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31 January 2020

Clerk of the National Assembly
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Subject: **iResolve™ COMMENTS ON THE ARBITRATION BILL 2020**

We welcome the opportunity to provide our comments on the Arbitration Bill 2020. We concur with the general direction of the Bill despite some shortfall as provided for in our comments. However, due to short notice we have managed to collect only a portion of the comments and we look forward to an opportunity to clarify any pertinent issue raised that may need our further input.

We take this opportunity to commend the work that has been done so far. We also understand the ultimate object of the Bill which for now seems to be to deal issues domestically to facilitate settlement of disputes outside of the courts - to ease up the Judges capacity and hence our comments are aimed to strengthen the tabled Bill.

Together in building our nation!

We therefore humbly submit.
Yours truly,
Madeline C. Kimei
Founder & Principal Director - **iResolve™**
President, **Tanzania Institute of Arbitrators (TIArb)**

COMMENTS ON THE ARBITRATION BILL 2020

GENERAL COMMENTS

1. The Tanzanian arbitration statute is so antiquated that a complete overhaul is required. The Arbitration Act Cap 15 originally known as the Arbitration Ordinance, was enacted in 1932 and was based on the English law of that period. This is an ancient outdated law that dates back to 1887. The provisions of the Arbitration Act are brief, comprising only 32 sections and related schedules. Further provisions are contained in the Arbitration Rules of 1957, made under the Arbitration Act (published in Government Notice 427 of 1957). This Act is largely premised on mistrust of the arbitral process and afforded multiple opportunities to litigants to approach the court for intervention. Coupled with a sluggish judicial system, this has led to delays rendering arbitrations inefficient and unattractive.
2. The Arbitration Bill 2020 covers both international and domestic commercial arbitration and aimed to promote arbitration as a speedy means to settle commercial disputes.
3. Our preliminary view is for purpose of international arbitration or enforcement of foreign arbitral awards it does not appear to be clearly aligned to UNCITRAL Model Law and there is no mention of the New York Convention 1958. The proceedings to set aside an award where Mainland Tanzania is the seat is not clear as well. There are a several issues foreign counsel will look at and raise concerns with it from an international arbitration perspective.
4. The bill proposes disturbingly large number of times when an arbitration matter can be referred to court which increases the room for court intervention. Such interventions will in more ways than one translates into delaying the arbitral process to the effect of defeating the expeditious trait of arbitration.
5. The draft Arbitration Bill is a **copy-paste-search-replace** of the English Arbitration Act 1996. Tanzania should be cautious about this approach because the English Arbitration Act 1996 was drafted for the specific context of the jurisdiction of England & Wales. The English Act was enacted in 1996 (more than 20 years ago), and

there have been calls for its reform / revision. It would be better to model the Tanzanian law on a more modern Act (like the UNCITRAL Model Law).

SPECIFIC COMMENTS

We would appreciate your due consideration of the comments in the below table.

SECTION BRIEF DESCRIPTION	RECOMMENDATIONS	JUSTIFICATION /ANALYSIS
	The Arbitration Act 2020 should be split into three separate statutes: • An Arbitration Act (domestic and international arbitration) • An act establishing the Tanzania Arbitration Centre • An act to domesticate the New York Convention	The NYC seems to have been left out despite Tanzania having ratified the Convention.
Confidentiality	A new provision may be inserted providing for confidentiality of arbitral proceedings unless disclosure is required by legal duty, to protect or enforce a	The Bill is silent on the question of confidentiality. In the Tanzania scenario, wherein arbitrations are usually ad hoc

	legal right, or to enforce or challenge an award before a court. New Zealand AA; 14D. Arbitral tribunal may allow disclosure of confidential information in certain circumstances (1) This section applies if— (a) a question arises in any arbitral proceedings as to whether confidential information should be disclosed other than as authorised under section 14C(a) to (d)); and (b)at least 1 of the parties agrees to refer that question to the arbitral tribunal concerned. (2)The arbitral tribunal, after giving each of the parties an opportunity to be heard, may make or refuse to make an order allowing all or any of the parties to disclose confidential information.	(institutional rules are not applicable), this creates a problem as no specific obligation would bind parties to maintain confidentiality in spite of confidentiality being one the most important factors in parties' choice of arbitration as the dispute resolution mechanism. One solution may be to create a default "opt-in" system, requiring parties to expressly provide for confidentiality in their arbitration agreements, in the absence of which the proceedings shall not be treated as confidential. A default position in favour of transparency could have a powerful impact.

