 of the Act. Lastly, where a foreign judgement has in the past pronounced judgement regarding the merits of the action, then enforcement can be stopped.[208]

Two sets of circumstances may be relied on in opposing enforcement of an award through summary procedure provided for in S66 of the Act. These include where an arbitration agreement is oral and not in writing and where the award in its substance or form bears a defect.[209] In the same vein, where an arbitration agreement is inclusive of an implied promise to pay and award that is subsequently made[210] and where an award is not honoured and the party seeking enforcement cannot rely on the procedure in S66 of the Act, court action for breach of the undertaking to pay can be commenced.

4.2.2 Enforcement through court action for breach of implied terms

The third option relates to bringing an action regarding an award for the breach of the implied terms which the parties agreed to comply with the award when the arbitration agreement was entered into and signed. This represents a relatively new cause of action which has a limitation of six years.[211] It is important at this juncture to note that the procedure in the UK offers more avenues for enforcing arbitral awards than the Zimbabwean procedure which is also based on the UNCITRAL Model Law that has a wider scope of exceptions.[212] While revision of the international instrument may be complicated, availing more avenues for enforcement is an important and much more realistic approach.

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[207] (s66(3)). (n187 above)
[208] *Carl Zeiss Stiftung v Rayner and Keller Ltd (No 2)* [1967] 1 AC 853
[209] *Goldstein v Conley* [2002] 1 W.L.R. 281 at [294]
[210] *Purslow v Bailey* (1704) 2 Ld Raym 1039)
[211] P Zumbansen 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8 (3) European Law Journal 400.
[212] HL Yu 'Five Years on: A Review of the English Arbitration Act 1996' (2002) 19(3) Journal of International Arbitration 209

4.3 Other enforcement tools

4.3.1 Freezing Injunctions (in England)

Freezing injunctions are an important instrument and these can be applied for pre-award or post-award. The court relies on the owners provided for in section 44 of the Act during the course of arbitration proceedings and after they are completed, the provision of section 37 of the Senior Courts Act of 1981 can be relied on. Such freezing orders have been described by the court of appeal as being capable of normally allowing payment in the ordinary course of business if applied in support of foreign enforcement awards.[213] It is important to note that such freezing orders can even be obtained against non-parties to arbitration including subsidiaries provided they hold assets on behalf of the defendant.[214] Acting conscionable and promptly on the part of the winning party is of essence given the nature of freezing injunction as equitable remedies. The applicant ought to show that there is a real risk that the award will not be honoured unless such a freeze is granted or that without restraining the defendant, enforcement may prove difficult.[215] Another essential is a real link connecting the subject matter of measures sought and the jurisdiction of the court approached in England.

4.3.2 Appointment of receivers

In addition to freezers, courts have power to appoint certain entities or individuals as receivers over a certain defendant's foreign domiciled assets so as to prevent dissipation of assets and help the party seeking enforcement.[216]

4.3.3 Defendant cross-examination

Where no information regarding the defendant's assets is identified, the claimant can seek an order requiring the defendant to appear in the English Court for oath

[213] *Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040
[214] *TSB Private Bank International SA v Chabra [1992] 2 All ER 245*
[215] *Congentra v Sixteen Thirteen Marine* [2008] EWHC 1615 (Comm) at 49
[216] s 44 of the Act and *Cruz City 1 Mauritius Holdings v Unitech Ltd and others* [2014] EWHC 3131 (Comm)

questioning about his assets globally, so that enforcement against those assets can be sought.[217] These scenarios are described in greater detail below.

4.3.4 Order for Third-Party Debt

A third-party debt order is an additional order that can be obtained by filing an application with the Court. It is an order issued against a third party who owes money to the judgement debtor, requiring the third party to directly pay the money owed to the judgement debtor to the creditor rather than to the judgement debtor. This would mean possessing knowledge of the parties who are owed money by the judgement debtor, which is not common in practice.

4.3.5 A Debtor Company's Liquidation and Winding-Up

A judgement creditor may also initiate insolvency proceedings against a defaulting party. This would entail handing over the company's operations to a liquidator, who will wind up the company through disposing of its assets at a fair price for purposes of satisfying a certain judgement or at the least a position of the judgement. This is usually creditors' last resort, and a judgement debtor will often settle the judgement debt if it is in a position to do so in order to avoid further action.

