

**STRENGTHENING THE LEGAL AND INSTITUTIONAL FRAMEWORK
OF INTERNATIONAL COMMERCIAL ARBITRATION IN KENYA: THE
CASE OF NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION**

BY

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DECLARATION

By submitting this dissertation I declare that the entire work contained herein is my own original work and I am the sole author thereof (save to where I have disclosed otherwise) and the same has never been submitted elsewhere for any qualification.

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DEDICATION

This work is dedicate this work to my parents Kennedy Muyala and Christine Wang'anya who always supported me through this academic journey and my siblings Cecilia, Melvin and Marshall may the Lord bless you all.

LIST OF ABBREVIATIONS

LCIA -London Court of International Arbitration

NCIA -Nairobi Centre for International Arbitration

ICC -International Chamber of Commerce

KIAC -Kigali International Arbitration Centre

UNICTRAL -The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985

HC -High Court

UNCTAD – United Nations Conference on Trade and Development

ICSID –International Centre for Settlement of Investment Disputes

MOU-Memorandum of Understanding

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The Arbitration Act (as amended in 2009) and the Arbitration Rules 1997

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The Nairobi Centre for International Arbitration Act 2013

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The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration of 1985

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CHAPTER ONE

1.1 INTRODUCTION

Arbitration is a private process for solving disputes through a tribunal made of one or more independent third persons.¹ It is one of the mechanisms that are known as alternative dispute resolution mechanisms (ADR).² The Kenyan Constitution 2010 recognizes arbitration as an alternative form of dispute resolution.³ Arbitration has gained recognition as a preferred mechanism for settling international disputes.⁴

In Kenya there are various institutions that promote alternative dispute resolution. These institutions include the Nairobi Centre for International Arbitration (NCIA), Chartered Institute of Arbitrators-Kenya Branch (CIArb-K) which was established in 1984 and Centre for Alternative Dispute Resolution (CADR). The Nairobi Centre for International Arbitration will be the focus of this research.

The Nairobi Centre for International Arbitration is a body corporate with perpetual succession and common seal.⁵ It was established by the Nairobi Centre of International Arbitration Act 2013⁶. The Centre has its headquarters in Nairobi.⁷ NCIA was established with the aim of enhancing international commercial arbitration⁸ and to administer alternative dispute resolution mechanisms.⁹ There are other functions of NCIA which are provided under section 5 of the NCIA Act 2013. However this research will mainly focus on its function under international commercial arbitration. The issues to be addressed will be the legal and institutional framework of NCIA on international commercial arbitration.

The legal and institutional frameworks are some of the basic components of international commercial arbitration. The practice of international commercial arbitration may be fully realized if the legal and institutional frameworks are efficient and effective.¹⁰

Kenya started to push for the creation of a conducive legal framework for international arbitration through various proposals made to establish Nairobi as Regional Centre for

¹ Philip Capper, *International Arbitration: A handbook*, 3rd edition, p 2

² Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, Lodana Publishers, 2012, p 1

³ Constitution of Kenya 2010, article 159(2)(c)

⁴ J.D Frank, *The Role of International Arbitrators*, p1. Available at <https://www.international-arbitration-attorney.com/wp-content/uploads/Microsoft-Word-ILW-ILSA-Article.docfranz.pdf> accessed on 6/05/2015

⁵ Nairobi Centre for International Arbitration Act 2013, Section 4(2)

⁶ Nairobi Centre for International Arbitration Act 2013, section 4(1)

⁷ www.ncia.ac.ke

⁸ Nairobi Centre for International Arbitration, Section 5(a)

⁹ Ibid, Section 5(b)

¹⁰ Honourable Amos Wako speech on Arbitration Bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

Arbitration under the auspices of Asian African Legal Consultative Organization (AALCO).¹¹ Nairobi would therefore be considered to be a Centre for International Arbitration if it had the legal framework conforming to the best international standards¹². The speech by Honourable Amos Wako therefore disputes Kamau Karori's view that the Kenyan business community started to push for the creation of a legal and institutional framework for international arbitration from around 2010.¹³ The effort to establish conducive legal framework started before the enactment of the Constitution of Kenya 2010. Honourable Amos Wako introduced Arbitration bill to parliament which was to repeal the previous law which was seen as obsolete and out dated.¹⁴ The Bill was to provide legal framework to facilitate the setting up of an international arbitration Centre in Nairobi.¹⁵ The Bill followed modern law on international arbitration of the United Nations Commission on International Trade Law.¹⁶

