

**Keynote by Ms. Madeline Kimei**  
**Tumaini University Dar es Salaam College (TUDARco)**  
**2nd Annual TUDARco Celebrations (TW2022)**  
**10 November 2022**

**Theme: ADR for Prosperity of Community, Commerce and Industrialisation in Tanzania:**

Good morning,

The Dean School of Law and Justice, Tumaini University Dar es Salaam College – Dr. Mtaki for his invitation to speak at this auspicious symposium;; Prof. Hosea, President of the Tanganyika Law Society; Dr. Mtaki; Adv Goodluck Chuwa, Deputy of the IJA-Lushoto; Mr. Kanyamale (for gracefully blessing today's event); Ms. Luckiness Jangu (a law school mate and friend); Prof. Angelo Mapunda our moderator;

Distinguished Faculty, Students, Ladies and Gentlemen,

1. It is with great pleasure that I can join you for this eventful day. I have been asked to speak about my views on ***ADR under the Realm of Tanzania Institute of Arbitrators in Commerce and Trade.***
2. The phenomenal economic development in the recent years has generated substantial demand for more sophisticated and effective business disputes resolution mechanisms. The rationale to reform Tanzania's investment regime is to ensure that we can continue to attract the productive, sustainable, and inclusive investment we need to boost economic growth.
3. Tanzania's overall ranking in the World Bank's ease of doing business report has improved to 141 (2020), it still ranks poorly - 71 (2020)- when it comes to enforcement of contracts. With an ever-growing economy aiming to step higher in the ease of doing business scale worldwide, the Tanzanian commercial and judicial landscape has seen a major overhaul in the past three year.
4. Our Constitution the supreme law of the land, Article 107A has encouraged the exploration of alternative ways of resolving disputes outside the courthouse, suggesting that there is a "rich variety of different processes, which, I would submit, singly or in combination, may provide far more 'effective' dispute resolution.
5. *As practising advocates, counsel are increasingly called upon to employ different models of advocacy as we move through the diverse terrains of litigation, mediation, arbitration, expert determination, conciliation and facilitation. We must be ready to shift gear, more so now than ever.*

6. And so, I find it to be timely, for the University, School of Law and Justice to have dedicated today to the theme stemming from Alternative Dispute Resolution. I recall in 2021, TI Arb was invited to take part in review of the LLB Curriculum on ADR at the TUDARCo.
7. Over the last two decades ADR has become a cornucopia of processes, procedures, and resources for responding to disputes, all of which supplement rather than supplant traditional approaches to conflict.
8. Some scholars have argued that it is restrictive to define the "A" as "alternative" dispute resolution which would usually mean a method that is not the courts. And that taking a systems approach broadens its application hence tagging it "Appropriate" dispute resolution considering all the possible responsible options for conflict resolution that are relevant for a given issue. So then, comes the advent thought of dispute system design which involves "the design of processes and of systems for preventing and managing disputes." It is not merely making a decision about using a particular ADR method to resolve a dispute. Instead, it means creatively crafting ways to resolve novel, complicated disputes that feature diverse and competing variables and interests.
9. The term can refer to everything from facilitated settlement negotiations in which disputants are encouraged to negotiate directly with each other prior to some other legal process, to arbitration systems or minitrials that look and feel very much like a courtroom process. Processes designed to manage community tension or facilitate community development issues can also be included within the rubric of ADR. ADR systems may be generally categorized as negotiation, conciliation/mediation, or arbitration systems.
- 10.—ADRs are an integral part of the policies aimed at improving access to justice. In effect, they complement judicial procedures, insofar as the methods used in the context of ADRs are often better suited to the nature of the disputes involved. ADR can help the parties to enter into dialogue where this was not possible before, and to come to their own assessment of the value of going to court.

*To justly address the ADR under the Realm of Tanzania Institute of Arbitrators in Commerce and Trade; a good starting point would be getting to know the institution, TI Arb.*

### **TI Arb History**

11. The Tanzania Institute of Arbitrators (TI Arb) is an arbitral institution of choice for commercial arbitration and other dispute resolution. TI Arb mission is to promote and

facilitate expedient resolution of commercial dispute through mediation, adjudication, arbitration, and other ADR mechanisms.