4.3.6 Cross-examination regarding assets

A judgement creditor may also request that the relevant persons (for instance company directors, shadow directors, or shareholders of a firm) attend a hearing to testify about the debtor company's assets.[218] This is a useful tool because these individuals would be familiar with all of the company's assets, whereas a claimant also has limited knowledge on such matters.[219] The information disclosed would put the creditor in a stronger place to effectively satisfy a claim against the debtor company because it would have a better understanding of the assets that could be

[217] P Tutun 'Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes [FNa]' [1994] Boston University International Journal 179.
[218] P Sarcevie 'The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law' in P Sarcevic (ed) Essays on International Commercial Arbitration (Graham & Trotman Limited 1989).
[219] RP Harris and J Tecks The Arbitration Act 1996 a Commentary (3 rd edn Blackwell publishing UK 2003).

seized, sold, or realised to pay off the debt.[220] A strong deterrent exists to prevent persons being cross-examined on assets from trying to mislead the Court or concealing information on the debtor company's assets: a person found to be misleading the court or refusing to release information may be found in contempt of court, with a prison sentence as the sanction. In some cases, just the threat of having to appear in Court for cross-examination is enough to get a debt paid.[221]

4.4 Other potential benefits of securing a judgement in the UK

Aside from pursuing enforcement in the ways described above, there are several other avenues that are available in the UK. In the context of the current study, these make arbitration a highly advantageous tool for settling disputes. It is possible that the Tribunal may not address interest that may accrue in its arbitral award. Under the Judgments Act of 1883, English courts have the authority to award interest at the rate of 8.5 percent per annum.[222] This is a high rate that the Tribunal may find difficult to obtain. There are authorities stating that the Court has the authority to award this rate as of the date of the award.[223] Second, there may be a limitation period after which the claimant may be unable to take further enforcement action. When a judgement is entered in accordance with the award, the limitation period for enforcing the judgement begins on the date of the judgement, not the date of the award.[224]

As a result, the claimant may be in a position to effectively prevent the implications of the limitation period. Furthermore, because England is (for the time being) a member of the EU, one may simply enforce in state that is party to Brussels Regulation state.[225] However, and most importantly, the UK is party to Convention

[220] N Blackaby 'Arbitration and Brazil: A Foreign Perspective' (2001) 17(2) Arbitration International 129.
[221] N Enonchong 'The Enforcement of Foreign Arbitrage Awards Based on Illegal Contracts' [2000] Lloyd's Maritime and Commercial Law Quarterly 495.
[222] Sonatrach v Statoil Natural Gas LLC [2014] EWHC 875 (Comm) and Gater Assets Ltd v Nak Naftogaz Ukrainy [2008] EWHC 1108 (Comm)
[223] World Arbitration Law [Volume 1], A Series of World Arbitration Law, Ministry of Justice, 2014
[224] J Sung, "Recognition and Enforcement of Foreign Arbitration Awards Under the German Civil Procedure Act - Focusing on Article 1061 of the German Civil Procedure Act", Journal of Arbitration Studies Vol. 29 No. 2, Korean Association Of Arbitration Studies (Kaas), 2019
[225] P Sanders 'The Making of the Convention' in (--) (ed) Enforcing Arbitration Awards under the New York Convention (United Nations New York 1999).

entered into with former UK colonies that are under the umbrella of the Commonwealth and this means that UK judgments may be easily enforced in the bulk of these countries.[226] This effectively means that a successful claimant may use UK recognition and enforcement procedures in adding interest to an arbitration award in cases where the Tribunal has not ruled on the issue. Similarly, recognition may be used to obtain a completely separate judgement if the limitation for enforcing the award has passed.[227] This means that a claimant may go through the same process and as such get a new limitation period which would see them gain more time to recover the debt.

4.5 Conclusions

The chapter critically analysed the potential detractors to effective arbitration in the Africa context. Various challenges may detract the processes of arbitration including the enforcement of arbitral awards. Contradictions in arbitration and other related processes have largely affected the utility of arbitration in Africa. Thus despite arbitration being recognised as viable alternatives to litigation which is relatively less susceptible to the interference of other states and one that may ensure fairer and faster resolution of disputes, it has been vulnerable to contradictions. These contradictions arise also from the ambiguous nature of related processes and may give way to state interference and control which further fosters capitalism. Resultantly arbitration is fast losing its distinctiveness from the litigation processes whose shortcomings it is meant to plug including the generation of zero-sum outcomes. Another issue relates to the adoption of model texts that should standardise and guide the processes of arbitration. African countries have in some cases treated the model texts with suspicion with some deciding against the adoption of these. Resultantly, the standardisation sought has proven elusive thereby affecting through difficulties in enforcing arbitral awards. The perceived bias in arbitration involving international contracts has contributed to the misgiving that African countries may have about arbitration. The widely shared view that arbitration is at stake against developing countries is highly problematic in this regard and has shaped some of the issues plaguing ADR.

[226] R Markin, Arbitration Act 1996, Fifth Edition, Informa Law, 2014.
[227] B Harris, The Arbitration Act 1996: A Commentary, 4th Ed. Oxford: Wiley-Blackwell. 2007.

