

# Banking Dispute Resolution in Tanzania: A Way Forward

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**Abstract:** *The banking sector all over the world has developed tremendously in terms of services and products, this development, however, have contributed to the rise of the banking disputes. To ensure all these disputes are resolved effectively various mechanisms are established in different countries. These mechanisms include the classic dispute settlement which is the court process and alternative methods to litigation which include arbitration and mediation. Thus, this paper examines the banking dispute settlement in Tanzania to find out the existing methods and propose appropriate methods. The methodology adopted in this paper is based on content analysis of legislations, decided cases, leading textbooks and journal articles to address the study in question. The findings of the study show that Tanzania in solving banking disputes uses Bank of Tanzania resolution desk, court process and arbitration. Hence, the study suggested for some improvement for the banking dispute settlements in Tanzania which include uses of mediation, establishment of commercial court in subordinate court, amendment of arbitration laws and making court-annexed mediation as compulsory.*

**Keywords:** Arbitration, Court, Banking dispute, Mediation, Tanzania

## 1. Introduction

The world has witnessed the growth of banking from saving banks to electronic banking. This shows that the services and products of the banking industry are growing very fast. Among these services and products include electronic banking, mobile banking, Islamic banking, financial lease, and bancassurance to mention few (Kato, 2019). However, this development on the other side has caused many disputes between bankers and customers. The experience has shown that the major disputes in the banking industry are on the recovery of loans, enforcement of security, guarantee, overcharging, and negligence (Finkler, 2019). When those disputes happen, the bank is required to solve the problem through internal process and when they fail to resolve each party has the right to seek other means to solve the dispute outside the bank. These means include the court process, mediation, or arbitration (Consumer Focus, 2012). Therefore, proper mechanisms for settlement of the banking disputes are required to ensure the smooth operation of the banking business, maintain confidence to the customer and above all justice among disputant parties. Based on that, different countries have set their mechanisms to resolve the banking disputes between banker and customer. As part of the world, the banking industry in Tanzania is also growing very fast in terms of structure, service and products. For instance, for many years private commercial banks were not allowed in Tanzania, but in the middle of the 1990s, the government allowed private sectors to run banking business (Estrin & Pelletier, 2018). This privatization brought some changes to the banking industry, among them include the introduction of private commercial banks, electronic banking, ATM, mobile banking, financial lease and Islamic banking. These developments, however, brought some challenges to the banking industry and the main challenge is banking disputes between bankers and customers. Thus, the government needs to ensure a proper mechanism for dispute settlement is in place to avoid the chaos which may lead to the collapse of the banking business. This study, therefore, intending to analyze the settlement of domestic banking disputes between bankers and customers in Tanzania and suggest the best approach.

## 2. Banking Dispute Resolution in Tanzania

Generally, the legal relationship between a banker and a customer based on a contract. This relationship creates some rights and obligations among the contracting parties and each party must comply with the contractual terms (Noor Mahinar et al, 2019). In case if the contractual terms are silent than the parties have to refer to the implied rights and obligations which derived from legislations, common law and equity since they form part of legal sources in Tanzania (Judicature and Law Applicable Act, Cap 358 s. 2(3), Interpretation of Laws and General Provisions Act, 1984 s. 7). This was also stated in *Tanganyika Garage Ltd v. Marceli C. Mafuruki* (1975) LRT 23 when the court stated that, "Where the circumstances of a contract are not provided for in the codified law of contract in Tanzania, one must fall back on the English common law". Thus, to start with bankers' obligations, the banker must maintain the secrecy of the customer's account, must pay the customer on demand, take reasonable care, obey the customer's instructions and to give reasonable notice before closing account of his customers (Tabrani, 2018). On the other hand, the customer has also some obligations to the bank such as an obligation to draw cheques carefully, to disclose forgeries, to keep cheques books in a safe place, to inform bankers on changes of his status and address, to abide by the banking regulations and to his banking read statement frequently (Noor Mahinar et al, 2019). From the above discussion if one party fails to observe his obligations the dispute may arise. The possible dispute as against the customer includes breach of contract and breach of fiduciary duty while as against the bank, the dispute may include dishonor of appropriate instruction, an unjustifiable increase of interest rate and commission or sale of a mortgaged property without informing the customer (Kimei, 2012). Having considered this situation, it is argued that it is important for the banks to have a proper conflict management system to minimize the acceleration of a conflict

with their customers. To support this argument, the Bank of Tanzania provides for internal mechanisms of resolving banking disputes between a bank and a customer (Bank of Tanzania Financial Consumer Protection Regulations, 2019 rule 43(1)). However, this does not confine banks or customers to seek justice outside the bank's wall. Thus, different means are adopted in Tanzania to solve banking disputes these include litigation process, arbitration, court-annexed mediation and the Bank of Tanzania (BOT) resolution desk.

