Rethinking the Role of African National Courts in Arbitration

Edited by

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To all pro-arbitration judges in Africa, who by their efforts, have promoted cross-border trade and the cause of international arbitration in Africa.

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Attitude of Sudanese Courts Towards Arbitration

Ahmed Bannaga

INTRODUCTION

This chapter examines the attitude of Sudanese courts towards arbitration, to determine whether it is supportive or interventionist. The discussion provides some context with a brief history of arbitration statutes in Sudan (§8.01) and the courts with jurisdiction over arbitration in Sudan (§8.02). It then discusses the arbitration precedents prior to the 2005 Arbitration Act (§8.03), the judgments given by the courts after the 2005 Act (§8.04) which leads to a discussion of the 2016 Arbitration Act (§8.05), a discussion on the recognition of international arbitration in Sudan (§8.06) and a conclusion with suggestions on the future developments of arbitration in Sudan.

§8.01 BRIEF HISTORY OF ARBITRATION STATUTES IN SUDAN

Arbitration existed in Sudan in civil disputes before independence in 1956.[1] The first statutory provision on arbitration was in Section 6(4) of the Civil Procedure Act of 1983 (CPA 1983). This Section of the CPA gave Sudanese courts control over the arbitral process. An example of the court control on the CPA was in Section 156.1:

> Where any matter has been referred to arbitration or conciliation without the intervention of a court and an award has been made thereon, any person interested

1. Dr Deraig explaining the history of arbitration in '*Arbitration Act 2016 and the Implications on the Engineering Sector Forum*', Engineers Society, 1 March 2016, Khartoum-Sudan.

> in the award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in court.[2]

In 2005, the first statute dedicated to arbitration was promulgated. This was the Sudan Arbitration Act of 2005 (SAA 2005). The provisions of the SAA 2005 borrowed heavily from the UNCITRAL Model Law on International Commercial Arbitration, 1985 (UNCITRAL Model Law). It was anticipated that the interpretation of the text by the courts would be a challenge since the history of arbitration in Sudan did not regard arbitration as an independent method of resolving disputes.[3] In order to understand the interpretation of this legislation by the courts, it is important to discuss arbitration precedents prior to and after SAA 2005. This will help in the assessment of the development of arbitration in Sudan. The discussion will also focus on the controversial (and important) case of *Tractors Co. v. The Gov. of Sudan*, by the Supreme Court and the Constitutional Court. At the outset, we acknowledge that despite the many registered arbitration centres[4] in Sudan, reliance by disputants on institutionalised arbitration is very weak when compared to ad-hoc arbitration[5] from which the cases discussed emanate. Arbitration in Sudan has witnessed both positive and negative changes in the last decade. The Supreme Court has guided the process in both directions, though it is expected that its future guidance will be more positive.

In 2016, a new Arbitration Act was promulgated (SAA 2016) to enhance the practice of arbitration and incorporate judicial precedents from the application of SAA 2005. The arbitration law in Sudan, as some other jurisdictions, such as Egypt and Saudi Arabia,[6] makes a distinction between domestic and international arbitration.[7] There has been no change in this regard in the text of SAA 2016 to suggest otherwise as it states:

> In accordance with the provisions of this Act, the arbitration shall be international in the following cases: a. where the headquarters of the business of the arbitration

2. This reflects the overall supervision of the court where it allows anybody '*interested*' to reside to the court to refer the process to the court scrutiny.
3. CPA, subsection 6-4 (repealed).
4. The Minister of Justice confirmed that there are eighteen registered arbitration centres while only two are active in handling arbitration cases. The rest of the centers are focusing on training. The Active arbitration Centres in Sudan: The Arabic Centre for Arbitration – ACA; The Sudanese Conciliation & Arbitration Centre. However, in SAA 2016, the Act allowed the Minister of Justice to review any established centre and issue new regulations with retroactive effect, according to Article 20-1.
5. The Sudanese Conciliation & Arbitration Centre is the oldest and busiest centre in Sudan. It was established in 2006 and as at end of May 2017, fifty-one cases have been filed under its arbitration rules. This data was obtained from an Interview with the Director of the Centre Dr Deraig in 16 May 2017. In comparison with the Arbitration Circuit at the Appeal Court which received eighteen cases as at the end of May 2017. This data was received from the Appeal Court Supervisor Office – Arbitration Circuit – May 2017.
6. Law No. 27 – 1994 Egyptian Arbitration Act and the Saudi Arbitration Act 2012. The reference is made to Saudi and Egyptian laws as SAA 2016 was influenced by these two laws according to the Drafting Committee, which shall be discussed in more details.
7. Article 7 SAA 2005 and Article 7 SAA 2016, no change in the wording was applied.

> parties business is in two different states; b. where the subject of dispute, included in the arbitration agreement is connected to more than one state.[8]

In general, and with the practice of arbitration since the late 2005, Sudanese courts can be considered as supportive of arbitration. The published decisions of the courts confirm this support. However, decisions from the Supreme Court and the Constitutional Court of Sudan have focused on two main issues. These are: the validity of the arbitration agreement and the contest of the arbitral award under the nullity of suit conditions. Nevertheless, there were cases where the Supreme Court issued controversial decisions that disrupted the supportive path followed by the same court. This Chapter examines the decisions of these two courts on these issues to understand the attitude of the Sudanese judiciary towards arbitration.

§8.02 THE COURTS WITH JURISDICTION OVER ARBITRATION IN SUDAN

It is important to briefly describe the judicial structure in Sudan and the courts with jurisdiction over arbitration in Sudan. This will help with understanding the judgments discussed in the following sections. Sudan is a Common Law jurisdiction, which observes the doctrine of precedents and 'judge-made law'. Hence the interpretation of any law by the courts is as significant as the legislation itself.

In order to understand the court system that supervises arbitration in this jurisdiction, a distinction between SAA 2005 and SAA 2016 must be made. In SAA 2005 the Magistrate Court (the general court) had the power to receive and review the Nullity Suit under Sections 5 and 41 of the Act and its decision was final. However, the decision can be subject to appeal to the Appeal Court under the CPA and later to the Supreme Court. In SAA 2016, the Appeal Court became the competent court for the Nullity Suit request instead of the magistrate court under its own version of Section 41. The Appeal Court has jurisdiction to examine the requests for setting aside the award or the Nullity Suit. Now there is a permanent circuit of three judges to review arbitral awards. This creates more certainty in the process and a pattern that is anticipated to be supportive of arbitration.

The courts in Sudan are yet to receive any request for the enforcement or recognition of international arbitration awards. This may probably be partly because of the onerous conditions imposed on the recognition and enforcement of international awards under the Arbitration Act of Sudan.