A conducive legal and institutional framework for international commercial arbitration is important as it will encourage advocates and people in the private sector to use arbitration to solve cases.¹⁷ When more people use arbitration as an alternative form of dispute resolution, congestion of cases in the courts will reduce.¹⁸ Kenya was not a preferred destination for international commercial arbitration.¹⁹ Most business investors preferred countries with Arbitration Centre. The investors would often choose Paris or London and any other Centre for international commercial arbitration.²⁰ A conducive legal framework will therefore attract international commercial arbitration in Kenya hence there will be benefit of earning foreign exchange hence promoting economic development.²¹

¹¹ Report on Asian-African Legal Consultative Organization(AALCO)Regional Arbitration Centre AALCO/51/ABUJA/2012/ORG3

¹² Honourable Amos Wako speech on Arbitration bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

¹³ Kamau Karori, A Momentous Step: Kenya establishes International arbitration Centre, International Arbitration Newsletter, 20 December 2013 available at [https://www.dilarppiper.com/en/global/insights/publications/2013/2012/a-momentous-step-kenya-establishes-international-/](https://www.dilarppiper.com/en/global/insights/publications/2013/2012/a-momentous-step-kenya-establishes-international/) accessed on 6/03/2015

¹⁴ Honourable Amos Wako speech on Arbitration Bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

¹⁵ ibid

¹⁶ ibid

¹⁷ ibid

¹⁸ ibid

¹⁹ ibid

²⁰ ibid

²¹ ibid

1.1.1 History of arbitration law in Kenya

Kenya has come a long way as far as arbitration is concerned. In the early years the local communities practiced alternative dispute resolution. The arbitrations were commonly conducted by the community elders who spearheaded the disputes involving land, succession and livestock.²² The Kenyan law on arbitration can be traced back as early as in 1914.²³ The first legislation on arbitration which was promulgated in 1914 was a replica of English Arbitration Act 1889. The same Arbitration Ordinance gave the court power to control the arbitration process which made little impact in promoting dispute resolution through arbitration.²⁴ This legislation was enacted when Kenya was a colony of the British. Colonization of Kenya by the British came to an end when it gained independence in 1963. After 1963 other various legislation on arbitration were enacted. The new Kenyan Government enacted the Arbitration Act 1968 which was based on the English Arbitration Act of 1950.²⁵ It should also be noted that Arbitration (Foreign Awards) Ordinance that had been passed in 1930 to facilitate enforcement of certain foreign awards also became part of the 1968 Act. After being seen as outdated, the Arbitration Act 1968 Act was repealed.²⁶ The Arbitration Act of 1995 which was based on the UNICITRAL model law²⁷ came in place to replace the repealed Act.

It is also important to mention the various conventions on arbitration that Kenya had ratified as forming part of the history of arbitration. These conventions are New York Convention on the Recognition and Enforcement of Arbitral Awards²⁸ and International Convention on the Settlement of Investment Disputes (ICSID) both of which deal with international commercial arbitration. The Nairobi Centre for International Arbitration Act 2013 was enacted to provide for

²² Edward Torgbor, A Comparative Study of law and Practice of Arbitration In Kenya, Nigeria and Zimbabwe, with particular Reference to current Problems in Kenya (PHD Thesis Stellenbosch)

²³ Jacob Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the legal Framework on Arbitration and ADR" International Journal Of Humanities and Social Sciences Vol No. 6 June 2011

²⁴ Jacob Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the legal Framework on Arbitration and ADR" International Journal Of Humanities and Social Sciences Vol No. 6 June 2011

²⁵ Couldrey J "Kenya" in Cotran E & Amissah A (eds) *Arbitration in Africa* 51 at 52

²⁶ Arbitration Act 1995, Section 42(1)

²⁷ The Bill adopted the UNCITRAL Model Law for both domestic and international arbitration: Couldrey "Kenya" in Cotran & Amissah (eds) *Arbitration in Africa* 51

²⁸ Adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation

the establishment of a regional centre for international commercial arbitration and the arbitral court and to provide for mechanism for alternative dispute resolution.²⁹

It is therefore important to note that Kenya has made various changes to its arbitration laws. The aim of making changes to arbitration is to ensure that the laws conform to the international or modern form of arbitration. The changes to arbitration laws are also made to ensure that they are effective and efficient.