### 2.1 Litigation Process

Despite many criticisms leveled against the litigation process, the litigation process remains the main adjudication institution for resolving banking disputes. The main reason for its existence is that the culture of the banking business requires litigation that has a win or loses situation. For instance, the Loan Market Association issued a standard Multicurrency Term and Revolving Facilities, which requires the reference to litigation only (Leibowitz & Lester, 2002). Moreover, it seems that some people are not ready to go for negotiation way instead they prefer litigation, the same to the academic institutions, most of the universities still teach advocacy hence people like to litigate to practice what they have learned (Armstrong, 2008). This shows that the litigation process will remain as a means of dispute settlement in banking disputes for years to come despite the criticisms against it.

The constitution of the United Republic of Tanzania empowers the judiciary to dispense justice. The structure of court in Tanzania comprises of highest courts and subordinate courts. The highest courts involve the Court of Appeal of the United Republic of Tanzania which is the highest court, the High Court of Tanzania and the High Court of Zanzibar (Hikmany & Oseni, 2016). These two High Courts have Commercial Divisions that deal with commercial disputes which include banking disputes. The purpose of having these divisions is to expedite commercial disputes. It is pertinent to note that, these divisions have no exclusive jurisdiction over banking dispute, since the ordinary High Courts may also entertain banking dispute. There are different reasons for ordinary High Court to have jurisdiction over banking disputes, for instance in Tanzania mainland the Commercial Division has only three branches all over the country, so it is not possible for all people to have access to the Commercial Court Division. More so, the court fees at Commercial Division are higher compare to the ordinary court. So, this allows those who cannot afford fees at the Commercial Division to provide their case at ordinary court. However, the ordinary court is not available in all regions of Tanzania, most of the regions have no High Court. Further, the High Court of Zanzibar has no sub-registry, this has made one side of Zanzibar, Pemba to have no a resident judge. The experience shows that judges visit Pemba when there is the availability of funds to finance their visit. This situation to some extent may affect the judiciary process for banking disputes in Pemba. Therefore, there is a need for having more High Court registries in the country with resident judges to help those people who traveling a long distance to find a High Court. On the other hand, the subordinates' courts in Tanzania Mainland involve the Resident Magistrate's Court and the District Magistrate's Court with concurrent jurisdiction and in Zanzibar, there are Regional Magistrate's Court and District Magistrate's Court with different jurisdictions. It appears that these subordinates' courts have no jurisdictions over banking disputes in Tanzania. Therefore, there is a need for some of the banking disputes to be entertained by these courts to minimize the cases in the High Courts. For courts to hear a banking dispute, the disputant parties must first comply with some procedure which has been underlined by the law. However, it is important to note that there are four main procedures for litigating banking disputes. First and foremost, a pre-litigation stage which comprises of preparation of pleadings and services of summons to the defendant. The next stage is litigation that involves the pre-trial stage, whereby parties with the help of the court solve their dispute amicably before going for litigation. If parties fail to solve their dispute amicably the only option will be to go for a trial that involves the framing of the issue, presentation of the case and evidence. Having completed the presentation of the case it becomes the duty of the court to issue judgments and decrees. From the above discussion, it is clear that the litigation process consumes time as from one stage to another there is a gap of time which suggests that a case can take more time before being finalized by the court (Ghosh, 2017). Moreover, the litigation process involves a strict application of court procedures, failure of which render the case to be struck off. For instance, in *Keloi Madore v. Mapukori Mbelekezi and Mti Mmoja Village Council* (Court of Appeal of Tanzania at Arusha Civil Appeal no. 13 of 2016) the applicant prayed for the extension of time because he was ignorant of the court procedures governing the application of appeal. The court, however, rejected his pray and struck out his application and held that ignorance of the law is not a good cause for an extension of time. This shows that a disputant parties may lose their rights in court for ignorance of the courts' procedures. Further, since litigation involves antagonism which means each party wants to win the case rather than solving the dispute, when the dispute is over parties will lose trust to each other. This is a big problem in the banking business since trust is very vital for both parties in making business to exist. Therefore, there is a need for having other methods which can resolve banking dispute amicably and speed.