8. This new SAA 2016, however, introduced a new mechanism for the judicial review of the arbitral process.

§8.03 THE PRECEDENTS PRIOR TO THE SUDAN ARBITRATION ACT 2005

The repealed Article 6-4 of the CPA 1983[9] did not make any distinction between conciliation and arbitration as separate processes of dispute resolution. This may have been due to the limited significance of alternative dispute resolution (ADR) processes in the Sudanese legal system. One example of this is under Article 141 of the CPA which refers to, 'the appointment of arbitrators or conciliators'.[10] This makes it clear that the arbitration model referred to in the CPA was not regarded as a final dispute resolution method. In fact arbitration was treated as an alternative method following conciliation and maybe mediation.

Prior to SAA 2005, the courts had several opportunities to intervene in the arbitral process.[11] In fact, the *repealed* Section 6 treated arbitration as a part or one level of the court process. It was this understanding that gave the courts the authority to intervene prior, during and after the arbitral process.[12] The practice of court interventions in arbitration had the effect (on both disputants and practitioners) of discouragement to use arbitration as they no longer considered arbitration as a method of dispute resolution with finality. It was easy for the judge or the reluctant party to find any reason to frustrate the arbitration process prior to its commencement, during the proceedings and after the tribunal renders its award. Under the CPA the court had expansive powers to set aside the arbitral award:

> An award remitted under section 148 becomes void and failure of the arbitration to reconsider it within the time fixed by the court.
>
> The parties may apply to have the award set aside on one of the following grounds, namely:
>
> a. corruption or misconduct of the arbitrators or of any of them;
>
> b. either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrators;
>
> c. the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit, in accordance with section 144(2) hereof;
>
> d. the award having been made after the expiration of the period allowed by the court, or being otherwise invalid.
>
> An application to set aside an award shall be made within ten days after the day on which the parties were notified of the award.[13]

9. Repealed by SAA 2005.
10. According to the Advisory, Conciliation and Arbitration Service (ACAS), conciliation is described as, 'the act to reconciling or bringing together the parties in a dispute with the aim of moving forward to a settlement acceptable to all sides'. According to Tweeddale and Tweeddale, Arbitration of Commercial Disputes, 2007, Oxford University Press, p. 9, the discussion always explains the differences between conciliation and mediation. But arbitration is an adjudicative process that has been recognised internationally and its outcome is enforced by national courts.
11. Please *see* the repealed CPA Section 6-4 or the discussion in (para. 2, p. 3).
12. The *repealed* Section 6-4 CPA and *Almagmou'a Almutakamela* case (*see* p. 6).
13. Ground for Setting aside the award Article 149 CPA (repealed).

The wording used in sub-Articles (c, b and d) were broad which made it very easy for the other party to apply to set aside the award. The sub-Article (b) allows the other party to set aside the award for misleading the arbitrator not mentioning the overall supervision by the court by limiting the tribunal to extend time to issue the award or examine the case in hand.[14]

It is also significant to mention that the CPA did not differentiate between international and domestic arbitration. Despite the fact that the law was issued in 1983, there was no influence on the law of best practices in arbitration or principles from international arbitration law or international conventions such as the New York Convention on the Recognition and Enforcement of Foreign arbitral awards (New York Convention),[15] Riyadh Convention for Judicial Cooperation 1983[16] and the International Centre for Settlement of Investment Disputes (ICSID) Convention, Washington D.C. 1966.[17]

Omer summarises the types of arbitration under the *repealed* CPA section into three: the first was the court-annexed arbitration in which the judge controlled the arbitral process (the process conducted by the court itself). The second, the court-supervised arbitration, this gave the arbitrator(s) more freedom to act than the first model. The third form was the independent arbitration, which operated outside the court supervision. However, all these forms suffered from a lack of finality of the awards. The court had the full discretion to enforce, or review, or treat the award as just evidence.[18] Where the status of the award is only evidentiary, any party may commence a new action before the competent court as a litigant.

In *Almagmou'a Almutakamela*,[19] the Supreme Court held that the existence of an arbitration agreement was not 'sufficient' so that the parties had to agree to arbitrate before the court. This means that the parties had to submit their dispute first before the court and thereafter agree to arbitrate the same dispute. Otherwise their agreement to arbitrate was considered invalid and did not bind the court to refer the dispute to arbitration. This case was the sole precedent on arbitration since Sudan's modern

14. Due to these broad wording, lawyers did not consider arbitration as dispute resolution model, subsequently, no frequent precedents to guide the stakeholders to reconsider.
15. The author also notes that Sudan is still not party to the New York convention.
16. Article 25 **"مع مراعاة المادة 30من هذه الإتفاقية أن يعترف كل من الأطراف المتعاقدة بالأحكام الصادرة عن محاكم أي طرف متعاقد آخر في القضايا المدنية..."**

    The translation ('With prejudice to Article 30 of this Convention, all contracting parties shall recognize the judgments issued by the courts of another party in civil cases…') Riyadh Convention for Judicial Cooperation 1983, Sudan ratified this Convention in 1984.
17. Sudan ratified the ICSID Convention in 1973.
18. Omer, Mohammed, *The Civil Procedures Law 1983: The Suit*, Vol. 1, 2nd ed., p. 394 **قانون الإجراءات المدنية لسنة 1983 : الدعوى**. This book is considered as the main guideline to the CPA, however, the book does not recognize the international arbitration convention or practice, which means that the CPA was not following any known international path for the arbitral process. The CPA arbitration model was drafted locally and therefore, was guided locally by the first instance courts.
19. Civil Recourse No. 624/1999, *Almagmou'a Almutakamela (Integrated Group) v. Borahn and other*, Sudan Law Journal & Reports, 1999, 192.

judicial system was established in 1900.[20] The Supreme Court confirmed that arbitration was not recognised as an independent method of resolving disputes. Thus the *Almagmou'a Almutakamela* case is significant in assessing the position and understanding of arbitration by the courts in Sudan. It also helps appreciate the developments in arbitration since the 2005 Act.

§8.04 JUDICIAL PRECEDENTS AFTER THE ARBITRATION ACT 2005

Between 2005 when the SAA 2005 came into effect and 2016 when it was repealed by SAA 2016, the SAA 2005 promoted the fundamental principles of arbitration and supported the authority of the arbitrator in the arbitral process. The similarities between the SAA 2005 and the UNCITRAL Model Law are notable. The ordering of the articles and their wording were identical though Sudan did not adopt the UNCITRAL Model Law.[21] Deraig Ibrahim[22] believes there is no reason to ignore the fact that SAA 2005 is based on the UNCITRAL Model Law.[23]

After a few months of the SAA 2005 coming into force, the first decision on the law, *GNPOC*[24] *v. Ramsees Engineering Co* [25] was published. This case was referred to arbitration after the request of the parties to the courts in accordance with the practice prior to the SAA 2005. By the time the arbitral award was rendered, SAA 2005 had come into force and the Civil Procedures Act 1983 (CPA) Section 6-4 had been repealed. The losing party requested the court to annul the award under the repealed Section of the CPA instead of the SAA 2005 as the parties had agreed and proceeded with the arbitration while Section 6-4 was the valid law. The court rejected this argument since the CPA was already repealed.

