



# INSIGHTS

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Insights is a monthly newsletter from CG Engineering Consults with news in Engineering, Contract Management and Dispute Resolution.





**DISPUTE**

**RESOLUTION**

# ROLE OF COURTS IN ARBITRATION: INTERNATIONAL PERSPECTIVE AND UGANDAN CONTEXT.

By: **Gavamukulya Charles, MCI Arb, AICCP**



## Introduction

**A**rbitration is always presented as an Alternative Dispute Resolution (ADR) mechanism where parties do not have to go to court to resolve a dispute and rather submit the dispute to a neutral third party who renders an award. The key question that arises then is whether the courts have a role in arbitration and if so, what the extent of this role is.

In this article, we shall delve into the role of courts in

arbitration from both an international and domestic Ugandan perspective. The international perspective will be based on the UNCITRAL Model Law while the domestic Ugandan perspective will be based on the Arbitration and Conciliation Act 2000.

## International perspective with the Model Law

The United Nations  
Commission on International

Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (herein referred to as “the Model Law”) outlines the role of courts in arbitral proceedings. Article 5 of the Model Law points out specific circumstances where courts can intervene in arbitration, limiting their interference to supporting the process. Furthermore, the Model Law does not allow judicial supervision on procedural decisions as was held by the Superior Court of Quebec in the case of *Cie Nationale Air France v Libyan Arab Airlines*<sup>1</sup>. As such, there are restrictions to courts’ involvement in international arbitration.

In essence, the Model Law allows for court intervention in certain instances to aid the

process due to the court’s coercive powers which are absent for tribunals. These instances are detailed in Article 6 of the Model Law and can occur at the arbitration’s commencement, during proceedings, and after the arbitrator’s award.

At the beginning of the arbitration, the court aids in enforcing the arbitration agreement, establishing the tribunal, and addressing challenges to its jurisdiction. The courts can be used to enforce arbitration agreements in Article 8(1) of the Model Law by refusing to accept proceedings in court in a matter which is the subject of an arbitration agreement and instead refer that matter to arbitration. Additionally, if there are no clear provisions for constituting the arbitral tribunal

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<sup>1</sup> [2000] R.J.Q. 717 (Quebec S.Ct.).



or applicable institutional rules, courts may appoint arbitrators as stipulated in Article 11(3) of the Model Law and this can be seen in the case of *Montpellier Reinsurance Ltd v Manufacturers Property & Casualty Ltd*<sup>2</sup>. While initial jurisdictional challenges may be handled by the tribunal, the final authority on tribunal jurisdiction lies with the courts as affirmed in Article 16(3) of the Model Law and as was held in the case of *PT Tugu v Magma Nusantra Ltd*<sup>3</sup>.

During the arbitration proceedings, courts can intervene in the issuance of interim relief to parties. Article 9 of the Model Law and Article 26(9) of the UNCITRAL Arbitration Rules (2021) (herein referred to as “the Rules”) provide that interim measures by the courts shall not be deemed to be incompatible with the arbitration agreement. These measures which are

outlined in Article 17(2) of the Model Law aim to maintain the status quo and the integrity of the arbitration process. They include measures concerning witness attendance and documentary disclosure as provided in Article 27 of the Model Law. Importantly, these interim measures do not waive a party’s right to arbitration.

At the end of the proceedings, courts enforce arbitration awards under Article 34(2) of the Model Law.

## The Ugandan Context

In Uganda, arbitration is governed by the Arbitration and Conciliation Act 2000 (herein referred to as the “Act”). The Arbitration and Conciliation Act 2000 is a derivative of the Model Law. The central aim of the Model Law was to harmonize the laws concerning arbitration

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<sup>2</sup> [2008] SC (Bda) 27 Com (24 April 2008).

<sup>3</sup> [2003] SGHC 204.

through the provision of an internationally agreed legal framework for the conduct of international commercial arbitration, with an emphasis on party autonomy and restriction of interference by the courts of the place of arbitration. As such, the Ugandan statute espouses these virtues that are central tenets to the arbitration process.