### 2.2 Alternative Dispute Resolution

The litigation process involves cost, time and complexity due to its procedures. Thus, to avoid those problems the Constitution of the United Republic of Tanzania provides an opportunity for the use of other methods of dispute settlement as an alternative to litigation (Constitution of the United Republic of Tanzania, 1977 article 107A (2) d). Following this opportunity, different legislations were made to provide room for the application of other alternative methods for dispute resolution. Currently, there are different methods which used to resolve banking dispute apart from litigation these include Bank of Tanzania Resolution Desk, Mediation and Arbitration.

### 2.2.1 Bank of Tanzania Resolution Desk

The Bank of Tanzania Resolution Desk is a desk that aims to resolve banking disputes in Tanzania, and it started its operation in 2015 and followed by the Bank of Tanzania (Financial Consumer Protection) Regulations in 2019. This regulation underlines the mechanisms and procedures for resolving banking disputes within the banking industry. The desk resolves small claims disputes whose monetary value in respect of both the claim amount and remedy awarded does not exceed TZS 15,000,000 (USD 6,818.18) (the Bank of Tanzania Guidelines on Complaints Resolution, 2015 rule 12). The desk aims to resolve complaints quickly, amicably and without a cost-effective manner. However, the experience shows that the desk is available only at the headquarters of Bank of Tanzania, Dar es Salaam. This means that the desk benefits more the residents of Dar es Salaam compare to the other regions. Thus, there is a need for the Bank of Tanzania to expand the services of the desk to at least at all six branches of the Bank of Tanzania to ensure more people are benefited from its service instead of going to the court. To ensure an amicable resolution of dispute the regulation provides that each bank must have an internal mechanism of resolving a complaint which lodges by their customers. The time for resolving such complaints varies from two hours to fourteen days depends on the nature of the complaints. However, if the bank fails to solve such a complaint within the prescribed time it must inform the Bank of Tanzania and a customer the reason for such delay, thereafter the bank is given a half of the prescribed time to finalize its resolution. On the other hand, if the customer is not satisfied with the decision of the bank, he may forward the complaint to the Bank of Tanzania Resolution Desk within 14 days from the date he receives a response from a bank. Then the Bank is required to complete the whole resolution process within 90 days and its decision becoming conclusive and binding. On the other hand, if the aggrieved party is not satisfied with such a decision, he may appeal to the Governor of the Bank of Tanzania whose decision can also be subject to judicial review. However, it is submitted that the reference to judicial review should only be for those cases which real proven to be against the principle of natural justice, otherwise the disputant parties may abuse this opportunity by making unnecessary delay and thus the whole idea behind having this desk will be impotent. Hence, there is a need for the Bank of Tanzania to ensure its resolution desk is well organized in terms of structure and human resources. The Bank should hire competent personals who can work on resolving banking disputes effectively. For instance, the Bank can hire retired judges who have shown enough expertise in adjudicating banking dispute to chair Resolution Desk. In addition to that, there is a need to increase the value of the dispute which the Resolution Desk can entertain, from fifteen million to at least one hundred million. The experience of insurance ombudsman whose power is limited to the complaint which its award amount is TZS 50,000,000 (USD 21,610.165) (Insurance Act, 2009 s. 124(1)) can be a good example for the power of desk to increase. This will encourage more people to use the desk instead of litigation that involves cost and time-consuming.

### 2.2.2 Mediation

Mediation is another method of resolving disputes between bankers and customers. Mediation is a process of dispute resolution where a third party helps the disputant parties to resolve their dispute with their consent. Mediation is more voluntary and is carried on through a private person or institution (Ali, 2018). However, it is clear that mediation has more advantages such as it is confidential, parties are free to choose their mediator, the process has proved to be suitable in loan recovery since it does not take a long time and it does not involve interest charge as in litigation (Nurah, 2010). Nevertheless, it is vital to mention that, this method involves costs among the disputing parties since in most cases it required sharing of the cost. Thus, though it is an amicable method of resolving banking disputes, it is not good for customers who cannot afford the cost of mediation (Gartner, 2013). Hence, it follows that those who can afford to pay the mediator are the ones who can use this method. Therefore, it is not an appropriate method of dispute resolution since it creates divisions within society. However, due to its importance, it is recommended that there is a need of having a special government agency that can deal with mediation to ensure all people have access to mediation (Lukumay, 2016). Mediation is of the two types, private mediation, and court-annexed mediation. In Tanzania, mediation is allowed as one among the method of dispute settlement. However, the practice shows that mediation is not commonly used in banking disputes since lawyers prefer litigation over it (Chande, 2012). However, court-annexed mediation is commonly applicable in Tanzania mainland since it is mandatory before proceeding with the litigation process (Hikmany & Oseni, 2016).