12. TIArb is guided by the following core values; integrity; innovativeness; transparency; impartiality; efficiency; and service excellence.
13. In 1995, the National Construction Council (NCC) consulted the A.G. Chambers and the Tanganyika Law Society regarding the establishment of a commercial arbitration institution. Originally, NCC had been resolving construction-related disputes only. However, it saw the importance of spear heading the establishment of an institutional framework for resolving not only construction related disputes but also commercial disputes. Hence, on 6 July 1995, NCC organized a brainstorming meeting involving 20 invitees, which subsequently formed the Steering Committee, to develop a framework for the settlement of all types of commercial disputes. The Steering Committee prepared a draft constitution, which was reviewed by the first General Meeting held on 25 October 1995, as the guiding framework of a new arbitration organization. On 15 July 1997, TIArb was registered by the Registrar of Societies.
14. Two years later, on 10 December 1999, the Tanzania Institute of Arbitrators (TIArb) was formally launched by Honourable Francis Nyalali (the former Chief Justice of Tanzania).
15. The main function of TIArb is to promote and facilitate the resolution of commercial disputes in Tanzania. Before its establishment, the National Construction Council (NCC) had been undertaking such a responsibility for both commercial and construction related disputes only.
16. In terms of governance structure, the Institute has an 8-member governing council, headed by the office bearers who are the President, VP, Secretary and Treasurer. The management of TIArb is overseen by an Executive Secretary who is assisted by administrative assistance, accountants, and marketing personnel.
17. For the period July 2021- June 2022, TIArb has had a total of 277 members: 7 Fellows, 19 Members and 251 Associate members from diverse backgrounds, such as Engineering, Quantity Survey, Architects, Law, Pharmaceutical, Academics, Accounts, IT Technicians, Project Management and Social Work. There was a total of 11 members who upgrade from Associate level to becoming Member and again from Member to Fellow were 3.
18. The TIArb Panel of Arbitrators currently consists of 18 accredited members. The panel has members from different professions, 12 lawyers, 2 Engineers, 1 Quantity Surveyor, 2 Retired Judges and 1 a dual profession member who is an Engineer and Advocate as at 30 June 2022 however currently the number has dropped from 52 in 2020 to 18 in June 2022 due to accreditation requirement and non-payment of Annual subscription fees required.

## Alternative Dispute Resolution

19. In 2020 various alternative dispute resolution (ADR) mechanisms were introduced and codified by a new legislative enactments and amendments in Tanzania solely aimed at developing, promoting and increasing the application of ADR mechanism in resolution of disputes. The pillars of the ADR system stem from the Civil Procedure Code<sup>1</sup> ("CPC") and the Arbitration Act,<sup>2</sup>. Also, there were the amendments to the CPC under section 64A of the Miscellaneous Amendments<sup>3</sup> which mention only "*conciliation, negotiation and mediation*". The new 2020 Arbitration Act is supplemented by the Arbitration (Rules of Procedure) Regulations, 2021<sup>4</sup>; Tanzania Arbitration Centre (Management and Operations) Regulations, 2021<sup>5</sup>; Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators<sup>6</sup>; and Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation)<sup>7</sup>.

## Mediation

20. ADR as is the often-used acronym, has grown markedly not merely in the footsteps of its international popularity, but as a frontrunner in a global emphasis on timely and cost-effective dispute resolution, *and no ADR process more so than mediation*. The "central quality of mediation," namely "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

21. Mediation is the sleeping elephant in Tanzania!

22. The hot debate now, is that international commercial mediation could replace international commercial arbitration because it has grown its teeth after the United Nations Convention on International Settlement Agreements Resulting from Mediation (dubbed the Singapore Convention) which came into effect in 2019.

23. The Convention was adopted to address the need for and the manner through which agreements resulting from mediation could be enforced internationally and thus adding yet another reliable and potentially preferable mechanism for resolving

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<sup>1</sup> Cap 33 R.E 2019

<sup>2</sup> Cap 15 R.E. 2020

<sup>3</sup> Written Laws (Miscellaneous Amendments) Act, No. 1 of 2020 - Section **64A**-(1) "*Without prejudice to the provisions of section 64, parties may settle their disputes out of court by way of conciliation, negotiation or mediation. (2) For purposes of facilitating conciliation, negotiation and mediation, the Minister may make rules prescribing for procedures, forms and other matters relating to conciliation, negotiation and mediation.*"

<sup>4</sup> G.N 146 published on 29 January 2021

<sup>5</sup> G.N.149 published on 29 January 2021

<sup>6</sup> G.N. 148 published on 29 January 2021

<sup>7</sup> G.N. 147 published on 29 January 2021

international commercial disputes. Settlement agreements that would normally give rise to a cause of action for breach of contract can now be recognized as independently enforceable under the Singapore convention, eliminating the need to pursue them as a civil or commercial matter of contract violation. The Singapore Convention gives birth to such guarantee with mediated settlement agreements, just as it does with the enforcement of a court judgment or an arbitral award.