Similar to the Model Law, the Act restricts court intervention in the arbitral process in section 9 save for the situations that it enumerates. The instances when courts can intervene in the arbitral process are at the commencement of the process, during proceedings and after the arbitrator renders the award to the dispute.

At the beginning of the arbitration process, the court can protect the arbitration process from suffering a still

birth by enforcing the arbitration agreement in section 5 of the Act. With this, court is able to refer a matter brought to it back to arbitration if the arbitration agreement between the parties is operable. Unlike the Model Law, the Act does not expressly mention the court as one of the remedies to parties that have failed to appoint an arbitral tribunal. The Act instead refers to an appointing authority in this case. Similar to the Model Law, the final authority on tribunal jurisdiction lies with the courts as illustrated by Section 16(6) and the court's decision on the arbitrator's jurisdiction shall be final and not subject to appeal as provided for by section 16(7) of the Act.

During the arbitration proceedings, the court may grant interim measures of relief to parties in the arbitral process under section 5 of

the Act. Contrary to the Model Law, the Act does not provide a breakdown of the different interim measures that parties can apply for from court. However, section 28 of the Act permits the courts to assist in the taking of evidence in a means to protect the status quo of the evidence.

At the end of the Arbitral process, the courts can be used to recognize and enforce an arbitrator's award under section 35 of the Act and also to set aside an award under section 34 of the Act.

## Conclusion

Whereas there exists de minimis variations between the Act and the Model Law, both provide for limited court intervention in the arbitral process. The Act and Model Law provide for the courts to occupy a supervisory position and not meddle in the arbitration process thereby supporting the arbitration process to move from commencement stage to enforcement of the arbitrator's award.







**CONTRACT**

**MANAGEMENT**

# RECONCILING CONTRACTORS' LIABILITY UNDER OCCUPIERS' LIABILITY AND THEIR RESPONSIBILITY FOR HEALTH AND SAFETY ON CONSTRUCTION PROJECTS.

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## Introduction

Recently, Members of Parliament in Uganda were denied entry into a construction site of the Lubowa Specialized Hospital under the pretext that the Members of Parliament were visitors who did not have unfettered access to the construction site. This sparked debate across different platforms where the tax payers were struggling to understand why the MPs who play an oversight role for the

government could not access a site of a public project. A number of key questions arose from this debacle: What informs the Contractor's action of restricting visitors' access to site? Does this affect a Contractor's outlook towards Health and Safety protocols on the site?

In trying to understand why visitors do not have unfettered access to construction sites, we need to understand the Contractor's liability as an occupier under Occupiers'

Liability.

## Who is an occupier?

An **occupier** is defined in the case of *Wheat v E. Lacon & Co. Ltd* as a person who exercises an element of control over premises. This control includes physical control of premises and legal control of premises as was established in *Harris v Birkenhead Corporation*. Often, it's the case that after the commencement order, the Employer hands over the site to the Contractor. This is exhibited, for instance, in Subclause 2.1 of the 1999 FIDIC forms of Contract. It is also a common feature in the JCT forms of contract where the Employer is required to give possession of the site to the Contractor on the Date of possession

which is stated in the Contract particulars. In *London Borough of Hounslow v Twickenham Garden Developments*, it was held that the Contractor was entitled to such possession, occupation or use as was necessary to enable it to perform the contract. The Contractor will then have possession of the site from the date of possession until the date of completion.

## Who, then is considered to be a visitor to premises?

A **visitor** to premises (site) is considered in three categories, namely:

- Those with express permission
- Those with implied

<sup>1</sup>[1978] Q.B. 574.

<sup>2</sup>[1966] 2 Q.B. 617.



permission: Implied permission is also subject to limitations which, if exceeded, render the person a trespasser. In *Harvey v Plymouth City Council*, it was held that any implied permission to enter must be exercised properly.

- Those with a right to enter: The law gives rights to entry to certain categories of people which render them within the definition of lawful visitors irrespective of the wishes of the occupier for instance police officers entering under warrant.