Specialist Bench	Creation of a specialist Bench- Judges hearing arbitration matters should be provided with periodic refresher courses in arbitration law and practice. These courses could be conducted by the IJA.	This will ensure that matters going to the Courts which are subject of arbitration are expeditiously handled by competent judges.
Default rules of procedure	Model rules for ad-hoc arbitrations to operate as the default rules of procedure for arbitrations, unless parties exclude its operation (wholly or in part) by mutual consent at any time. The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules").	Arbitration is popular in India as an ad-hoc rather than an institutional setup, wherein parties regulate the arbitration proceedings themselves. There is hence no data on the number of ad-hoc arbitrations in Tanzania as it is difficult to keep track of these self-running arbitrations without institutional oversight.
Expedited Procedure – as an option not mandatory.	To include provisions to cater to expedited procedure so that it can complement some of the institutional rules in the country, specifically the TIArb Arbitration Rules revised in 2019 which provide for the option of experdited procedures. The Bill should also deal with mandatory	A mandatory expedited procedure for disputes below certain thresholds may work to reduce costs and thereby promote arbitration as an effective dispute resolution mechanism.

	reference in cases of disputes involving smaller claims.	
"Institutional Arbitration "	There is no definition provided for and we recommend that there should be. A high- level committee should be formulated to review the institutionalization of arbitration mechanism in Tanzania.	Institutional arbitration is a specialized institution with permanent character and assumes the function of aiding and administering the arbitral process as provided by the rules of Institutions. The institution facilitates and the panel of an arbitrator who arbitrates the dispute as per the rules of the institution.
s. 3 - **Definition of "Arbitrator"**	The Bill defines an arbitrator as a person who *facilitates* the arbitration. The definition should be amended to reflect the actual meaning of "arbitrator" which is not a facilitative role. To add: *…..includes any emergency arbitrator appointed under—* *(i) the arbitration agreement that the parties have entered into; or*	The term arbitration should not be translated to "Usuluhishi" as the two set out to achieve two different things; and The arbitrator plays a quasi-judicial or adjudicatory role leading to a decision that is final and binding between the parties. Sometimes also referred to as a private judge.

	(ii)the arbitration rules of any institution or organisation that the parties have adopted	
s. 3 **"arbitral awards"** includes an interim award	To insert the following definition *"means a decision of the arbitral tribunal on the substance of the* address *dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section ___"* *Or* "arbitral award" means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award	The provided definition is not definitive of what an arbitral award is.
s. 3 **Definition of Foreign Award** – the definition establishes 3 factors for an award to be foreign: a) It's made outside the UR; b) For a dispute between persons; and c) Binding to Mainland Tanzania by a reciprocal arrangement from an international	Let us provide for a clearer definition by including the words "non-domestic".	The term "non-domestic" appears to embrace awards which, although made in the state of enforcement, are treated as "foreign" under its law because of some foreign element in the proceedings, e.g. another State's procedural laws are applied.