Analysis of enforcement in the UK revealed some important facts regarding the same. There are some similarities in the enforcement procedures in Zimbabwe and the UK. Both countries' legislation on arbitration requires that an application is made to the courts as the initial step in the enforcement process. However there are differences in the simplicity with which parties can get judgements and permissions where necessary. While the Zimbabwean procedure requires that the losing party is notified from the onset of the application, the procedure in the UK makes no provision for this notification and the courts rule based on the submitted papers with no need for parties to appear in court. More importantly, the enforcement procedure in the UK avails many avenues to parties seeking enforcement and these extend to cases where the losing party is attempting to avoid enforcement or paying. These methods are innovative at law and they are not available in the case of Zimbabwe. The national courts in the UK are also empowered to make provision for certain grey areas that may accompany an award including failure by a tribunal to award interest or to provide a scale for determination in the event of late settlement. Thus the enforcement procedure in the UK is highly optimised.

CHAPTER FIVE: SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The previous chapter critically analysed the arbitral award enforcement procedure in the UK. The current chapter presents a summary of the study leading up to the conclusions drawn based on the study. Recommendations are also offered in the current and last chapter of the study.

5.1 Summary

Study examined the arbitral awards enforcement and its effectiveness in the mining sector in Zimbabwe with a view to produce a model framework for the effective enforcement of arbitration awards. The study was motivated by the rampant dispute in the Zimbabwean mining sector which has threatened production and output in the sector. Highly publicised cases on the enforcement of arbitral awards in Zimbabwe had cast a negative picture of the aspect thereby casting doubt on the utility of arbitration which is evidently a preferred alternative dispute resolution method. There was thus a need to examine the procedure and its effectiveness with a view to suggest a model for improved enforcement of arbitral awards. The study showed that the concept of arbitration is an old concept that has evolved over time. The high levels of use have culminated in the highly systematic nature of arbitration as it is known today. However, the essence of its utility is the enforcement of awards. These are a good measure in assessing its utility.

5.2 Findings

What is the legal and institutional framework for the enforcement of arbitral awards in the mining sector in Zimbabwe?

Zimbabwe is a contracting state to the UNCITRAL Model Law though this is implemented with modifications. Chapter VIII of the Arbitration Act [Chapter 7:15] (hereinafter the ZAA) is a replica of the Article 35 and 36 of the Model Law and provides for both recognition and enforcement of foreign arbitral awards. At national level, enforcement of arbitral awards in the mining sector in Zimbabwe is governed by the Arbitration Act [Chapter 7:15]. The High Court in Zimbabwe will

under Article 35(1) recognise and enforce an arbitral award provided that the grounds for refusal contained in Article 36 are not engaged.

What are the current arbitral award enforcement practices in the mining sector in Zimbabwe?

The National courts in Zimbabwe play a key role in arbitration by facilitating enforcement especially given that arbitral awards are non self-executing. Article 35(1) allows national courts to recognise and enforce arbitral awards subject to lack of any grounds for refusal or engagement of the same. A party seeking enforcement in Zimbabwe needs to apply to the courts and in this regard, the ZAA effectively does away with the double *exequatur* requirement by operation of Article 35 (2). The 1971 High Court Rules and the SI 2021 202 High Court Rules, 2021 provide the necessary guidance for the application process. However, losing parties may actually seek to fight enforcement and the law provides for such refusal particularly by the courts. The grounds for refusal are laid out in Article 36(1) (a)(i) of the ZAA which very much mimics Article V(1)(a) of the New York Convention. ZAA gives local national courts the discretion to refuse the recognition or enforcement of foreign arbitral awards. Grounds for refusal include improper notification of arbitral proceedings, irregularities in the arbitral tribunal or the procedure, composition of an arbitral tribunal or procedures not being in accordance with the arbitration agreement or the law of the country of the seat of arbitration, annulled, non-binding or suspended awards, non-contemplation by the arbitration agreement of issues resolved and decisions in an award falling outside the scope of the arbitration agreement are all grounds for refusal.

The public policy exception is also applicable in Zimbabwe though it is applied restrictively. The stance in this regard is pro-enforcement. Arbitration Act (Chapter 7:15) Article 34(5) provides that an award is deemed to be in violation of the Zimbabwean public policy if

a) The making of the award was induced or effected by fraud or corruption; or
b) A breach of the rules of natural justice occurred in connection with the making of the award.

Thus Zimbabwe has standardised practices that are guided by the international instruments adopted.

What are the challenges faced in the enforcement of arbitral awards in the mining sector in Zimbabwe.