#### 2.2.2.1 Court-annexed mediation

Court-annexed mediation is a process of dispute resolution under the supervision of the court. It is also known as compulsory mediation because the law requires the existence of mediation before litigation (Syukur & Bagshaw, 2013). The reference to mediation is very important in the process of dispute settlement since it serves many purposes including the disposition of cases in speed but in a friendly manner and it avoids the possibility of corruption for judges since the decision relies mainly on the parties themselves. In Tanzania, the court-annexed mediation is a creature of the statute since the laws require a court to institute mediation before trial (Mashamba, 2014). This position was also stated in the case *Fahari Bottlers Ltd and SHB Ltd V. Registrar of Companies & National Bank of Commerce* (1999, Unreported Civil Revision) when the Court of Appeal of Tanzania made a binding requirement to the judges, magistrate, advocates and parties of the dispute to refer the dispute to mediation before trial. This shows that banking disputes are also subject to mediation under court supervision before litigation. However, in Zanzibar reference to court-annexed mediation seems not to be compulsory since disputant parties are at liberty to refer their dispute to mediation or not (Zanzibar Commercial Court (High Court Division) Act, 2013 s. 18). This situation is not good for banking

dispute settlement. Zanzibar should amend its law to allow reference to mediation becomes a compulsory process before the court proceeds with the litigation process. To ensure mediation pending trial does not take much time the law requires a mediation process to be concluded within fourteen days and if there is no agreement between the disputant parties the matter will go for trial. The experience shows that most of the dispute like debt recovery are settled in this stage before going to trial. However, there are some cases which fail to be concluded in this stage. Thus, it is submitted that, despite being an appropriate way of dispute settlement, few people are supporting it either for the lack of awareness or lack of readiness of the judiciary in Tanzania to use it (Lukumay, 2016). For instance, up to date, the country has no guideline which guides court-annexed mediation. However, Zanzibar has developed regulation that governs qualifications and remuneration of mediators, but that is not enough the judiciary should go further to provide a guideline which shows explicitly how to conduct court -annexed mediation (Mzee & Azam, 2020).

### 2.2.3 Arbitration

Arbitration is a process in which a dispute between two or more parties is resolved by impartial individuals, called arbitrators. Arbitration is another method of resolving banking disputes in Tanzania. For instance, the Code of Banking Practice which has been issued by Tanzania Bankers Association directs the use of arbitration when there is a dispute in which Bank of Tanzania Resolution desk has failed to be settled (Tanzania Code of Banking Practice, code 11 (c) ii). This shows the bank industry in Tanzania encourages the use of arbitration rather than litigation. The main purpose of arbitration was stated in the case of *Tanzania Electric Supply Co. Ltd v. Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)* when the court provides that the purpose of arbitration is to solve commercial disputes out of the court litigation by using amicable way without involving the court. Therefore, any banking dispute may be subject to arbitration. The main legal sources of arbitration are the Arbitration Act, 2020, Civil Procedure Code, Cap 33 for Tanzania mainland and in Zanzibar Arbitration Decree, 1928. By referring these laws one can find that Tanzania mainland has a new law of 2020 while Zanzibar still uses laws that were made during the colonial era. Thus, it is from the foregoing stark reality that Arbitration Decree needs an immediate review to incorporate new ideas on arbitration. Currently, the legal practitioners of the various law firms, individuals and non-governmental organizations such as the Tanzania Institute of Arbitrators administer the commercial arbitration process. Disputant parties are free to initiate the arbitration through the institute, which acts as a facilitator to what the disputant parties have agreed on the choice of arbitrator (Muigua, 2015). However, in case the parties have not appointed arbitrator the institute finds arbitrators for them according to its rules. On the other hand, a court can entertain arbitration when disputant parties pray for a stay of proceeding to allow them to refer their matter for arbitration. However, this must be before the court makes a judgment. When the court grants such order the parties are at liberty to appoint their arbitrator without the court intervention. However, if it is difficult to find an arbitrator the court will appoint for them after the expiry of seven days from the issue of notice. Another scenario in which the court may intervene arbitration is when there is a prior agreement between parties to refer their disputes to the arbitration. This suggests that it is important for banking contracts to contain a provision which shows the reference to arbitration in case of any dispute between them. The experience has shown that bankers prefer to use litigation instead of arbitration, thus by having such provision bankers will be enforced to resolve the dispute through arbitration. Since most of the customers could not enforce the inclusion of such provision to the banker the government needs to come up with a law which can enforce a bank to have such provision in their contract. Among the conditions for application to stay of proceedings pending arbitration include a person must be a party to a written agreement of submitting the dispute to arbitration or any other person. The petition should be at any time before the filing of a written statement of defense or take any other step in the proceedings and last a person to be entitled to apply for the stay of proceedings he must have entered an appearance. Though the laws, which govern the arbitration, allows the stay of proceedings pending arbitration it has been arguing that the court does not provide adequate support for the arbitration process. This is evident by the fact that sometimes the court denies arbitration and proceeds with the trial (Mkumbukwa, 2009). For instance, in the case of *Nor Consult A/S v Tanroads* (Miscellaneous Commercial Appeal No 16 of 2008), the court rejected the application of reference to arbitration because of the wrong citation of the law. The court must be lenient when facing the application to refer to arbitration by not taking too much regard on the technicalities of the procedure this will help people to use arbitration (Cosmas, 2015).