agreement to which UR is a party		
s. 3 **Definition of International Commercial Arbitration –** To achieve this condition the Arbitration must be on a relationship considered as commercial under the law in force in Mainland Tanzania. The law which to such a consideration is however lacking.	The bill should define or otherwise address what relationship, contractual or not, is considered as commercial for purposes of arbitral practice.	Reference to laws in force in Mainland Tanzania which can have the intimated consideration (such as the Companies Act, the Tanzania Investment Act, and the Business Activities Act) provide no answer. Section 4(b) of the Written law (Miscellaneous Amendments) (No.3) Act of 2019 offers a definition of commercial activities which would render the scope of international commercial arbitration under the bill impractically narrow at best.
New definition for "**Consumer Arbitration Agreements"**	To introduce a new definition for "consumer arbitration agreements"	Arbitrations involving consumers and parties with significant differences of resources raise issues about jurisdiction and about how arbitrators should handle the case generally.
Section 3 Definition of "arbitral tribunal" "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;	The definition is aligned to the 2006 UNCITRAL Model Law. However, the concept of Emergency Arbitrator should be considered. The Bill is silent on this issue of 'emergency arbitrator' despite rules of the existing arbitration institutions in	There is need to accord legislative sanctions to rules of institutional arbitration which recognize the concept of an 'emergency arbitrator'. By inserting, immediately after the words "permanent arbitral institution" in the definition of "arbitral tribunal" in

	Tanzania having rules for emergency arbitrators. There is need to broaden the definition of "arbitral tribunal" under the section 3- to clarify the status of orders made by emergency arbitrators. This will ensure such orders are enforceable under this new regime.	subsection (1), the words ", and includes an emergency arbitrator appointed pursuant to the rules of arbitration agreed to or adopted by the parties including the rules of arbitration of an institution or organisation";
Section 3 Section 3 of the Bill, Definition of **"Party"**	There is no need to expand on the definition of "Party" to include and recognize persons claiming through and under "a party"	Even non-signatories to an arbitration agreement may be able to take part in arbitration proceedings as long as they are proper and necessary parties to the agreement. This broader definition should be included explicitly for the avoidance of any further ambiguity.
s. 6 – meaning of **"seat"**	The definition should go an extra mile to distinguish between the "[legal] seat" from a "[mere] venue" of arbitration.	

Section 8 Agreement to be in "writing"	We recommend Option 1 (Hybrid Approach) provided for under the UNCITRAL Model Law - This option preserves the requirement that arbitration agreements be "in writing", but redefines the requirement to include agreements concluded by any means (orally, by conduct or otherwise), as long as their content is recorded in any form. s.8 (7) should include the following text *"…..whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means".*	It would ensure that our international arbitration regime remains progressive, particularly as other jurisdictions have already moved in this direction.
Section 12	Section 12 of the Tanzania Arbitration Act has been taken, practically word-for-word from the India Arbitration and Conciliation Act 2015, which is based on Article 8 of the Model Law. It is odd to include this provision because it duplicates the provisions in Section 13 of	

	the Tanzania Arbitration Act – the approach is different, but the effect is the same.	
Section 15 Law of Limitation	The applicable limitation period should be the rules of the law governing the dispute.	This reform will have a significant effect on arbitration practice when the question arises as to whether the applicable limitation law should be that of the foreign law governing the dispute or the law of the forum (i.e. Tanzania)?
S. 20 **Failure of Appointment Procedure**	To borrow leaf from India, After Amendment of the Indian Arbitration and Conciliation Act- section 11 provides for a default procedure i.e. appointment of arbitrator by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court in case a party fails to appoint an arbitrator or the two appointed arbitrators fail to agree on the third arbitrator. 1. Appointment of arbitrator shall now be made by the Supreme Court or the High Court, as the case may be,	• The UNCITRAL Model Law also does not disallow for such a possibility, as is evident from a combined reading of Articles 6 and 11, which suggests that any suitable authority as prescribed by the legislature, not necessarily courts, can appoint arbitrators. • That such power is delegable to an arbitral institution and believes it will provide greater incentive to the Courts to delegate the power of appointment (being a non-judicial act) to specialized, external persons /institutions. Not only will such delegation leave space for the