The enforcement of arbitral awards based on Article 35 of the ZAA in Zimbabwe has been shown to be sub-optimal. The process of enforcement of arbitral awards in Zimbabwe as per provisions of Article 35(2) involves some procedures that may prove onerous on parties seeking enforcement. These include the requirement to notify the losing part of the steps to apply for enforcement in the courts. The resultant cost of enforcement may actually increase astronomically. The same can be said of the effect can be implemented to ensure effective arbitral award enforcement in the mining sector in Zimbabwe.

The study also found that the arbitration procedure needs to be streamlined by getting rid of requirements in Article 35 of the ZAA like notification of the losing party of the cause of action as a measure for ensuring effectiveness of arbitral award enforcement. This would make the process as simple and lean as possible thereby reducing the cost and time required to successfully complete enforcement. Thus streamlining the process of enforcement would make the process of enforcement much more manageable and less complicated for parties seeking award enforcement. The national legislation and on arbitration can also be harmonised with national development priorities to ensure that development goals are not at the mercy of texts like the Model Law which are not crafted with local realities in mind. This can be achieved through reviewing Section 4(2) of the ZAA and incorporating provisions that are specific to strategic sectors like the mining sector. These can be incorporated through amendment of the public policy exception test. This would allow for arbitration processes and enforcement procedures to facilitate smooth and less chaotic resolution of disputes.

5.3 Recommendations

The study recommends the following:

Need to streamline and simplify the enforcement process

As shown in the findings, the current procedure requires that the losing party is notified of the intention to seek enforcement through the courts which potentially increases the cost and time required to enforce awards. It is therefore recommended that the provision on the court applications espoused in Article 35 of the ZAA are reviewed to ensure that parties are able to apply to the courts virtually without also notifying the other party.

Need for courts to automate processes

Given the requirement to apply for enforcement through national courts, it is important that courts embrace digital technologies and other ICTs in order to quicken the process of enforcement by cutting down the processing times as well as allowing for cost effective enforcement. This is facilitated by the ability of ICTs to allow for virtual interaction and quicker processing of information.

Need for more enforcement options

The options for enforcement in Zimbabwe are greatly limited and parties seeking enforcement have limited options. It is important that the provisions on enforcement of arbitral awards are reviewed to accommodate provision for other viable enforcement procedures besides the current one. Lessons can be drawn from the UK where in addition to enforcement based on the New York Convention provided for in ss100 to 103 of the Act, parties can also enforce in various other ways. Thus Article 35 can be reviewed to incorporate many other enforcement routes.

Provision for the appointment of receivers

Enforcement may prove difficult where parties employ different tactics to avoid payment. This has been shown in the Amari and Von Pezold case where different delaying tactics have been employed. As such provisions should be added to the ZAA to facilitate the appointment of receivers in cases where the losing party has assets domiciled in other jurisdictions. This would help parties seeking enforcement and facilitate settlement. Such provisions are noted in the case of the UK where section 37 of the Senior Courts Act 1981 provides for the appointment of such receivers.

Defendant cross-examination

Given difficulties in obtaining information about a losing party's assets, it is important that the ZAA is reviewed to insert clauses allowing courts to leverage other provisions including cross-examination of losing parties under oath. This would allow for information regarding assets to be obtained thereby enhancing enforcement. For instance the UK procedure allows courts to invoke Part 71.1 of the provisions on judgement creditors in helping parties seeking enforcement. In the case of companies, directors and other officials can be cross-examined under oath.

Need to add provisions on interest accrued on awards where tribunal make no such provisions

It is recommended that national courts are empowered through amendments to the ZAA to award interest on financial awards where the tribunal fails to make such provisions. This is necessitated by the possibility of awards taking long to be enforced despite there being no guidance for interest. In the UK such provisions under the Judgments Act of 1883 allow English courts the authority to award interest at the rate of 8.5 percent per annum.

Need to seek treaties outside the existing international instruments

It is recommended that the Zimbabwean government seek treaties outside the existing international conventions to facilitate easy enforcement of arbitral awards. This could see the state leveraging existing memberships to certain multilateral forums like the African union to facilitate enforcement in any member state.

BIBLIOGRAPHY

Acts

Arbitration Act

Kenya Arbitration Act

Mines and Minerals Act

Singapore Arbitration Act 2001

UK Arbitration Act

UNCITRAL Arbitration Rules 2013.

Zimbabwe Arbitration Act [Chapter 7:15]

Books

Asouzu, A.A., 2001. *International commercial arbitration and African states: practice, participation and institutional development*. Cambridge University Press.

Asouzu, A.A., 2001. *International commercial arbitration and African states: practice, participation and institutional development*. Cambridge University Press.

Bertincourt,J., 2008. Zimbabwe - State of the Mining Industry.

Black, B., 1999. Making It Up As They Go Along: The Role of Law in Securities Arbitration. *Cardozo L. Rev.*, *23*, p.991.