### 3. Way Forward

The above discussion shows in banking business disputes are inevitable because of the nature of the business. Though it remains important for banks to ensure they prevent disputes with their customers by encouraging pre-dispute mechanisms. However, since the dispute is inevitable it is important to make some changes to the current banking dispute resolution system to make dispute settlement as easy as possible. This can be achieved by having more special court for banking disputes and improving alternative dispute resolution. Start with special court, both the High Court Commercial Divisions need to have a special unit that deals with banking disputes only. Having this unit will enable judges to specialize more on banking and its emerging services and products hence they can provide appropriate remedies whenever a banking dispute arises. Moreover, there is a need for special courts at subordinate's courts level which adjudicate banking disputes. For instance, Pakistan established Banking Courts deals with banking issues such as the recovery of loans from the lower level (Cohan & Cohan, 2011). These courts are required to finalize cases within 90 days from the day of its commencement and should not adjourn a case for more than seven days all these aims at making

banking disputes to be finalized with speedy and efficiencies. In addition to that, in India has two levels of Commercial Courts; the Commercial Courts and Commercial Division, which has jurisdiction within the district established and Commercial Appellate Division of High Courts (Garimella & Ashraful, 2019). Having special courts for banking dispute at subordinate's court will make magistrates and judges specialize in banking and its emerging issues at large. Therefore, Tanzania should adopt these structures of Banking Court of Pakistan or Commercial Courts of India to make quick settlement of the banking disputes. More so, due to the introduction of Islamic banking in the country, there is a need for the judiciary to consider having a special unit within commercial divisions that can hear disputes from Islamic banking. Having this unit will make judges specialized more on Islamic finance since it is a field of itself that requires special treatment to provide an appropriate decision for the disputant parties (Olayemi, 2017).

Moreover, Zanzibar should ensure court-annexed mediation becomes compulsory for all banking disputes in court whether in ordinary High Court or its commercial division. Also, it is submitted that the procedure which allows the same judge to proceed with mediation is not effective, since it may create conflict of interest and produce a bias judgment if mediation fails. Judges are human beings sometimes they become angry with parties of the case or their advocates (Maroney, 2012). Thus, a judge can become angry with one party who shows disagreement during the mediation process hence a judge may punish him by giving judgment against him during litigation. This suggests that the judiciary must sensitize the public on the benefits of using it through media and to have appropriate instruments that give direction on how to conduct a court-annexed mediation otherwise this process will be useless.

Furthermore, Zanzibar should amend its laws governing arbitration to have a law that will address the current issues in the arbitration process which the existing law fails to address. In addition to that, there is a need for having strong arbitration rules and institution that deals with banking disputes between bankers and customers. As the country has no legal support for the Islamic banking industry, the arbitration process can play a big role in solving the dispute by having standard rules such as of the Accounting and Auditing Organisation for Islamic Financial Institutions (AAOIFI Standard on Arbitration), which is applicable in Malaysia (Hikmany & Oseni, 2016). In doing so, there is a need to consolidate arbitration laws as this will simplify the reader and practitioner of arbitration.

#### 4. Conclusion

The paper looks at the resolution of banking disputes in Tanzania. The findings of the study show that different methods are used in solving banking disputes such as court process, court-annexed mediation, Bank of Tanzania resolution desk, mediation and arbitration. However, mediation has shown not to be used in Tanzania in solving banking disputes, but it uses the Bank of Tanzania (BOT) desk as an alternative to mediation in solving banking disputes. To ensure banking disputes are disposed of in proper time with the appropriate decision, the paper proposes for the establishment of the commercial court at subordinates' court, special unit at commercial division for Islamic banking dispute, amendment of the Arbitration laws of Zanzibar to comply with international standards and making court-annexed mediation as a compulsory procedure in banking dispute in court.

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