1.1.2 History of Formation of Nairobi Centre for International Arbitration (NCIA)

Apart from the laws governing arbitration in Kenya, there have been attempts to establish arbitration centers for solving commercial disputes. A well-organized arbitral institution is in a position to provide quality international arbitration services.³⁰ The process of setting up NCIA was an effort of both the international community and the local or national effort of the government of Kenya. The international community made an effort to establish NCIA under the auspices of Asian African Legal Consultative Organization (AALCO).³¹ The local effort involved the government of Kenya in ensuring that the necessary pieces of legislation for arbitration conforming to the international best practice were enacted.

In performing its functions as provided under article 1 of the Statutes and Statutory Rules of AALCO, AALCO realized one of its objectives by deciding to establish Regional Arbitration Centres (RACs) which itself would provide guidance.³² The RACs would function as International Institutions with the goal of enhancing international commercial arbitration in the Asian-African regions.³³ In putting into practice its decision to form RACs, AALCO made sure that Kuala Lumpur and Cairo were established as the first Arbitration Centres.³⁴ The Kuala Lumpur and Cairo AC had the mandate to:³⁵ enhance international commercial arbitration in the Asian and African Regions, help in the enforcement of arbitral awards, help in Ad Hoc

²⁹ Nairobi Centre for International Arbitration Act, 2013, the preamble

³⁰ Redfern & Hunter, Law and Practice of International Commercial Arbitration, 2nd Edition, London: Sweet & Maxwell 1991, p. 155.

³¹ AALCO is an international organization made of African and Asian member states. Its mandate and objectives is provided under article 1 of the Statues and Statutory Rules of AALCO

³² This Scheme was launched under the AALCO Programme known as Integrated Scheme for Settlement of Disputes in the Economic and Commercial Transactions in 1978.

³³ www.aalco.int/scripts/view-posting.asp?recordid=1 accessed on 4/5/2015

³⁴ Report on AALCO Regional Arbitration Centres AALCO/51/ABUJA/2012/ORG3

³⁵ Report on AALCO Regional Arbitration Centres AALCO/51/ABUJA/2012/ORG3

arbitrations where necessary, provide arbitration and help to coordinate the activities of existing arbitration institutions in the two regions that were established.

It is the success of Kuala Lumpur Arbitration Centre and Cairo Arbitration Centre that informed the decision to form other AC like Lagos AC and NCIA.³⁶ Nigeria was identified as a country where a Regional Arbitration Centre should be established to serve the Western Africa region. The RAC was to be established in Lagos. On the hand Kenya was identified as a country where a Regional Arbitration Centre should be establishes to serve the East African region. The Regional Arbitration Centre was to be established in Nairobi.

As stated earlier the various deliberations to form NCIA as a Regional Arbitration Centre under the auspices of AALCO was an international community effort.³⁷ It is the various conferences conducted by AALCO that various proposals were made to establish Nairobi as a Regional Arbitration Centre. A Kenyan representative to the Arusha Annual Sessions of AALCO made the first request to have Nairobi as Regional Arbitration Centre.³⁸ This was followed by seeking support and back up from Uganda and Tanzania to establish Nairobi as Centre to provide arbitration services and other necessary needs of States in the Eastern and Southern parts of African continent.³⁹ However, it was during a session held in Tokyo, Japan in 1994 that the first proposal was tabled to establish more Regional Arbitration Centre in Nairobi and Tehran which informed the Government of Kenya to express their interest to establish Nairobi as a Regional Arbitration Centre.⁴⁰