The Supreme Court in this case, however, accepted the concept of the finality of the award, and therefore, the first instance court decision remained intact. At the same time, the Supreme Court's interpretation of the Nullity Suit[26] was not supportive of arbitration. It held that although the losing party cannot contest the arbitral award unless under Nullity Suit conditions, the decision of the first instance court in the

20. There has not been any publication of any precedent on arbitration since the first law journal (Sudan Law Journal & Reports) of 1900.
21. Sudan is not listed among the countries that have adopted the UNCITRAL Model Law on: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
22. Dr Deraig Ibrahim is an eminent legal consultant at the Ministry of Justice. He was a member of the Arbitration Legislators' Committee. He is a Professor of Law at the Juba University and an elite academic writer on the SAA. He is also the vice president of the Khartoum Centre for Arbitration. Some of his published writings, *Concluded Arbitral Principles* مبادئ تحكيمية مستخلصة, 2008, Sudanese House for Books.
23. Deraig from his role at the drafting Committee confirms that the draft was influenced by the UNCITRAL Model Law.
24. Greater Nile Operation Oil Company – the major oil exporter consortium in Sudan.
25. Civil Recourse No. 1216/2005, *Greater Nile Petroleum Operating Co. v. Ramsees Engineering Co,* 2006 Law Journal & Reports, pp. 148–151 (*GNPOC v. Ramsees*).
26. Article 40 SAA 2005 allows the losing party to contest the award before the competent court following the Nullity Suit process. The wording of this Article is similar to that of Article 34 of the UNCITRAL Model Law on the '*Application for setting aside as exclusive recourse against arbitral award*'.

Nullity Suit is subject to all levels of appeal under the provisions of the CPA. This decision of the Supreme Court meant that it was *only* the procedure the losing party followed that was not accepted. In other words, the appellant should have followed the conditions of the Nullity Suit to appeal before the Appeal Court, but the Nullity Suit should be treated as a separate suit subject to all level of appeal according to the CPA.

In 2007, a new decision emerged that corrected this interpretation in the *GNPOC* case. In *Fisal Bank v. Osman Musa*[27] the Supreme Court held that:

> [T]he Nullity Suit is not a separate suit applicable to all rules in the CPA. This is because the arbitral proceedings purpose was set to reduce the time of adjudication and its domains.

In other words, the GNPOC case understanding was reversed making the Nullity Suit decision final and not subject to any appeal or recourse process. With this decision, it became clearer that arbitration practice and the interpretation of the courts are leaning towards support for the arbitral process.[28]

One of the shortcomings of the SAA 2005 is the lack of guidance to the courts to assist with the appointment of an arbitrator in default of party appointment. Experience shows that the issue of arbitrator appointment can be used to frustrate the arbitral process. For example in *Alamin v. Abualarki*,[29] the first instance court dismissed the claimant's request for assistance with appointing the respondent's arbitrator. In its judgment, the judge said the SAA 2005 did not mention or give the court the power to appoint the parties' arbitrators. In addition, the court is not a lawmaker to initiate its own power.[30] However, the Appeal Court overruled this decision confirming that the court has the power to appoint an arbitrator for the reluctant party. The Court noted that, 'according to the law, the request is a procedural request to the first instance court ends by obliging the reluctant party to appoint an arbitrator, and does not intervene in the merit … '.[31]

In the judgment of the Supreme Court in *Nile Inter Trade Co. v. Atcoco Co.*,[32] the court noted:

> Although article 14 does not give the court the authority to appoint the reluctant party arbitrator, which considers a literal interpretation violates the intent of the legislator. The role of the court is to interpret the law by the way that makes it executable … despite the fact that the law does not clearly authorize the court to do so, but the law embodies such authority.[33]

27. C.R/86/2007-Revision/21/2008, Sudan Journal & Law Reports, 2008, pp. 137–141.
28. Article 41-2 provides: 'The request referred to in sub-section (1), shall be presented before the competent court, whose decision *shall be final.*' (Emphasis added).
29. Civil Appeal No. 2370/2006, *Huda Abu Alaraki v. Abdalla Al-amin* (unpublished).
30. Ibrahim, Deraig, *Concluded Arbitral Principles* مبادئ تحكيمية مستخلصة, 2008, Sudanese House for Books, pp. 100–103.
31. Translated by the author for the original text, *ibid.*, p. 102.
32. Civil Recourse No. 310/2006, *Nile Inter Trade v. Atcoco for Advanced Trading and Chemical Works Co.* (unpublished) cited in *Concluded Arbitral Principles* (مبادئ تحكيمية مستخلصة), *2008*), Sudanese House for Books, pp. 146–149.
33. Ibrahim, Deraig, *Concluded Arbitral Principles*, *ibid.*, pp. 146–149 (translated from the Arabic text).

This judgment is considered to be supportive of arbitration and it provides positive guidance to the lower courts and stakeholders in arbitration that the Supreme Court will make sure that arbitration is supported and not crippled as in the *Abualarki* decision.

In *SAS Co v. A. Fattah*,[34] the Supreme Court was explicit in identifying the validity of the arbitration agreement under SAA 2005. The court explained that the arbitration agreement can take two forms: the first is the agreement after the dispute has arisen and the second is the arbitration clause or agreement stipulated prior to the dispute arising. In both cases, the agreement and the award upon that agreement are valid and subject to the Nullity Suit[35] conditions only. It is the same meaning of setting aside request and effect in the Model Law. This case is significant as it overruled the *Almagmou'a Almutakamela* decision previously noted and strengthened the understanding of the effect of the arbitration agreement.

In 2013, in *Kassala State v. Sala International*,[36] the Supreme Court stated clearly that the court must refer the parties to arbitration unless they both neglect the arbitration agreement and proceed with the litigation. This case ended any debate about the validity of the arbitration agreement and made it clear to stakeholders that the court will not exercise any discretion in the face of an arbitration agreement following Article 10 of the SAA 2005.[37]

A very distinctive case was published in 2015 which took over six years to be settled by the Supreme Court review panel.[38] In *Flatco Engineering v. Amer M. Ibrahim*,[39] the Supreme Court held that labour disputes are not subject to arbitration unless it is a 'collective claim'. In *Flatco* the parties agreed in the labour contract to arbitrate disputes arising from it. This agreement shifted the adjudication from the court to the arbitral tribunal according to Article 9 of the SAA 2005.[40] The decision on the merit was based on the principle that the Labour Court has ultimate jurisdiction to protect labour rights and no agreement to use any medium of dispute resolution (such as arbitration) was valid. This decision sends a negative message that classifies arbitration clauses as infringements of labour rights. It also clearly contradicts the provisions of Article 3 SAA 2005 that accepts the arbitrability of all disputes of a civil nature.[41]

34. C.R/1053/2008, Sudan Journal & Law Reports, 2008, pp. 180–184.
35. The Nullity Suit is a translation to the Arabic text (دعوى البطلان) where the losing party may a null the award. It is discussed in details in p. 18.
36. C.R/232/2011- R/94/2012, Sudan Journal & Law Reports, 2013, pp. 278–285.
37. Article 10 SAA 2005 on 'Stay of Suit proceedings for the purpose of Arbitration'.
38. Article 9 of the CPA allows parties to have recourse to the Supreme Court decision at the Supreme Court Review Panel. The Panel is composed of five judges that were not part of the panel that made the original decision under review.
39. S. C./C. R/645/2009- R /257/2009, Sudan Journal & Law Reports, 2015, pp. 122–126.
40. Article 9 SAA 2005 is on stay of court proceeding.
41. This decision also contradicts the decision in the *Inheritors of Ahmed Younis* case which states that, 'the precedents are obligatory when they agree with the law, but when they violate the clear wording of the law, it loses its power and must be ignored…'. SC/CC/746/1994 *Inheritors of Ahmed Younis v. Aiysha A. Rahi*, Sudan Journal & Law Reports, 1994, p. 212.