Blackaby, N., Partasides, C., Redfern, A. and Hunter, M., 2009. *Redfern and Hunter on international arbitration*. Oxford University Press.

Born, G.B., 2014. The law governing international arbitration agreements: An international perspective. *SAcLJ*, *26*, p.814.

Cole, S.R., 2005. Fairness in Securities Arbitration: A Constitutional Mandate. *Pace L. Rev.*, *26*, p.73.

Delaume, G.R., 1997. Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State. *Int'l Bus. LJ*, p.253.

Elgueta, G.R., 2011. Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators. *Harv. Negot. L. Rev.*, *16*, p.165.

Emelonye, U.P. and Emelonye, U., 2021. Public Policy Exception in the Enforcement of Arbitral Awards in Nigeria. *Beijing L. Rev.*, *12*, p.266.

Enonchong, N., 2000. Enforcement in England of Foreign Arbitration Awards Based on Illegal Contracts. *Lloyds Maritime and Commercial Law Quarterly*.

Farber, D.A., 2007. The Supreme Court, the law of nations, and citations of foreign law: The lessons of history. *Calif. L. Rev.*, *95*, p.1335.

Fouchard, P. and Goldman, B., 1999. *Fouchard, Gaillard, Goldman on international commercial arbitration*. Kluwer Law International BV.

Gaillard, E., 2002. *Towards a Uniform International Arbitration Law?* (No. 3). Juris Publishing, Inc..

Garry,B.,2009. *International Commercial Arbitration*, Kluwer Law International. Black, Henry Campbell, M.A. (1991). *Black's Law Dictionary*, St.Paul: West Publishing Co. Cambridge.

Global Arbitration Review: The Guide to Mining Arbitrations 2021

Harris, B., Planterose, R. and Tecks, J., 2008. *The Arbitration Act 1996: A Commentary*. John Wiley & Sons.

Harris, B., Planterose, R. and Tecks, J., 2008. *The Arbitration Act 1996: A Commentary*. John Wiley & Sons.

Idornigie, P.O., 2015. *Commercial Arbitration Law and Practice in Nigeria*. LawLords Publications.

Lynch, K. and Lynch, K.L., 2003. *The forces of economic globalization: Challenges to the regime of international commercial arbitration*. Kluwer Law International BV.

Macneil, I.R., 1977. Contracts: adjustment of long-term economic relations under classical, neoclassical, and relational contract law. *Nw. UL Rev.*, *72*, p.854.

Makaramba, R.V., 2012. Curbing delays in commercial dispute resolution: arbitration as a mechanism to speed up delivery of justice. In *International Conference Centre, Organized by the High Court of Tanzania, Dar es Salaam*.

Malinga, W., 2018, January. 'From an Agro-Based to a Mineral Resources-Dependent Economy': A Critical Review of the Contribution of Mineral Resources to the

Economic Development of Zimbabwe. In *Forum for Development Studies* (Vol. 45, No. 1, pp. 71-95). Routledge.

Maurer, A.G., 2013. *Public Policy Exception Under The New York Convention: History, Interpretation, and Application-Revised Edition*. Juris Publishing, Inc..

Mentschikoff, S., 1961. Commercial arbitration. *Columbia Law Review*, *61*(5), pp.846-869.

Mentschikoff, S., 1961. Commercial arbitration. *Columbia Law Review*, *61*(5), pp.846-869.

Merkin, R., Seriki, H., Fox, D.P., Flannery, L. and Harwood, S., 2014. *Arbitration act 1996*. Informa law from Routledge.

Mudoni, T.V., 2017. An analysis on the effectiveness of conciliation and arbitration as labour dispute resolution mechanisms Zimbabwe.

Nariman, F.S., 2000. *The spirit of arbitration.*: Redefining the Landscape of ADR in Asian Jurisdiction City University of Hong Kong.

Opiya Esq, R., 2012. Recognition and Enforcement of International Arbitral Awards: A Comparative Study of Ugandan and UK Law and Practice. *Available at SSRN 2569014*.

Organisation for the Harmonization of Business Law in Africa Treaty (OHADA). 1993. Reviewed. 2008.

Paulsson, J., 2013. *The idea of arbitration*. OUP Oxford.

Peerenboom, R., 2001. Seek truth from facts: An empirical study of enforcement of arbitral awards in the PRC. *The American Journal of Comparative Law*, *49*(2), pp.249-328.

Redfern, A. and Hunter, M., 2004. *Law and practice of international commercial arbitration*. Sweet & Maxwell.

Rosenne, S., 1961. *The International Court of Justice: an essay in political and legal theory*. AW Sythoff.

Sanders, P., 1999. The making of the convention in enforcing arbitration awards under the New York Convention. *United Nations, New York*.