A duty of care is owed by an occupier to the three categories of persons stated above. Visitors to the site therefore are duly covered under the Occupiers' Liability Principle. The occupier's duty is to ensure that the visitor is not injured while on the premises. This can be particularly highlighted for road projects that run over a long distance and are used by different visitors at different times of the day and night. The Contractor has a duty of care towards visitors in the three stated categories. As such,



there has been a general shift in Contractors' mindsets towards Health and Safety Protocols as most contractors have adopted to use preventive measures that will ensure safety for all visitors of the site/ premise. The same applies for building projects.

Regarding the duty of care, although there is similarity with the standard of care in negligence, there is also an important distinction as an occupier is empowered by statute to determine the boundaries of his liability in **section 2(1) Occupiers' Liability Act 1957** in England and Wales for instance. Generally, since the occupier controls the extent of the permission to enter, a visitor who acts in a manner contrary to that permission becomes a trespasser. The issue of the trespasser will be dealt with below.

Since children have access to sites sometimes and are largely considered to be less careful than adults, case law has sought to balance the responsibility between occupiers and parents as was seen in the case of *Phipps v Rochester Corporation*. Additionally, the level of care expected will depend upon the nature of the risk and the age and awareness of the child. In the case of *Titchener v BRB* it was held that no duty of care was owed to a 15-year-old boy who was struck by a train while walking on a railway line at night as he was aware of the dangers posed by his activity. A duty will exist if the land/premise holds concealed dangers or allurements that tempt children into danger as was seen in the case of *Glasgow Corporation v Taylor*.

## Use of Warning Signs

Under the Occupiers' Liability Principle, an occupier has a duty of care towards visitors and it may be satisfied if the occupier displays warning signs or cordons off areas that are dangerous. The following factors need to be taken into account when considering whether a warning sign was enough to enable the visitor to be reasonably safe:

- A visitor should know what risk he is facing and therefore the warning has to be specific. As such, the Contractor could be liable where there is a deep excavation and he does not alert visitors to the site to it using a specific warning sign.
- Hidden dangers necessitate greater efforts to call attention to them than readily apparent

risks for instance as in the case of *Staples v West Dorset District Council* in the UK where it was held that risks posed by wet algae on a high wall were so obvious that there was no need for a warning sign. The Ugandan case of *Gakumba v Mandela National Stadium Ltd* also highlighted the fact that the defendant was liable due to absence of warning signs and security lights where there was an uncovered manhole.

- Is the sign combined with other safety measures? The use of fencing or barriers emphasizes the need for safety.

## Who is a trespasser on a site?

A trespasser is defined in the case of *Robert Addie & Sons Ltd v Dumbreck* as someone who



goes in the premise without invitation of any sort and where presence is either unknown to the proprietor, or if known, is practically objected to. As such, it is true that in instances, a Contractor has limitations on who enters the premise(site). The key question then arises as to whether a Contractor bears liability on injuries to trespassers.

The approach taken by the courts to determining liability towards trespassers can be seen in *Young v Kent County Council*. The issues of liability of injuries caused to child trespassers was further explored by Court of Appeal in *Keown v Coventry Healthcare NHS Trust*. Keown makes an important distinction between injury caused by the danger caused by the state of the building and the dangerous use of perfectly well-maintained premises. This was also seen in *Tomlinson v Congleton* where

it was held that injuries arising from the claimant's dangerous use of otherwise safe premises will not give rise to liability under the Occupiers' Liability Principle.

## Conclusion

The contractor, as an occupier, has a duty of care to keep visitors under different categories safe while they use the site. This can have lasting effect on the Contractor's Health and Safety protocols as a way of dealing with this liability. Contractors are therefore encouraged to develop robust Health and Safety Protocols in order to keep workers and visitors safe while they use the site premises. Additionally, visitors are encouraged to act within the ambits of the set protocols and warning signs while accessing a construction site given the high risk of injury on construction sites.

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