	instead of the Chief Justice of India or the Chief Justice of the High Court. This development reflects the position in other jurisdictions, including Singapore and Hong Kong, where the role is played by the president of the SIAC Court of Arbitration and the HKIAC respectively (Singapore International Arbitration Act 2002 (Cap 143A), s 8(2); Hong Kong Arbitration Ordinance (Cap 609), s 13(2)).	judiciary to adjudicate other matters but will also speed up the process of appointment of arbitrators, by reducing one time-taking step from this process. • Not only will such delegation leave space for the judiciary to adjudicate other matters, but will also speed up the process of appointment of arbitrators, by reducing one time-taking step from this process. • This is indeed a pro-arbitration development in India. It is hoped that this process is systemized whereby the parties can approach designated arbitral institutions directly for such purpose, instead of the court acting as an intermediary for every such appointment.
Section 30(2) **Application to court for adjustment of arbitrators' fees –**	The subsection should be amended to preserve the sanctity of the agreement between the appointing party(ies) and the arbitrator which would also contain the agreed fees.	I think that the courts' power to modify the arbitrators' fees amount should be more regulated. Under this provision they have complete discretion to make adjustment which may lead to drifts and discourage some high-profile arbitrators. I understand, however that the idea is to render arbitration more affordable.

		The appointment of an arbitrator is a contractual arrangement and fees are as subject of an agreement between the appointing party(ies) and the arbitrator. Referring the matter to the decision of the court renders the agreement futile.
Section 32	The determination of competence should be done exclusively by the tribunal as afforded by section 32 of the Bill. Having such power also vested in the court under section 34 of the Bill will complicate arbitral proceedings by potentially having two conflicting decisions on the issue with no way to resolve the conflict.	Again, this will add to potential delays of the arbitral proceedings to finally defeat the general principles in section 4(a) of the bill. Any such challenge of substantive jurisdiction should only be entertained by the court as a ground to challenge the consequent award as under section 69 of the Bill.

Part VI- Section 32-34 **Jurisdiction of Arbitral Tribunal**	Our view is that negative jurisdictional rulings should, like positive jurisdictional rulings, be subject to judicial review following reasons:	(a) To disallow judicial review in negative jurisdictional ruling cases shuts out parties' agreed form of dispute resolution (i.e. arbitration) and undermines the essence of what they agreed to avoid (i.e. litigation in national courts). (b) It is inconsistent to deny judicial review of negative jurisdictional rulings, when judicial review of positive jurisdictional rulings is permitted. Injustice can just as easily arise in cases where a tribunal makes an erroneous negative jurisdictional ruling. (c) Potential claimants may favour a seat where judicial review of negative jurisdictional rulings is possible.
Section 34 **The courts determination of the arbitral tribunal's jurisdiction –** with section 32 empowering the tribunal to decide on its own substantive jurisdiction this section appears redundant and potent towards defeating the finality aspect or trait of arbitration by allowing appeals.	The section should be removed in favor of section 32.	
s. 46 (2) (c) (ii) …..*and for that purpose, the tribunal may*	Should this be reading "Court"?	

authorize any person to enter any premises in the possession or control of a party to the arbitration;		
s. 47 (8)		It is unfortunate to have this limitation when we know that Court of Appeal Judges are more experienced lawyers.
Section 51 Liberty to compound interest	There is need to clarify the ambit of powers of the arbitral tribunal to award compound interest.	
Section 58 Power to withhold award in case of non-payment	There should be the option of allowing one of the parties at their own accord to pay the full outstanding fees and expenses of the arbitral tribunal for the release of the Award.	Arbitrators' fees being a subject of agreement between the parties and the arbitrator(s), the power of the court to adjust the arbitrators' fees is an abrogation on the principles of contracting. The court should in no way interfere with the fee agreement which the arbitrator(s) may have reached with the parties at the beginning of the arbitration; To minimize the supervisory role of the courts in arbitral processes. The provisions of the Bill give room for substantial intervention by the Court in the arbitration process.
Section 58(2)		The subsection should be amended to preserve the sanctity of the agreement