Sarcevic, P., 1989. The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law. *Essays on International Commercial Arbitration*, *167*, p.177.

Shalakany, A.A., 2000. Arbitration and the third world: a plea for reassessing bias under the specter of neoliberalism. *Harv. Int'l. LJ*, *41*, p.419.

Sheppard, A., 2003. Interim ILA report on public policy as a bar to enforcement of international arbitral awards. *Arbitration International*, *19*(2), pp.217-248.

Smith, M.A., Couste, M., Hield, T. and Jarvis, R., 2005. Arbitration of patent infringement and validity issues worldwide. *Harv. JL & Tech.*, *19*, p.299.

Strong, S.I., 2012. Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration. *J. Disp. Resol.*, p.1.

Sundari, E., The Limitation of Final and Binding Arbitral Awards: How Far in Supporting the Autonomy of Arbitration?.

Tutun, P.D., 1994. Arbitration Procedures in the United States-German Income Tax Treaty: The Need for Procedural Safeguards in International Tax Disputes. *BU Int'l LJ*, *12*, p.179.

Watadza, C., 2015. The effectiveness of conciliation and arbitration as an alternate dispute resolution mechanism in the ferro–alloy industry: a case of Zimasco and Zimbabwe Alloys International.

Wetter, J.G., 1990. The present status of the International Court of Arbitration of the ICC: an appraisal. *Am. Rev. Int'l Arb.*, *1*, p.91.

Journals

Adekoya,F.2015.The Public Policy Defence to Engagement If Arbitral Awards: Rising Star or Setting Sun? BCDR International Arbitration Review.

Akoto, A.S., 2021. Public Policy: An Amorphous Concept in the Enforcement of Arbitral Awards. *J. Liberty & Int'l Aff.*, *7*, p.51.

Alaloul, W.S., Wirahadikusumah, R.D., Hasaniyah, M.W., Tayeh, B.A., Hasiholan, B. and Kusumaningrum, P., 2019. A comprehensive review of disputes prevention and resolution in construction projects. In *MATEC web of conferences* (Vol. 270, No. 270 (2): 05012). EDP Sciences.

Altawyan, A.A., 2016, November. Arbitral Awards Under the New Saudi Laws and International Rules, Challenges and Possible Modernization. In *4th Academic International Conference on Interdisciplinary Legal Studies* (p. 25).

Asante, S.K., 1993. The perspectives of African countries on international commercial arbitration. *Leiden Journal of International Law*, *6*(2), pp.331-356.

Asouzu, A.A., 2000. The UN, the UNCITRAL model arbitration law and the Lex Arbitri of Nigeria. *Journal of international arbitration*, *17*(5).

Babu, R., 2006. International Commercial Arbitration and the Developing Countries. *AALCO Quarterly Bulletin*, (4), p.386.

Barraclough, A. and Waincymer, J., 2005. Mandatory rules of law in international commercial arbitration. *Melbourne journal of international law*, *6*(2), pp.205-244.

Barraclough, A. and Waincymer, J., 2005. Mandatory rules of law in international commercial arbitration. *Melbourne journal of international law*, *6*(2), pp.205-244.

Barry, R.A., 1978. Application of the public policy exception to the enforcement of foreign arbitral awards under the New York Convention: a modest proposal. *Temp. LQ*, *51*, p.832.

Baykitch, A. and Hui, L., 2008. Celebrating 50 Years of the New York Convention. *UNSWLJ*, *31*, p.364.

Berends, A.J., 1998. The UNCITRAL Model Law on cross-border insolvency: a comprehensive overview. *Tul. J. Int'l & Comp. L.*, *6*, p.309.

Blackaby, N., 2014. Arbitration and Brazil: a foreign perspective. *Arbitration international*, *17*(2), pp.129-142.

Böckstiegel, G., 2015. The Role of the State in Protecting the System of Arbitration. Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, 81(4).

Chi, M., 2009. The time for a new arbitration law in China: Comparing the arbitration law in China with the UNCITRAL model law. *Journal of International Arbitration*, *34*(3).

Falahati, K., 2019. Time, Arbitrage, and the Law of One Price: The Case for a Paradigm Shift. *Journal of Economic Issues*, *53*(1), pp.115-154.

Gaillard, E. and Edelstein, J., 2000. Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat. *International Arbitration Law Review*, *3*(2), pp.37-43.

Grigera Naón, H.A., 2005. Arbitration and Latin America: Progress and Setbacks 2004 Freshfields Lecture. *Arbitration international*, *21*(2), pp.127-176.

HAN, N.H. and HUR, Y.S., 2017. A Study on the Relation of International Arbitration and Lex Abitri under Arbitration Act 1996. *THE INTERNATIONAL COMMERCE & LAW REVIEW*, *76*, pp.49-76.