The proposal to establish Nairobi as a Regional Arbitration Centre was adopted and a Memorandum of Understanding (MOU) was signed by the Attorney General of Kenya and Secretary General of AALCO at a conference held in New Delhi on 3rd April 2006.⁴¹ An agreement to establish NCIA was signed in Cape Town, South Africa as from 2nd to 6th of July 2007 as a follow up to the MOU signed in New Delhi.⁴² Furthermore, a committee was put in

³⁶ Report on AALCO Regional Arbitration Centres AALCO/51/ABUJA/2012/ORG3, p 2

³⁷ The Speech by Honourable Amos Wako, The Kenya National Assembly Official Record(Hansard) 4th July 1995

³⁸ Report on Asian-African Legal Consultative Organization(AALCO) Regional Arbitration Centre's AALCO/51/ABUJA/2012/ORG3

³⁹ *ibid*

⁴⁰ *Ibid*

⁴¹ *ibid*

⁴² *Ibid*

place by the Attorney General of Kenya to implement the establishment and function of Nairobi as a Regional Arbitration Centre.⁴³

As stated earlier in the paper there was also a local initiative to establish Nairobi as a Centre for International Arbitration led by the Government of Kenya. The local initiative was on the basis of passing pieces of legislation conducive for international commercial arbitration.⁴⁴ To begin with, Kenya ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards on February 10th 1989 and became operational on 11th May 1989.⁴⁵ This convention is important because it is one of the basic components in international commercial arbitration.⁴⁶ In 1994 there was discussion to change the then arbitration Act of Kenya.⁴⁷ Arbitration bill was introduced in parliament by Honourable Amos Wako with a view to change the then Arbitration Act which was seen as obsolete, outdated and not conforming to the international best practice of international commercial arbitration.⁴⁸ The Bill followed modern law on international arbitration of the United Nations Commission on International Trade Law hence preparing the ground for establishing a Centre for international commercial arbitration in Nairobi.⁴⁹

Kenya on 14th January 2013 enacted the Nairobi Centre for International Arbitration Act No. 26 of 2013. The said Act established Nairobi Centre for International Arbitration.⁵⁰ The Centre has a secretariat headed by a Registrar.⁵¹ There is also a Board of directors which is a governing body incorporating members from beyond Kenya.⁵² The current board members took oath of office on Friday March 6, 2015.⁵³ The Centre has an arbitral court⁵⁴ which shall consist of a president,

⁴³ The Report of the Forty-Ninth Annual Session of AALCO, Dar es Salaam, United Republic of Tanzania, 5-8 August 2010, p. 216, available at www.aalco.int

⁴⁴ Honourable Amos Wako speech on Arbitration bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

⁴⁵ Jacob Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR, International Journal of Humanities and Social Science, Vol. 1 No.6; June 2011

⁴⁶ Ibid

⁴⁷ The discussion mainly took place in parliament.

⁴⁸ Honourable Amos Wako speech on Arbitration bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

⁴⁹ Ibid

⁵⁰ Nairobi Centre for International Arbitration Act No. 26 of 2013, Section 4(1)

⁵¹ Ibid, section 9(3)

⁵² Ibid, section 6(1)

⁵³ Business Daily available at <http://www.businessdailyafrica.com/Nairobi-arbitration-centre-board-takes-oath-of-office/-/539552/2060166/-/bsdv5o/-/index.html> accessed on 07/03/2015

⁵⁴ Nairobi Centre for International Arbitration Act No 26 of 2013, Section 21(1)

two deputy presidents, 15 other members who shall be leading international arbitrators and Registrar.⁵⁵

This work will therefore analyze the current legal and institutional framework for Nairobi Centre for International Arbitration. The analysis will establish if the laid down legal and institutional framework for Nairobi Centre for International Arbitration conforms to the modern laws on international commercial arbitration, how it promotes business, the gaps in the law and what needs to be done to improve the same.