Determination of the arbitrators' fees – like under section 30(2) this section also gives rooms for the court to adjust the amount to be paid to an arbitrator in fees and expenses the former being a subject of agreement.		between the appointing party(ies) and the arbitrator which would also contain the agreed fees.
Part VIII – S. 61 – 67 Regime for costs	The new provision provides comprehensive provisions for costs regime to both arbitrators as well as courts.	This will ensure minimizing frivolous and meritless litigation/arbitration, thereby increasing the efficiency and overall speed and efficacy of the arbitral process. This leads to the introduction of the 'costs follow the event' regime in Tanzania.
s. 68 (3)		This paragraph may raise confusion. Article 78 deals with enforcement issues (it reproduces the New York Convention on enforcement provisions. More precisely article 78(a)(iv) deal the possibility to refuse enforcement when "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration". Is this article saying the same thing? If so, the confusion relies on the fact that article 78

		allows to separate the parts of the award that are submitted to arbitration from those that are not and then enforce the 1st. However, this article 68-3 does not.
s. 69 English Arbitration Act 1996 (Appeal on a Point of Law), which appears as s.71 Tanzania Arbitration Act 2020		This provision might alarm potential users of Tanzanian seat, who may be concerned about the threat to finality of an award. It should be noted that while s69 has generated a lot of discussion and concerns, it has not posed a serious threat to the use of an English seat. But, this should be read in the context of a well-established seat (England & Wales) v a newer seat (Mainland Tanzania) – the more experienced English judges are able to limit the applicability of s69 (and apply the safeguards in the Act) as intended by the law's drafters. Would this be the case in Tanzania?
Section 78 on Enforcement of Arbitral Awards	As I understand it, Tanzania has ratified the New York Convention, but has not domesticated it. This is a good opportunity to domesticate the Act by passing separate legislation. Section 78 attempts to recreate the text of the New	

	York Convention, but does so incorrectly. • The use of 'may' dilutes the thrust of the New York Convention. The logic is 'shall…unless' • It is not clear what is happening in Section 78(1) – which party has the obligation? The party seeking to enforce, or the party resisting enforcement? • What is the difference between Section 78(1) and Section 78(5) – as currently drafted, they both seem to end with the award not being enforced! • It would be best for Tanzania to domesticate the New York Convention. However, failing that, Tanzania should draft robust provisions for the enforcement of	

	arbitral awards, which are faithful to the spirit and letter of the NYC.	
Section 81 Interest	To add item (c) which is costs awarded /ordered by the Tribunal in the proceedings.	For avoidance of doubt as to whether an arbitrator can award interest on legal costs and other costs awarded under section 61 (1) (C)
Section 88 Accreditation matters	To recognize professional institutes providing for accreditation of arbitrators.	The Bill provides for international standards which conflict with the domestic reality. However, it may not work effectively in an Indian context as such detailed disclosures would effectively reduce the existing pool of available arbitrators.
Part XIII – Consequential Amendments	It will be more effective to separate entirely those amendments made under Part XII as they deal with other forms of ADR not particularly arbitration.	There needs to be developed an ADR Policy for Tanzania which will guide to the directions of such legislations especially the Criminal Procedure.
s. 98 (4)	Non-criminalization of the offence is welcomed.	A monetary penalty or fine should be sufficient. However, the threshold of liability is too high and may threaten the growth and application of arbitration and other dispute resolution practitioners in the country. The action of practicing

		without accreditation should not amount to a criminal offence.
Third Party Funding	Room should be availed for third-party funding of arbitration especially international arbitrations.	There is a general prohibition in Tanzania against providing funding to third parties in order to conduct litigation, as contained in the common law doctrine of champerty. In the UK, the common law rule on champerty has not been abolished by statute, but it is recognized that it is not against public policy for a third party to fund litigation. Other jurisdictions, including the UK, Australia, and the US have moved away from the doctrine of champerty. The reasons for this are concisely summarized by Lord Jackson in his report entitled Civil Litigation Costs: Final Report as follows: (a) Third party funding provides an additional means of funding litigation and, for some parties, the only means of funding litigation. Thus, third party funding promotes access to justice. (b) Although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to

		recover a substantial part of his damages than to recover nothing at all. (c) The use of third-party funding (unlike the use of conditional fee agreements ("CFAs")) does not impose additional financial burdens upon opposing parties. (d) Third party funding will become even more important as a means of financing litigation if success fees under CFAs become irrecoverable. (e) Third party funding tends to filter out unmeritorious cases, because funders will not take on the risk of such cases. This benefits opposing parties.
THE END		