In 2014, the Constitutional Court made a very supportive decision on arbitration in *Marble Art Co. v. Abdelaziz*.[42] In this case the losing party, *Marble Art*, submitted a constitutional petition claiming that Article 41(2) of the SAA 2005 is not constitutional.[43] The main claim was the contradiction between this Article and the constitutional right to litigation.[44] The petitioner claimed that according to the Article in question, the decision of the first instance court is final, hence, no appeal application will be accepted, since such lack of appeal effectively limits the party's right to litigation as provided in the Constitution. Judge Haj Al Tahir[45] was very clear in his analysis. He confirmed that the right to litigation was not in question since SAA 2005 allowed any party to apply to the jurisdictional court to annul the award under the Nullity Suit procedure. Accordingly, the right to litigation was preserved. The decision also noted that the legislator was clear in the limited levels of appeal provided due to the nature of arbitration and its advantages of speed and confidentiality. The Constitutional Court strengthened its decision by quoting similar claims raised in the *Alamatong Leather Co v. Cleopatra Co;*[46] and *State of South Kordofan v. Jebarooky Engineering Co*[47] cases. In both cases, the Constitutional Court stated clearly that Article 41(2) of the SAA 2005 does not contradict the constitution. These constitutional precedents were victories for arbitration in Sudan and ended the debate over the finality of the arbitral award and the limitations on the discretion of the jurisdictional court, which are the main motivation to arbitrate.

However, in January 2016, the Supreme Court followed a new trajectory that shocked the Sudanese arbitration community. The Minister of Justice unveiled a new Supreme Court decision in the *Ministry of Finance v. Tractors Co.*,[48] case to defend his proposal in the new Sudan Arbitration Act of 2016 (SAA 2016) in regards to the controversial Article 44 (discussed in greater details below). The *Tractors Co* decision states:

> Article 41(2) states that the jurisdictional court decision is final … this is a clear infringement to Article 35 of the Constitution that has given everybody the right to litigate and it is not allowed to forbid anyone to justice[49]. The constitutional text is a commander and conclusive and neither discretion nor deception can be held

42. C.J/66/2014 *Marble Art v. Abdel Aziz Abbas & the Gov. of Sudan* case. The Constitutional Court decision was notified to the parties on 23 February 2015. (The Law Journal of the Constitutional Court was not yet printed.)
43. SAA Article 41-2 provides, 'The request referred to in sub-section (1), shall be presented before the competent court, whose *decision shall be final*.' (Emphasis added).
44. The Interim Constitution of Sudan 2005 Article 35 provides on the Right to Litigation, 'the right to litigation shall be guaranteed for all person; no person shall be denied the right to resort to justice'.
45. Professor Haj Adam Hassan Altahir is a known Constitutional Court judge and professor of law.
46. C.J/79/2008.
47. C.J/22/2008.
48. S.C/892/2015, *The Finality or the Fees*, Dr Hassan Alnor, Minister of Justice, in AL-Sudani Newspaper, 28 February 2016.
49. The Supreme Court understanding to justice is the judicial control over the arbitral process. In this decision, the court disqualifies arbitration from being final and allow higher courts to examine as a typical lower courts decision.

> against it by any legislative authority to forbid, limit or cripple the right to litigation…

These are very strong words used by the Supreme Court which effectively deviates from the path it followed under SAA 2005. The Minister of Justice published this decision in a newspaper article he wrote to defend his position after passing the controversial Arbitration Act of 2016 (SAA 2016).[50] The new SAA 2016 was intended to clarify some issues in the wording of the SAA 2005, instead the Minister of Justice, according to the Head of the Drafting Committee,[51] changed many of its provisions to affect the finality of the arbitral award and include greater scope for interference by the jurisdictional court. This is by including provisions that require parties to exhaust the appeal process under the provisions of the CPA as a normal lower court decision.[52] This is a clear stand from the Ministry of Justice to retract some of the benefits of arbitration because the State had been dragged to arbitration in several cases.[53] Suing the Sudanese State is understandable because of the economic deterioration in Sudan since 2011.[54] The answer to this situation cannot be to curtail the rights of arbitration and the gains already made in this field. This decision of the Supreme Court returned the status of the arbitral award to the era of the *GNPOC v. Ramsees*[55] decision discussed above.

The Government of Sudan was the petitioner before the Constitutional Court in the case of *Almatanog and South Kordofan* discussed above. Also in the *Tractors Co* case,[56] the Government of Sudan was the defendant. In addition to these, the new SAA 2016 was passed by a Presidential temporary decree as the Legislative Committee[57] of the General Assembly rejected the bill and the Minister waited for the General Assembly to go on vacation, to proceed under the Presidential Decree option.[58] The new temporary decree created mistrust between the legal community and the Ministry of Justice. As a result of this the Bar made a public announcement to criticise the behaviour of the Minister and the law. This was followed by many arbitration centres.

50. The Supreme Court guided the arbitral process in many cases discussed in this chapter. These decisions clarified many misunderstandings about arbitration. Cases such as *Kassala State* case (p. 10) and *Fisal Bank* (pp. 8–9) cleared the path for arbitration to move forward.
51. Dr Deraig Ibrahim, the Head of the Arbitration Act Review Committee, Interview on 23 February 2016.
52. SAA 2016 Article 44-6 Procedures of reviewing the nullity recourse. It means that the arbitral award can be treated as a lower court decision subject to the full review of the Appeal Court and the Supreme Court following the CPA rules of appeal and recourse.
53. In June 2017, the Ministry of Justice confirmed that 148 cases were registered at the Attorney General office against the State in six months. ALTYAR Newspaper, 10 June 2017.
54. South Sudan declared independence in July 2011 after referendum following the Comprehensive Peace Agreement – CPA signed in 2005 with Southerners rebels – Sudan People's Liberation Movement (SPLM), http://www.un.org/press/en/2005/sc8306.doc.htm. The South was supporting the federal government with oil which was considered 95% of exports of Sudan by the World Bank. *See*: http://www.worldbank.org/en/country/sudan/overview (29 July 2017). The absence of the oil made the Government of Sudan to default in many projects which resulted in arbitration claims against the Government.
55. Section (2).
56. Also known as the *Manga* case.
57. Badria Suliman is a famous lawyer in Sudan and is the Head of the Legislative Committee at the General Assembly. She was seriously ill and the Minister could not manage to convince the Committee to vote for the bill he presented.
58. Dr Awad Alnor, *The Finality or the Fees*, Alintabah Newspaper, 28 February 2016.