1.2 STATEMENT TO THE PROBLEM

A good legal and institutional framework for Nairobi Centre of International Arbitration will enhance effective and faster resolution of commercial disputes while a bad legal and institutional framework will undermine the whole arbitration process and scare away investors.⁵⁶ The legal structure for Nairobi Centre for International Arbitration should provide a favorable environment for solving disputes. The Nairobi Centre for International Arbitration Act 2013 was enacted to provide for the establishment of a regional Centre for the international commercial arbitration and the arbitral court and to provide for the mechanisms for alternative dispute resolution.⁵⁷

The members of the secretariat of NCIA took oath of office but does its current institutional framework enhance effective resolution of disputes? The rules of an AC are important in solving the commercial dispute. This then begs the question if NCIA as a new arbitration Centre make its own rules or should it use rules of other well experienced AC like the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC)? This question need to be clearly addressed because if the Nairobi Centre of International Arbitration sets its own rules which have not been tested the parties may not be willing to take their commercial disputes to the Centre as they will not be sure if the rules are effective. A physical infrastructure for the parties to have their hearing is very important in solving dispute. If the Nairobi Centre for International Arbitration has physical infrastructure for hearing will convince

⁵⁵ Ibid, Section 21(2)

⁵⁶ Honourable Amos Wako speech on Arbitration bill 1995 available at the Kenya National Assembly Official Record (Hansard), 4th July 1995

⁵⁷ The preamble of Nairobi Centre for International Arbitration Act No. 26 of 2013

parties to a dispute to choose it rather than travelling abroad to other institutions and hence reducing costs.

There are various laws providing for domestic arbitration and international commercial arbitration. The Nairobi Centre for international arbitration Act 2013 was put in place to facilitate international commercial arbitration. Is the Nairobi Centre for international Arbitration Act 2013 effective? This research will therefore seek to point out the gaps in the laws governing international commercial arbitration and whether they can be rectified and make them effective. Lack of effective legal and institutional framework will undermine the effective resolution of international commercial disputes by Nairobi Centre for International Arbitration.

1.3 JUSTIFICATION OF THE PROBLEM

This study is justified on the basis that much work has been written on international commercial arbitration. However, literature on NCIA is limited.

1.4 RESEARCH QUESTIONS

- a) What is the institutional framework of Nairobi Centre for International Arbitration and does it meet international standards?
- b) Does the laws governing Nairobi Centre for International Arbitration meet international best standard for arbitration when compared with other arbitral institutions?
- c) What is the way forward for NCIA in ensuring that its legal and institutional framework meets the international best standards?

1.5 OBJECTIVES OF THE STUDY

The main objective of the research is to examine if Nairobi Centre for International Arbitration is an ideal Arbitration Centre that meets the best international standards.

The specific objectives of the study include:

- a) To examine if the legal and institutional framework of Nairobi Centre for International Arbitration conform to the best international best standard or practice of an ideal Arbitration Centre

- b) To examine how the NCIA carries out its mandate and if they meet the international best standards as compared to other established Arbitration Centre like LCIA, ICC, Kigali International Arbitration Centre(KIAC)
- c) To make proposal for reform.

1.6 HYPOTHESIS

The research will test the following hypotheses:

- a) The institutional framework of Nairobi Centre for International Arbitration meets international best standard.
- b) The laws governing NCIA meet international best standard as compared to London Court of International Arbitration, the International Chamber of Commerce and Kigali International Arbitration Centres.
- c) NCIA has put in place the legal and institutional framework that meets the best international standards or practice.

1.7 THEORETICAL FRAMEWORK

Alternative Dispute Resolution (ADR) is one of the ways of solving disputes among conflicting parties in the society apart from litigation.⁵⁸ ADR in the Kenyan Constitution include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁵⁹ This paper will however be focused on arbitration. According to Kariuki Muigua, arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties but which is regulated and enforced by the state.⁶⁰ The proponents of arbitration have argued that arbitration has more advantages than litigation.⁶¹ Arbitration is flexible, faster and parties have the choice to decide how their disputes will be resolved and who

⁵⁸ Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution of Kenya" Op cit. page 2

⁵⁹ Constitution of Kenya 2010, article 159(2)(c)