24. TI Arb offers administration of mediations and maintains trained mediators among its membership. In 2021, the first set of TI Arb Mediation Rules 2021 were published with aim to increase its uptake and application.

### **Adjudication**

25. The disputes nature of the construction industry ("CI") is universal. There is no uniform common law definition of adjudication. It differs across jurisdictions. Adjudication is concluded by an adjudicator, whose decision is binding on the parties until the dispute is finally determined by legal proceedings, arbitration or by agreement. The adjudication method is highly depended upon as an appropriate option and used in resolving construction industry disputes. Unlike in the UK, there is no separate procedure for the enforcement of Adjudicators decisions in Tanzanian courts.
26. Due to a growing number of construction adjudication cases, the TI Arb Adjudication Rules 2021 were released to ensure that the adjudicators in cases administered by TI Arb along with the parties and/or their counsels have procedural guidance to support the process.

### **Proliferation of ad hoc arbitration.**

27. Is ad hoc arbitration preferable to institutional arbitration, particularly in the Tanzanian context? Notably, the trend in Tanzania has been predominantly ad-hoc arbitrations, although I have no statistics to prove this. However, by its nature, ad hoc arbitration cannot generally be quantified. I believe arbitral practice in the field of commercial arbitration is in large measure little known because it is not published and it is conserved, by certain arbitral institutions, for a small number of initiates who alone have the right to know this practice. The problem with ad-hoc arbitration, therefore, begins with the replica bit. Most arbitrators in Tanzania are retired judges and the pace at which they function is frustrating. Subject experts as arbitrators are rare here. It could take years for a dispute to reach an awards stage. In arbitration, the ad hoc nature of arbitration and its finality and privacy militate against overall consistency. No general means yet exist to ensure that arbitral decisions are consistent. The preference

for ad hoc arbitrations by Indian parties is not limited to arbitrations where the amounts in dispute are small. But also, those billion-dollar construction disputes etc.

28. **Institutional arbitration** in Africa is a very recent concept. The first known arbitral institution in Africa is the Cairo Regional Centre for International Commercial Arbitration (CRCICA) which was set up in 1979 (compared to ICC Court of Arbitration created in 1919). There are currently 92 arbitral centers in over 39 African countries. Most of these centers are located in countries that are the signatories to the NY Convention. However, a very few of those institutions have been trying to boost arbitration practice in accordance with the international best practices (Arbitration Foundation of Southern Africa (AFSA); CRCICA, KIAC, LCIAC and NCIA).
29. In order to promote institutional arbitration in Tanzania, it is imperative that: (a) Tanzanian parties involved in domestic and international arbitrations are encouraged to shift to institutionally administered arbitrations rather than resort to ad hoc arbitrations; and (b) Tanzania becomes a favoured seat of arbitration for international arbitrations, at the very least in matters involving Tanzanian parties. Broadly, it has been accepted that ad hoc arbitration is more effective in cases where parties to a dispute cooperate with each other and can mutually agree to constitute a tribunal and select arbitrators to resolve their dispute.
30. The development of arbitration brings further economic benefits to Tanzania. International arbitration invariably brings overseas parties to Tanzania, which will benefit not just the legal and ADR professionals, but also other service industries. It also saves valuable judicial resources and therefore understandably the settlement of disputes by ADR is a key emphasis in the Civil Justice Reform in Tanzania.
31. An enhanced arbitral environment will help further develop our arbitration services. We already have a robust and innovative legal system, an independent Judiciary, as well as a growing pool of experienced professionals (including lawyers, accountants, engineers, architects, and surveyors and many more). Arbitration awards made in Tanzania are enforceable through the courts of most of the world's trading economies by virtue of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention).
32. A successful arbitration system requires a regulatory framework which controls the legal status and effectiveness of arbitration in a national and international legal environment. This regulatory framework must give effect to the agreement to arbitrate, the organization of the arbitration process and the enforceability of the arbitration award.
33. The AA2020 R.E 2020 is a lucid, coherent, and cohesive -18 January 2021. And supplementary regulations came into force in February 2021, for the Accreditation and Procedural Rules (optional). Other features of this new piece of legislation include:

