So I was at a bar this weekend and at our table everyone was enjoying “a cold one”, some soda and others well yes a cold beer. All of a sudden a fight of *“words”* broke between friends and as it was about to calm down one said they should “arbitrate” hahaha! yes as you can imagine a very lengthy lecture followed on what an arbitration is etc well hence this article. You see entering into real estate transactions in today’s litigious society without taking advantage of an arbitration clause is like driving a car without a seat belt: it is a dangerous and unnecessary risky. However, most people just cruise through this “Arbitration Clause” part of the contract without really understanding what is happening “there”.

Suing someone is very expensive, especially in modern time, and it takes a lot of time…and is expensive…and takes a lot of time…You get the Point. Going to court and venturing into the intricate court system is a very serious trip into the Legal Twilight Zone so to speak, where no one is really certain as to what will happen once the battle ends. You add the huge costs to that uncertainty and the amount of time it would take until the matter is finalized, which is a lot. Hence arbitration was born.

To understand the theory behind arbitration and how it potentially relates to your real estate transaction, you will need a little background on the subject.

What is Arbitration

ARBITRATION is a lower cost and quicker alternative to the court system. It is one type of Alternative Dispute Resolution (ADR). It was designed to reduce both the time and money required if you were to go to court. You can still have a lawyer, but the process was designed to give every person their “day in court” at a lower cost and quicker pace. Instead of a trial, arbitration is an informal hearing which takes place in a conference room with the arbitrator, the parties and their lawyers. Instead of a judge, you have an arbitrator decided upon by both, cases are presented, and a ruling is made. In Arbitration the chances are you will get an expert on the matter as an arbitrator because, even engineers and people of other professionals or lawyers practicing only real estate law are judges/arbitrators unlike in court where judges deliver judgment in all spectrum of law. There is also neutrality, privacy and procedural flexibility in Arbitration, where as in court the procedures are the same but in arbitration even though there are rules in conduct of arbitration (such *The Tanzania Institute of Arbitrators Rules, IBA rules, LCIA Rules, UNCITRAL Arbitration Rules(as revised in 2010), LCIA-MIAC Rules, The East African Court of Justice Arbitration Rules, Court of Justice (COMESA) Arbitration Rules*) there is room for flexibility. Arbitration can be done by an institution or adhoc. There are number of centers throughout the world that practice arbitration. In Tanzania, apart from the law practitioners of various law firm and individuals practicing Arbitration every day, we have the Tanzania Institute of

Arbitration. Other countries for example in Mauritius there is MIAC-Mauritius International Arbitration Centre in Mauritius ,CRCICA-Cairo Regional Centre for International Commercial Arbitration in Egypt, LRCSCA-Lagos Regional Centre for International Commercial Arbitration in Nigeria, CIA-Chartered Institute of Arbitration in Kenya, NCIA - Nairobi Center for International Arbitration- in Kenya, CADER- The Centre for Arbitration and Dispute Resolution in Uganda, LCIA- London Court of International Arbitration in England and KIAC-Kigali International Arbitration Centre in Rwanda. Hence as you can see, arbitration is widely practiced across the globe and is becoming the preferred measure is settling disputes.

These centers have proved successful and some have become the pinnacle of arbitration. However, occasionally, as it is always in other professions, you will hear a lawyer say: “But I had one arbitration that ended up taking longer than litigation.” So what! Such statements also mean that the reverse is true: most of the time arbitrations are quicker than litigation. Admittedly, an unusual turn of events may occur that causes a particular arbitration to be as expensive or as time-consuming as litigation. But, such exceptions merely prove the rule: arbitration almost always is quicker, less expensive, and more efficient, convenient, and civilized than litigation. Just as importantly, arbitration affords the parties in a real estate dispute a tremendous advantage that a court not always offers: the opportunity to have the dispute decided by a person who possesses legal expertise in real estate law and who is also intelligent, fair, and conscientious.

In your real estate transaction

In most contracts, in Tanzania these days have a clause that opts for Arbitration as provided for under the Arbitration Act, Cap 15 R.E. 2002. The clause will read like this *“All disputes and controversies arising out of or relating to the performance of this Agreement which cannot be settled by mutual agreement may be referred to a single arbitrator in accordance with the provisions of the Arbitration Act of Tanzania”.* This clearly says that the parties have agreed to live the court system and opt for arbitration proceedings which are fast, cheap and binding. The arbitration clauses are recognized worldwide, the New York Convention of 1958 of which Tanzania has ratified, under Art II, recognizes the arbitration agreement and article II recognizes the enforcement of the award (Also See third Schedule of the Tanzania Arbitration Act). Other recommended clauses are such as ICC-*“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”* The LCIA recommends the use of *“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration*

under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three].The seat, or legal place, of arbitration shall be [City and/or Country].The language to be used in the arbitral proceedings shall be [ ].The governing law of the contract shall be the substantive law of [ ].” These pertains to international commercial agreement but can be made to suit the local circumstances and they have been done to such as seen in most Tanzania Real estate contracts.

The clause, as you can see above, is a contract in its own is a contract so to speak, for the parties to a contract agree to arbitrate. Even if the other parts of the contract may be in contention, this “arbitration” part of the contract will stand ground in court. It’s that “mighty”.

You need to be careful on choosing how you resolve your dispute, most people have a clause for arbitration and it only seems “fancy” that is there but do not know the implication of it. What people don’t know is that once the arbitrator(s) have been picked and the proceedings have been finalized, the award that is given is final. There is no appeal to the award that is given for the parties have agreed to subject themselves to the “finality playground” of arbitration. It is the law that, when the award if filled at the High Court for execution, it will be enforceable as if it was a decree of the Court. You can only appeal in relation to the proceedings for example as stipulated under the Arbitration Act, where an arbitrator or umpire has misconduct himself or an arbitration or award has been improperly procured and the award will be set aside by the High Court.

What you should know

When opting for arbitration, even though it’s the best way to solve dispute, you should be keen to remember that one disadvantage of arbitration is the lack of any right to appeal. The arbitration process lacks a procedural safeguard against erroneous determinations. In court, if a judge makes a mistake, the parties can appeal the decision to the Court of Appeal for review. In arbitration, the arbitrator’s decision is final and cannot be appealed.

But (this is a big BUT) remember that finality is a great practical benefit. Remember also: most courtroom fact-finding errors rarely rise to the level of reversible unreasonableness; judicial errors are not reversed unless prejudicial; appeals are expensive; most appeals do not succeed; and, successful appeals too often result in the dubious “new trial” reward of having to repeat the same expensive process. Advocates who would sacrifice the benefits of arbitration on the holy grail of appellate review fail to acknowledge a more pragmatic explanation of an adverse award: if they could not persuade an astute arbitrator (or, in large cases, a panel of three able people), perhaps they did not deserve to win. In sum, the right to appeal is vastly overrated.

Hence, you need to consider what will be important to you if a dispute arises. For most of us,well, when we sing a contract ,we only look at the money we will earn or the house we will build (“happy mood”), you forget the unknown “sad mood” side of the transaction. That it might go wrong somewhere before the “final destination”. The final decision on whether or not to initial an arbitration provision by having a clause in your real estate contract depends upon your view of the advantages and disadvantages of arbitration. There is no “right” answer.

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