Harris TL. The “Public Policy” Exception to Enforcement of International Arbitration Awards Under the New York Convention—With Particular Reference to Construction Disputes. Journal of international arbitration. 2007 Feb 1;24(1).

Hodges, A.C., 2000. Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law. *Ohio St. J. Disp. Resol.*, *16*, p.91.

Kalaitsoglou, K., 2021. Exploring the concept of arbitral awards under the New York Convention. *Journal of Strategic Contracting and Negotiation*, *5*(1-2), pp.99-112.

Kang,I.,2018.A Case Study on Arbitration in the UK, Korean Law School 2018 Justice Vol.- No. 167

Kerin, L. and Cullen, A., 2017. Enforcement of foreign arbitral awards: a London perspective. *International Journal of Diplomacy and Economy*, *4*(3), pp.388-398.

Kim,M., 2014. A Study on Revocation of Arbitral Award, England Arbitration Act, Seoul National University.

Liebscher, C., 2014. European Public Policy and the Austrian Supreme Court. *Arbitration International*, *16*(3), pp.357-366.

Madhuku L. The alternative labour dispute resolution system in Zimbabwe: Some comparative perspectives. U. Botswana LJ. 2012;14:3.

Mahapa, M. and Watadza, C.W., 2015. The dark side of arbitration and Conciliation in Zimbabwe. *Journal of Human Resources Management and Labor Studies*, *3*(2), pp.65-76.

Maitireyi, P. and Duve, R., 2011. Labour arbitration effectiveness in Zimbabwe: fact or fiction?. *African Journal on Conflict Resolution*, *11*(3), pp.135-158.

Manjiao, C., 2009. Is It Time For Change? A Comparative Study of Chinese Arbitration Law and the 2006 Revision of UNCITRAL Model Law. *Asian International Arbitration Journal*, *5*(2).

Moneke, E., 2018. Strengthening the legal regime for the recognition and enforcement of arbitral awards in Nigeria. *The Gravitas Review of Business and Property Law*, *9*(3), pp.18-42.

Murombo, T., 2013. Regulating mining in South Africa and Zimbabwe: Communities, the environment and perpetual exploitation. *Law Env't & Dev. J.*, *9*, p.31.

O'Connell, M.E., 1989. The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States. *Va. J. Int'l L.*, *30*, p.891.

Racine, J.B., 1999. *L'arbitrage commercial international et l'ordre public* (Vol. 309). LGDJ.

Rana, R., 2014. The Tanzania Arbitration Act: meeting the Challenges of Today With Yesterday's Tools?'. *Chartered Institute of Arbitrators, Kenya, Alternative Dispute Resolution Journal*, *2*(1), pp.232-233.

Reid-Rowland, J., 2007. Arbitration in Zimbabwe: the UNCITRAL Model Law in Practice in a Developing Country. *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, *73*(2).

Roy, K.T., 1994. New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defense to Refuse Enforcement of Non-Domestic Arbitral Awards, The. *Fordham Int'l LJ*, *18*, p.920.

San, F.A., 2015. The Public Policy Defence to Enforcement of Arbitral Awards: Rising Star or Setting Sun?. *BCDR International Arbitration Review*, *2*(2).

Sempasa, S.L., 1992. Obstacles to international commercial arbitration in African countries. *International & Comparative Law Quarterly*, *41*(2), pp.387-413.

Shen, C., 2005. International Arbitration and Enforcement in China: Historical Perspectives and Current Trends. *Currents: Int'l Trade LJ*, *14*, p.69.

Sung, J.H., 2021. Recognition and Enforcement of Arbitral Awards under England Arbitration Act. *J. Arb. Stud.*, *31*, p.3.

Taft, W.H., 2015. Dawn of world peace', The Int'l. Conciliation, Vol. 1, p.857. Lancing the relationship between the courts and arbitration, The Third Annual.

Torgbor, E.N.A., 2013. *A comparative study of law and practice of arbitration in Kenya, Nigeria and Zimbabwe, with particular reference to current problems in Kenya* (Doctoral dissertation, Stellenbosch: Stellenbosch University).

Yu, H.L., 2002. Five Years On: A Review of the English Arbitration Act 1996. *Journal of International Arbitration*, *19*(3).

Zumbansen, P., 2002. Piercing the legal veil: commercial arbitration and transnational law. *European Law Journal*, *8*(3), pp.400-432.

Online papers

Arentsen , N.J and Weber, M.S.,2014. UNCITRAL Model Law: Still a Model or Second Best: Kluwer Arbitration Blog [Accessed 20 July 2022. Available at available at:

<http://kluwerarbitrationblog.com/2014/07/01/uncitral-model-law-still-a-model-or-second-best/>.