- a. UNCITRAL Model Law adopted with minor diversions which mirror to a great extent the UK Arbitration Act 1996 by introducing several innovations unique to English law.
- b. The contents intermediate effectively between legal regulatory principles and the practical realities. The fundamental principles of party autonomy, the validity of arbitration agreements, role of the courts in cooperation and assistance, procedural fairness requirement and limited scrutiny of awards and the need for finality are everywhere in the statute provisions. Such principles are not new for Tanzanian law however, the codification of them give it new light and stronger presence.
- c. Section 81 – relating to Immunity of arbitral institutions “provides for immunity for institutions for acts or omissions in the discharge or purported discharge of his functions as an institution except in case of bad faith”.
- d. The statute also gives payment of and liability for arbitrator fees and arbitral costs a relatively important place in the regulatory framework
- e. In the old regime, the court would stay proceedings when arbitration agreement is invoked and sometimes on the conditions that a defendant should not have taken further steps such as filing of a Defence. Section 15 of the new Act elaborates rules regulating stay of proceedings and hence the principle has now been codified. This provision contains innovative feature requiring parties to have exhausted other dispute resolution procedures. We are yet to observe the direction of the court on this feature.
- f. Tanzania has been a party to the 1958 New York Convention since 1 January 1965. Section 83 of the Act makes formalist reference to the New York convention sets out provisions under which the courts can refuse to enforce and award where, among others: (a) incapacity; (b) A party against whom it is to be enforced was not given proper notice or was unable to present its case (c) tribunal lacked jurisdiction (d) procedural irregularity (e) award not binding or set aside or suspended by a competent authority or under the law. S.83 (5) (b) incorporates the ground for refusal of recognition or enforcement of an arbitral award on the basis of public policy. The new Act does not provide a definition of “*public policy*” and hence left to the interpretation of the Tanzanian courts. The recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration (s.78(5)(a)).

34. As a result of the uptake and to gain competitive advantage, modernizing arbitration rules became our priority, a set of new TI Arb Arbitration Rules came into effect in August 2022. I would like to highlight some important features of the 2022 Arbitration Rules; Availing special procedures – schedule of arbitration fees and costs, expedited

proceedings, simpler filings, multi-party references, consolidation, digital evidence; and provides for a default seat of the arbitration is Dar es Salaam. The innovations of the 2022 Rules certainly place the TI Arb at the forefront in terms of efficiency and flexibility, following the steps of other important arbitral institutions that renewed their rules in the past couple of years.

## Conclusion

35. I want to end if I may by returning to the following key statements:

- According to the Queen Mary University and White & Case, International Arbitration Survey the top influences on the choice of arbitration institution are neutrality “internationalism”; reputation/recognition and arbitral rules. On another leg, the top influences on the choice of seat of arbitration are formal legal infrastructure; the laws governing the substance of the dispute; convenience and general infrastructure.
- To not undermine the necessity to establish a pro arbitration judiciary (supportive judiciary).
- To continue Strengthening synergies among key stakeholders (Judiciary and Bar Associations/Law Societies and other arbitration institutions); I have advocated for the need to establish an Arbitration Promotion Council - an autonomous body having representation from various stakeholders for purposes of grading and advising arbitral institutions.
- Leveraging on the development of mediation service by offering hybrid services (Med-Arb/Arb-Med). This is the process of combining mediation and arbitration. This process involves the same person acting both (i) as a mediator in seeking to facilitate a settlement between the parties, and (ii) as an arbitrator to determine the issues in dispute and issue a final and binding award.
- Lastly, as part of its strategy, the digital revolution will need to be accommodated by the institute so as to deliver its services to the end users efficiently and cost effectively. The use of the 4<sup>th</sup> Party, technology therefore becomes a necessity in assisting in the administration of alternative dispute resolution.

36. On this note, ADR under the realm of the Institute has truly begun to flourish and based on the number of arbitration cases administered since its inception, the SOAS Arbitration in Africa Survey 2020 by Prof. Emilia Onyema, ranked TIARB at 6 with 89 cases administered under its Rules and was hence the top ten African arbitral centres.



37. In this regard, as President of the Tanzania Institute of Arbitrators, I would do whatever I can to support, and to realise our common goals. Finally, may I wish you a very successful symposium.

Thank you very much.

MADLINE KIMEI

President, Tanzania Institute of Arbitrators (TIArb)

10 November 2022