They all agreed to annul the temporary decree upon the next assembly session. This new tendency that treats arbitration as one level of the litigation process[59] is evidence of the government's intention to limit the finality of the arbitral award.[60] This intention of the government is understandable as the government enjoys multiple litigation levels and grace times following the CPA rules in many levels of litigation,[61] not to mention the requirement to exhaust all the levels of appeal. Such procedure prolongs the dispute resolution over several years.[62] In arbitration, government bodies and agencies who are parties do not have this protection.

In December 2016 and as anticipated, the Constitutional Court issued the decision in *The Tractors Co* case.[63] All stakeholders were waiting anxiously to read the Constitutional Court opinion on the Supreme Court decision. The decision is viewed as being a victory for arbitration and repealed the Supreme Court decision as anticipated. In its judgment, the Constitutional Court held:

> Only the Constitutional Court has the jurisdiction on the constitutionality or non – constitutionality of a legal text … The Constitutional Court issued more than a judgement in the constitutionality of art: 41/2 of the Arbitration Act…

The wording used by the Constitutional Court was very direct and clear to the extent that the judgment only referred to the constitutional precedents previously discussed without dwelling on details.

However, the precedents under SAA 2005 were progressive, from the weak support of the courts in the *GNPOC* case to the full support by the Constitutional Court in the *Tractors* case. Despite the fact that the *Tractors Co* case was a success for arbitration, SAA 2016 was passed and created another debate about the finality of the award as will be discussed in the next section.

§8.05 THE ARBITRATION ACT OF 2016 (SAA 2016)

Following the practical application of arbitration under SAA 2005 by the Judiciary, advocates and the Ministry of Justice, many difficulties and shortcomings were noted by users and practitioners. As a result of which the Minister of Justice with the power vested in his office, constituted the Arbitration Act 2005 Revision Committee in 2014 to assess the application of SAA 2005 and to suggest proposals for amendments. The membership of the Committee was drawn from the Judiciary, the Bar Association, the

59. Ahmed Bannaga, Response to the Minister of Justice, Alahram Newspaper, 23 February 2016.
60. It is to be noted that the CPA gives the state the opportunity to seek several extensions and the appeal process, which are both not applicable under the SAA 2005. This fair and fast process of arbitration was not embedded in the government psyche, which makes the finality of the award and the limited appeal process not welcomed by the State.
61. The CPA articles gives the government grace times at many levels, for example: before the suit in Article 33-4 (two months) and the execution process Article 213 (four months).
62. According to the CPA, appeal can take up to four levels from the Appeal Court to the Constitutional Court.
63. Constitutional Recourse 104/2016 dated 22 November 2016.

arbitration centres, the Engineers Society and the Businessmen Association.[64] The Committee met seven times and submitted the final draft proposal to the Minister of Justice in July of 2014. The Proposal was ready in July 2014 and submitted to be approved by the Minister of Justice. However, the Proposal was not approved and returned to the Committee in August of 2015 for additional review. On 2 February 2016, the new Act was passed by a Temporary Decree[65] ignoring many points discussed by the Committee and it included new articles. The publication of the new SAA 2016 raised a storm in the Sudanese arbitration community and attracted a stream of criticisms with a demand for the new Act to be revoked.

The Drafting Committee was influenced by the UNCITRAL Model Law and other sources in their work.[66] Yet the outcome of the SAA 2016 is far from the provisions in any of these sources. A very controversial amendment is Article 19. The Article created a new method for the arbitration tribunal fees and issued an index of fees to be followed in case of fees disagreement. Following the laws of arbitration of which SAA 2016 is referenced,[67] the arbitration fees were not discussed. The wording on the issues regarding payment of arbitration fees was clearly influenced by the Ministry of Justice. The fees issue is normally handled by the arbitration rules[68] or under the institutionalised arbitration,[69] but SAA 2016 have crossed that tradition to use it in the ad hoc[70] arbitration. This confusion between the roles of the arbitration institution and rules and the arbitration law is seen also in Article 37 (keeping the record of arbitration suit). It raises the question about the role of the arbitral tribunal after rendering the award in an

64. It was clear that the pressure of the stakeholders pushed towards necessary amendments. The constitution of the Committee, however, was a typical process for law revision under the Ministry protocols. Decision No. 9-2014, Minister of Justice, Institution of the Arbitration Act 2005 Revision Committee.
65. The date of approval is 03 February 2016.
66. The Committee in its presentation confirmed that that the references were limited to nine sources that influenced the deliberation, which can be summarised as follows:

    (1) The recommendation of the subcommittee of the Commercial Arbitration Conference, 2007 organised by the Sudanese Bar Association.
    (2) The keynotes of the previous committee constituted by the former Minister of Justice to revise SAA.
    (3) The Recommendation of the Arbitrators Forum in 2011.
    (4) The Saudi Arabia Arbitration Act 2012 as the most updated Act in the Arab world.
    (5) The UNCITRAL Rules of Arbitration 1976 and the UNCITRAL Model Law 1985.
    (6) The international and local arbitration centres laws and rules.
    (7) The precedents of the Supreme Court.
    (8) The application of SAA and its shortcomings.
    (9) The opinion of the local scholars of arbitration.
    However, during the discussion with the Committee in the Forum of Arbitration held in the first of March 2016 at the Engineering Society, the Committee referred to the Egyptian Arbitration Act as one of the sources discussed. The Committee believed that the Saudi Law was influenced by the Egyptian Law of Arbitration, and therefore, they had to consider the latter in their examination to the updated rules of arbitration in the region. This means that ten sources where considered to draft SAA 2016.

67. The Egyptian Law of Arbitration 1994, the Saudi Law of Arbitration 2012 and the Model Law.
68. UNCITRAL Arbitration Rules Articles 40–43.
69. ICC Arbitration Rules 2017, Appendix III.
70. Ad hoc arbitration is widely used in Sudan as institution are yet to be acknowledged by the users.

ad hoc arbitration while the arbitration centres rules[71] embody such mandate already. It obliges the arbitrator to keep the record of the arbitral proceedings for five years creating many questions about the role of the arbitrator after signing the award, not mentioning the contrast with Articles 35 and 36, which terminate the arbitrator's mandate at the end of the proceedings.

Moreover, Article 20 enlarges the power of the Minister of Justice to approve, inspect and remove arbitration centres, with retroactive effect. Thus, all registered arbitration centres operating in Sudan have to adapt to any new rules that the Minister may issue.

Another confusion is created under Article 30 (Proceeding with the arbitration proceedings). SAA 2016 clearly apply the principle of *Competence-Competence* under Article 6-1-b, but Articles 17 and 30 do not allow the tribunal to decide on the merit of the dispute in case of jurisdictional issue, or the challenge of arbitrator. This confirms that the court is not supporting the arbitral process but rather controlling it.