Bailii Lecture, Freshfields, London [online] https://www.judiciary.gov.uk/announcements/speech-by-the lord-chief-justice-thebailii-lecture-2016/ (accessed 19 May 2022).

Eder, B.'Does arbitration stifle development of the law? Should s.69 be Revitalised?', Chartered Institute of Arbitrators, London Branch, Essex Court Chambers. 2016. 33. [online] https://essexcourt.com/recent-keynote-address-chartered-institute-arbitrators-sir-bernard-eder (accessed May 2022).

Sarkodie, K.,2014., International Arbitration in Sub-Saharan African Context Available at: https://www.mayerbrown.com/files/News/469b450b-52cd-470d-bad6425cb4203bbf/Presentation/NewsAttachment/799d0574-6bba-43c1-9b22-

Reports

Zimbabwe Chamber of Mines: https://www.chamberofminesofzimbabwe.com/index.php/en/production-statistics.

Reported judgements

Amaplat Mauritius Limited, Amari Nickel Holdings Zimbabwe Limited v. Zimbabwe Mining Development Corporation, The Chief Mining Commissioner, Ministry of Mines, Zimbabwe, ICC Case No. 17720/AMP/MD/TO

Amari Nickel Holdings Zimbabwe Limited v. Zimbabwe Mining Development, ICC Case No. 17720/AMP/MD/TO

Bernhard von Pezold and other v. Republic of Zimbabwe, ICSID Case No. ARB/10/15

Bernhard von Pezold and other v. Republic of Zimbabwe, ICSID Case No. ARB/10/15

Carl Zeiss Stiftung v Rayner and Keller Ltd (No 2) [1967] 1 AC 853

China Agribusiness Development Corporation v Balli Trading [1998]

Conforce (Pvt) Ltd v City of Harare 2000 (1) ZLR 445 (H)

Congentra v Sixteen Thirteen Marine [2008] EWHC 1615 (Comm)

Cruz City 1 Mauritius Holdings vUnitech Ltd and others [2014] EWHC 3131 (Comm)

Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan *[2010] UKSC 46, per Lord Mance SCJ at paragraph 26.*

Goldstein v Conley [2002] 1 W.L.R. 281 at [294]

Heyman v. Darwins Ltd. [1942] App Cas 356

International Quantum Resources Limited, Frontier SPRL and Compagnie Miniere de Sakania SPRL v. Democratic Republic of Congo, ICSID Case No. ARB/10/21 https://www.italaw.com/cases/567

Mandikonza & Another v Cutnal Trading (Pvt) Ltd & Others HH 19-2004

Mike Campbell (PvT) Limited and Others v The Republic of Zimbabwe [2008] SADCT 2

Miminco LLC and others v. Democratic Republic of the Congo, ICSID Case No. ARB/03/14, cf. https://www.italaw.com/cases/3586 (last visited: 22 May 2022)

Mobile Telesystems Finance SA v Nomihold Securities Inc [2011] EWCA Civ 1040

Ndlovu v. Higher Learning Centre HB 86- 2010

Piero Foresti, Laura de Carli and others v. Republic of South Africa(ICSID Case No. ARB(AF)/07/1)

Purslow v Bailey (1704) 2 Ld Raym 1039)

Roseel NV v Oriental Commercial Shipping Ltd[1991] *Dallah v Ministry of Religious Affairs* [2010] UKSC 46.

Soinco SACI & Anor. v. Novokuznetsk Aluminium Plant & Ors.Court of Appeal, England and Wales (Dec. 16, 1997) [1998] CLC 730.

Soleimany v. Soleimany [1998] APP.L.R. 02/19.

Sonatrach v Statoil Natural Gas LLC [2014] EWHC 875 (Comm) and Gater Assets Ltd

TSB Private Bank International SA v Chabra [1992] 2 All ER 245

Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. [1999] 3 ALL ER.

Zesa v. Maposa (2) ZLR 452(S) (1999)

Subsidiary instruments

UNCITRAL Model Law

London Court of International Arbitration (LCIA), Rules, *ICC Arbitration Rules, Article 35.6. 2014 LCIA Arbitration Rule 26.* 2017

New York Convention 1958

Theses and dissertations

Chanaka, N.F., 2014. *An Evaluation of the effectiveness of the Labour Arbitration System in Zimbabwe* (Doctoral dissertation, University of Zimbabwe).

Idornigie, P.O., 2002. The Legal Regime of International Commercial Arbitration. *Unpublished Ph. D. Thesis Submitted to the Faculty of Law, University of Jos.*

Sklenyte, A., 2003. International Arbitration: the doctrine of separability and Competence-competence Principle. *The Aarhus School of Business*, pp.1-3.