SAA 2016 also ignored the arbitrary claims of forgery in Article 30-2 as a predicted action by a disputant to delay the process. The text should have included sanctions in this sub-article as a counter-measure to any party whose claim is not supported by the evidence. The great disappointment with SAA 2016 comes under Articles 42, 43, and 44 that changed the previous path for recourse or Nullity Request.[72] After detailed steps to guide the Appeal Court in making a decision on the Nullity Request, Article 44(6) gives the Appeal Court the power to follow the same process it uses for litigation. It means that the court can investigate the merit of the dispute and its order will be subject to appeal before the Supreme Court following the CPA Rules of Recourse as mentioned above.[73]

Approval for SAA 2016 was contested by the Bar Association,[74] the Arbitration Centres,[75] the Engineers Society[76] and arbitration commentators,[77] but the Act was approved by the National Assembly in June 2016 regardless of all the petitions.

All the above noted articles of the SAA 2016 confirm the allegation that the intention of the Minister of Justice was to weaken the finality of the arbitral award. The new wording gives the Appeal Court the jurisdiction to decide the arbitral award nullity request under the seven grounds of Article 44, which are similar to the Model Law. However, the wording of sub-Article (6) is very distortive. It states:

71. ICC Arbitration Rules 2017, Article 35, which confirms the role of the Secretariat in providing certified drafts of the award.
72. The Nullity Request in SAA 2005 and SAA 2016 is the claim or the request to set aside the award.
73. CPA Article 189 allows the Supreme Court to review the Appeal Court decision and Article 197 gives the same court the right to review its decision. This makes the award subject to three levels of appeal, which is the same set of rules in litigation.
74. A public announcement by the Council of the Bar Association was published on the second day of passing the law 11 February 2016.
75. Workshop held by the Arab Arbitration Centre on 9 February 2016 a week after passing the new Act heavily criticised the Act and most of its new articles that abandoned the basic rules of commercial arbitration. Workshop on the New Arbitration Act 2016, University of Khartoum – Sharjah Hall 9 February 2016.
76. Forum of Arbitration 01 March 2016.
77. Dr Magdi Elsaliabi, '*The New Arbitration Act 2015 and the Necessity to pass it Under a Temporary Decree*', Alintabah Newspaper, 16 February 2016.

> With prejudice to all the above sub articles, the same procedures followed in the appeal court to examine the appeal shall be followed in the nullity recourse.

This wording of sub-Article (6) is difficult to comprehend. It refers to the nullity *recourse* rather than the nullity *request*. It allows the court to apply the rules of the CPA when the 'recourse' is examined. This means that the decision of the Appeal Court is not final and will be subject to review by the Supreme Court.[78]

However, the practical application of Article 41 SAA 2005 was clear in the precedents discussed earlier. In 2008 in *Fisal Bank v. Osman Musa*, the Court noted:

> The Nullity Suit is not a separate suit applicable to all rules of appeal under the CPA. This is because the arbitral proceedings purpose was set to reduce the time of adjudication and its domains.

The wording of Article 44-6 changes the guidance given in consistent Supreme Court precedents discussed earlier.[79]

Alsahabi[80] in his interpretation of Article 44 (6) SAA 2016 narrows the significance of the wording. He believes the sub-article only confirms that the appeal court shall follow the procedural rules in making its decision. It does not abolish the finality of the arbitral award that has been a pillar in Sudanese jurisprudence for years.[81]

However, and for the first time since introducing arbitration into Sudan's legal system, the judiciary initiates a special circuit for arbitration at the appeal court. This helps the arbitral process by making sure arbitration will follow certain mechanism rather than changing decisions for each nullity request suit. It will provide statistical data about arbitration, which is a weak link in the availability of information against which to assess the development of arbitration in Sudan. With this new circuit, arbitration practitioners will be aware of the judges in charge of arbitration and it will increase certainty in the litigation process in support of arbitration. The Judiciary will be able to train the judges at the arbitration circuit to enhance the quality of decisions. Those judges will later be promoted to the Supreme Court, which allows the Judiciary to be more efficient in guiding the arbitral process.

These changes give arbitration practitioners hope that the Appeal Court will be supportive of arbitration and interpret the law positively. As at the time of publishing no court decision on the SAA 2016 has been published to confirm this notion.

§8.06 RECOGNITION OF INTERNATIONAL ARBITRATION IN SUDAN

Two of the most crippling provisions in SAA 2005[82] and SAA 2016 are those on the enforcement of the international arbitral award.[83] It is vividly clear that these two Articles are *obstructive* and do not make the legal system of Sudan supportive of

78. CPA Articles 189–202.
79. Please *see* Judicial Precedents after the Arbitration Act 2005 section.
80. Alsahabi Abdelhalim is the GM of the Arab Arbitration Centre and a pro-arbitration supporter.
81. Interview dated 25 March 2017.
82. Article 46 (Execution of the foreign Arbitration Award), which is the same wording in SAA 2016.
83. Article 48.

international commercial arbitration. In fact, the Article states five conditions to be satisfied for the enforcement of foreign arbitral awards. Before discussing the conditions, it is important to illustrate the effect of the words 'foreign arbitral tribunal award'. SAA 2016 only used the word *foreign* in this article without giving any interpretation as to its meaning.

It is recognised that the SAA 2016 recognises international arbitration in its Articles 3 and 7. However, there are many interpretations for 'international arbitration'. For example, it can refer to the tribunal that governs the international arbitration as described in Article 7. It can also refer to the nationality of the arbitrator(s), or the seat of the arbitral tribunal regardless of the nationality of the arbitrators. It can also refer to the existence of any foreign law or arbitrator in the proceeding. This Article was copied from the Civil Procedures Act 1983 (CPA),[84] the words that were changed for the purpose of the SAA 2016 are the 'arbitral tribunal' in the place of 'foreign judgment or order'. The CPA article is concerned with the enforcement of foreign judgments, which makes the foreign seat interpretation more probable to be the intended meaning of *foreign award*. Nevertheless, there is no precedent to investigate how the courts will interpret this Article. Apparently, neither the parties nor the lawyers are willing to start such a debate, which may explain why parties avoid Sudan as a place of enforcement.

The second stage of this discussion is the conditions to be satisfied for the enforcement of an award under Article 48 of the SAA 2016[85] which provides:

> No execution of the award of a foreign Arbitration Tribunal shall be made, before Sudanese courts, save after verifying the satisfaction thereby of the following conditions:
>
> a. the award, or order is passed by an Arbitration Tribunal or centre, in pursuance of the arbitration rules of jurisdiction of international arbitration, prescribed by the law of the country, in which it has been passed, and it has been final, in accordance with such law;
> b. the opponents in the suit, in which the award has been passed, have been summoned and have been validly represented;
> c. the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts in the same substantive issue of the dispute;
> d. The award does not include what is inconsistent with public order, or morals in Sudan.
> e. The country where the award is issued and requested to be executed, is executing Sudanese courts judgements, centres and tribunal awards in its jurisdiction, or by the judgments conventions ratified by Sudan.

The first obstacle is the burden of proof, the party who invokes the enforcement has to convince the court that the award is free from all the conditions stated. SAA 2016 uses the words *No execution* which means that even the court has no discretion to enforce the award unless the five conditions are fulfilled. Sub-Articles (a) and (b)

84. CPA Article 306.
85. It is these provisions that justify the description of the SAA 2016 as anti-international arbitration.

quoted above are clear and consist with international rules of enforcement.[86] But subsection (c) obliges the party that invokes the award to search the Sudanese courts' judgments to prove the consistency of the award with Sudanese courts' judgments, arbitration tribunals and arbitration centres. In other words, the party against whom the award is invoked can revoke the process of enforcement by finding one court judgment or previous award issued by an arbitration tribunal in the last ninety years to counter the enforcement of the award. The wording of the sub-article is vague and impracticable. Fadul,[87] the Khartoum General Court judge and a member of the Drafting Committee,[88] correlates this sub-section with the concept of res judicata. He argues that sub-Article (c) will be applied when the award contradicts a judgment in the same dispute and between the same parties. Omer shares this opinion. He argued (in his interpretation to Article 306 of the CPA, from where Article 46 was adopted)[89] that the condition discussed is restricted to the foreign judgment that contradicts Sudanese judgment issued in the same dispute for the same parties only. However, this interpretation departs from the meaning of the words of the SAA 2016 and CPA. Indeed, nothing has been stated in SAA 2016 or CPA that support such opinion. The law in both scenarios did not mention the words 'the same parties' or 'the same dispute' to limit its application as suggested by Omer and Fadul. Maybe the interpretation of Fadul and Omer is a trend to simplify the difficulty of the wording in both articles to make it executable and acceptable. However, SAA 2016 was a good opportunity for the legislator to rephrase the wording of sub-Article (c).

In addition, this issue falls within the meaning of public policy in sub-Article (d). For example, China has a pattern of refusing awards under the principle of public policy when an award violates mandatory law.[90] Precedents are law under common law jurisdictions, and therefore, public policy may apply if the award contradicts the law and order of the enforcement state. Nevertheless, the author is of the opinion that the wording of the SAA 2016 makes Sudan an unwelcoming jurisdiction for international arbitration in general.

Public policy is provided as a common ground for setting aside[91] or refusing enforcement[92] of foreign arbitral awards under sub-Article (d). This is another barrier under Article 48 in addition to the previous sub-articles, which extend the court's power to refuse to enforce the award. It is noteworthy that public policy is limited in some of the advanced legislations.[93] In fact, the UNCITRAL Model Law uses the same

86. For example, Article V(b) and (e) New York Convention; and Article 36(ii) and (v) Model Law.
87. Fadul A. is a General Court Judge in Khartoum (Magistrate Court). (The competent court for international arbitration according to Article 5.) He has been promoted to an Appeal Judge after this interview.
88. The Arbitration Act Review Committee 2014.
89. Omer, Mohammed, (Civil Procedures Act 1983: The Regulations of Recourse & Execution Procedures, Vol. 2), Buraag & Khateeb, p. 319 "قانون الإجراءات المدنية لسنة 1983: أحكام الطعن وإجراءات التنفيذ"
90. Fei, Lanfang, Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach, Arbitration International, Vol. 26-2, Kluwer, Nov. 2010, p. 306.
91. Article 34(b-ii) UNCITRAL Model Law.
92. *Ibid*., Article 36(b-ii); Article 5(2-b) New York Convention.
93. In France, for example, the Arbitration Act 2011 limits the interpretation of public policy from the national public policy to the international public policy. *See* Article 1520(6).

wording to achieve harmonisation with the New York Convention.[94] Many commentators argue in favour of limiting the concept of public policy by using the concept of international public policy though the *border interpretation* prevailed in the final draft of the UNCITRAL Model Law.[95] However, this ground has been used internationally to limit some attempts to enforce an arbitral award,[96] especially, when the state or its agencies are the losing party. It is not difficult to see problems in the interpretation of public policy in Sudan, unless the higher courts give guidance or proper interpretation to such ground.[97]

The concept of reciprocity comes at the end of this sub-article, which adds a new difficulty for the party who invokes the award. The party will have to prove that the court at the seat is not reluctant to enforce judgments from the Sudanese courts or awards. That can be easy to prove where there is in existence bilateral or multilateral treaties between Sudan and the seat state.[98] However, in the absence of such treaty, no one can be certain that the seat country will be willing to enforce Sudanese judgments or awards[99] unless previous awards or judgments had been enforced.[100]

This sub-article treats arbitration in the same manner as litigation, disregarding the ideals of arbitration, and extending the power of the courts to block international arbitration in general, in Sudan. In fact, as at the end of July 2017, Sudanese courts have not received any application for the enforcement of a single foreign arbitral award.[101] However, some commentators say that parties tend to transform the arbitral award into a judgment of the court at the seat of arbitration. This step may help parties seeking enforcement in Sudanese courts by invoking any applicable bilateral or

94. Broches argues, '... there is no substantial difference between the Model Law and New York Convention'. Broches, Aron, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer and Taxation Publishers, 1990, 188.
95. Howard M. Holtzmann and Joseph E. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration*, Kluwer Law and Taxation Publishers, 1989. Despite the influence of the modern interpretation of public policy, especially, by the French *ordre public externe* the Working Group chose the border interpretation (pp. 914–915).
96. '*Whatever the freedom surrounding international arbitration, a limit still exists to that freedom: public policy',* Hanatiou, Bernard & Caprasse, Olivier, *Public Policy in International Commercial Arbitration*, cited in Gaillard, Emmanuel & Di Pietro, Domenico, *Enforcement of Arbitration Agreement and International Arbitral Awards*, Cameron May, 2008, p. 787.
97. The higher courts or the Supreme Court may deal with the public policy issue with guidelines from the practices of other countries. Redfern & Hunter, *Law & Practice of International Commercial Arbitration*, 4th edition – reprinted 2007, Sweet & Maxwell, pp. 541–545, give example of the courts in many jurisdictions regarding the interpretation of public policy.
98. Such as Amman 1987 and Riyadh 1983 Conventions endorsed by the Arab countries. Sudan is a contracting state of these conventions.
99. This concept of reciprocity is not new in international or domestic arbitration laws or rules. In fact, some African States have restricted their ratification of the New York Convention with respect to reciprocity. *See* Asouzu, Amazu, *International Commercial Arbitration and African States*, Cambridge University Press, 2001, pp. 193–194.
100. It is noteworthy that the recommendation of the Committee was against the reciprocity principle, but this was rejected by the Ministry of Justice.
101. Nothing in the Sudanese courts records show any application or request to enforce an award issued in another country. Source: The Khartoum Public Court Record and the Supreme Court Record, as at 21 December 2008.

multilateral conventions of judicial cooperation, although, these conventions allow the arbitral award to be enforced without the necessity of the seat court approval.[102]

In spite of all the obstacles discussed above, Article 48 of the SAA 2016 reflects the general conditions or grounds for refusing the enforcement of an award under the New York Convention. The concepts of finality, fairness (due diligence or irregularity), public policy, and reciprocity[103] in sub-Articles (a), (b), (d), and (e) are already embraced in international commercial arbitration. The only difficulty in Article 48 is subsection (c), in addition to the limited authority of the court to support the enforcement. The first two words in the discussed article are 'No execution'. The literal interpretation from the Arabic text is 'the court may not enforce', which sends a negative message to the judge and may make him or her reluctant to enforce the foreign award.

Azahri described the situation prevalent in the United Arab Emirates (UAE) before it became a New York Convention country.[104] He indicated that the arbitral award may not be enforced because it violates the Civil Procedure Law of the UAE, which is considered a huge obstacle to the development of international commercial arbitration in the UAE.[105] Sudan now faces the same situation. In the author's opinion, the Committee should have adopted the New York Convention grounds. It would have changed the wording at least opening the door for Sudan to host international arbitration references. It may also open the path for Sudan to sign and ratify the New York Convention.

It is acknowledged that the New York Convention is one of the pillars of international commercial arbitration.[106] The development of modern arbitration evolved as a result of the vast acceptance of this convention[107] and the UNCITRAL Model Law.[108] Despite the efforts at modernising the arbitration law and practice in Sudan, the country is yet to ratify the New York Convention. *Deraig* the Head of SAA 2016 Drafting Committee finds no reason for Sudan not to ratify the Convention. Many practitioners including members of the Ministry of Justice are supportive of Sudan ratifying the New York Convention.[109] After detailed communication by the author

102. For example, Article 37 of the Riyadh Convention for Judicial Cooperation 1983.
103. Article 1(3) and 1(4) of the New York Convention.
104. UAE signed the New York Convention in August 2006. For convention states, *see*: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (29 July 2017).
105. Azahri, Rassan, *The Recognition and Enforcement of the Arbitral Awards of United Arab Emirates in Germany*, The Dubai International Arbitration Centre (DIAC) Journal, 2005, pp. 30–31.
106. Briner, Robert & Hamilton, Virginia, cited in Gaillard & Di Pietro, *supra*, pp. 19–20 noted: 'The New York Convention is often hailed as one of the great successful stories of international commercial law- if not private international law in general … As the product of concerted effort by governments, jurists and business communities, it reflected the aspiration of all those most directly concerned.'; in The Creation of an international Standard to Ensure The Effectiveness of Arbitration Agreements and Foreign Arbitral Awards.
107. *Ibid.*, pp. 20–21. 'The New York Convention has thus been instrumental in creating conditions in which cross-border economic exchange could flourish.'
108. For the status of the Model Law, *see*: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (29 July 2017).
109. Alsahabi Abdelhalim interview dated 25 March 2017, *supra.*

with the Ministry of Foreign Affairs in 2014 on this issue of Sudan's ratification of various international conventions, including the New York Convention, in March 2017, Abusabaib[110] the legal counselor of Sudan's Mission to the UN in New York confirmed that the New York Convention has been studied and will be signed.[111] This is good news though it is not clear when Sudan will sign the Convention.

However, it is confusing that Sudan was one of the early signatories to the Washington Convention, and ratified the convention in 1973.[112] ICSID has been criticised and described as an international instrument initiated to support international investment and curb governmental behaviours against foreign investors.[113] The fact that ICSID tribunal awards have negatively affected many countries' economies such as Argentina[114] is proven. Meanwhile Sudan discusses ratification of the New York Convention without projecting any reasoning for its delay in ratifying the Convention other than the slow pace of work by government bodies.

CONCLUSION

Anti-arbitration cases such as, *GNPOC, Tractors and Flatco,* were decided by the Supreme Court Review panels. It is also true that the Supreme Court issued significant decisions favouring and supporting arbitration in *Fisal Bank, SAS Co and Kassala State* cases. But this fluctuation in handling arbitration cases is not supportive as it creates uncertainty. These very untrendy cases discouraged many disputants from pursuing the resolution of their disputes through an uncertain mechanism that may lead to the annulment of the arbitration award and subsequently the arbitral procedure in general. In addition to this uncertainty in the Supreme Court Review decisions in arbitration, Article 44-6 of SAA 2016 does not help to restore the missing trust created by the Supreme Court Reviews.

On the other hand, arbitration practice has been developing slowly but positively. The precedents of the Constitutional Court, which were very supportive of arbitration, encouraged disputants to rely on arbitration. As a result, many parties have altered their contract provisions from choice of court to include arbitration clauses. Even governmental institutions, prior 2016, and the private sector relied on arbitration and the precedents previously discussed show the engagement of the Ministry of Justice in many cases. Despite the fact that in most of these cases, the awards rendered were against the government, the Ministry of Justice did not issue any restrictions to governmental bodies to limit or cease referral of state disputes to arbitration. The engagement of the Minister of Justice in changing the draft of SAA 2016 is a valid

110. Dr Hassan A. Abusabib, Minister Plenipotentiary at the Permanent Sudan's Mission to the UN New York.
111. Interview 01 March 2017 with Dr Hassan Abusabib.
112. On April 1973, Sudan ratified ICSID Convention. *See* the ICSID database at: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (accessed on 12 April 2018).
113. Schereuer, *The ICSID Convention: A Commentary*, 2001, pp. 4–5.
114. Over fifty cases have been commenced in ICSID against Argentina since the beginning of the Centre. These cases have definitely caused turmoil in the Argentinean economy.

outcome of the reliance on arbitration and its effects as the government failed to pay its debts after the separation of the South.[115] However, the new SAA 2016 reflects the willingness of the State to arbitrate rather than litigate, and therefore, the Ministry of Justice chose to alter the provisions of the Act rather than limit their use of arbitration. Hence, arbitration has taken its place as an independent dispute resolution method in Sudan's legal system and the debate now is how to enforce the arbitral award not why to arbitrate. Understanding these variations in precedents allows disputants to be prepared and practitioners to critically analyse the stand of each court. The analysis will lead to discussions which it is hoped will eventually unify the view of judiciaries towards arbitration.

115. Sudan inflation rate is considered the highest in Africa. In 2017 inflation reached 33%. It has been increasing since the separation of the south in 2011 creating great challenges to the government to control the economy. http://www.reuters.com/article/sudan-inflation-idUSL5N1GP0FI (accessed 29 July 2017). Inflation rates was 11% in 2009 and rapidly increased after the separation to 36.9% in 2014, Central Bureau of Statistics CBS 06 March 2017. The IMF report stated that international debit of Sudan is USD 50 billion (61% of the GDP) where 84% of the debit are arrears. This confirms the challenges facing the economy https://www.imf.org/external/pubs/ft/dsa/pdf/2016/dsacr16324.pdf (accessed 29 July 2017).