⁶⁰ Kariuki Muigua, ADR the road to justice in Kenya, 2014

⁶¹ Paul Ngotho, the Bastard Provision in Kenya Arbitration Act, paper presented at CIArb (Kenya Branch) & CADR Regional Arbitration Conference, 2013 Southern Sun Hotel, Nairobi, Kenya available at <http://www.ngotho.co.ke/TheBastard.pdf> accessed on 07/03/2015

will resolve the dispute.⁶² It is the advantages of arbitration that makes people to believe that arbitration facilitates justice more accessible than the courts.⁶³

The research posits that arbitration is very important in access to justice and this is analyzed using the positive school of thought. Access to justice can be described to mean the circumstances in which people find solution to their disputes other than the one provided by the state judicial system.⁶⁴ These solutions should be solved through a system that is easily accessible, affordable, faster and which is seen to dispense justice fairly without discrimination of any kind.⁶⁵ In discussing access to justice it is important to note the existence of access to justice systems. Access to justice system refers to the ways used to resolve disputes through the formal legal structure using different methods such as mediation and arbitration with the aim of enhancing faster resolution of disputes.⁶⁶

The positivist school of thought believes that all laws are man-made and does not emanate from the Supreme Being as emphasized by the natural school of thought.⁶⁷ The positivists are concerned with what the law is and not what ought to be.⁶⁸ In realizing access to justice, a fair and effective legal framework should be put in place to ensure protection of human rights and easy delivery of justice.⁶⁹ The positivists also opine that bad law can be rectified by repealing or amending the statute.⁷⁰ The Kenyan Constitution under article 48 provides for access to justice.⁷¹

⁶² Ibid

⁶³ Ibid

⁶⁴ W Davis & H Turku, Access to Justice and Alternative Dispute Resolution, Journal of Dispute Resolution, Vol 2011, Issue 1, 2011

⁶⁵ M.T. Ladan, 'Access To Justice As A Human Right Under The Ecowas Community Law' A Paper Presented At: The Commonwealth Regional Conference On The Theme: - The 21st Century Lawyer: Present Challenges And Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010, available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-> accessed on 4/05/2015

⁶⁶ W Davis & H Turku, Access to Justice and Alternative Dispute Resolution, Journal of Dispute Resolution, Vol 2011, Issue 1, 2011

⁶⁷ Marmor, A., 'Legal Positivism: Still Descriptive And Morally Neutral', Available at <http://lawweb.usc.edu/users/amarmor/documents/DescriptivePositivismfinalms.pdf> Accessed on 4/05/2015

⁶⁸ John Austin quoted by B Bix in B Bix, Jurisprudence: Theory and Context (6th edn Sweet & Maxwell London 2012), pg 34

⁶⁹ M.T. Ladan, Access To Justice As A Human Right Under The Ecowas Community Law op. cit. p3

⁷⁰ G Leslie, Legal Positivism the Stanford Encyclopedia of Jurisprudence' <http://plato.stanford.edu/entries/legal-positivism/>> accessed on 14/07/2015

⁷¹ Constitution of Kenya 2010 provides that the State has the responsibility of ensuring access to justice by all persons.

This study will use the international arbitration laws enacted to facilitate resolution international commercial disputes.

1.8 RESEARCH METHODOLOGY

The research method to be used in data gathering will mostly focus on both primary and secondary data. The secondary sources will include library research that will take an analysis of the scholarly journals, thesis and dissertations about the subject, the various legislations and treaties signed that have effect towards the development of international commercial arbitration in Kenya. Books, references quoted in books and government documents will also be used. The sources of primary data will be the Constitution, statutes and the cases. The primary data will be supplemented by interviewing the Registrar of Nairobi Centre for international Arbitration and the Director of Nairobi Centre for International Arbitration.

1.9 ASSUMPTIONS

This paper assumes that Kenya has taken steps to ensure that there is an effective process of international commercial arbitration by enacting conducive legal and institutional framework governing the Nairobi Centre for International Arbitration.

1.10 LIMITATION OF THIS STUDY

This study will investigate the practice of international commercial arbitration in Kenya from the time the Constitution of Kenya 2010 was promulgated. Analysis of applicability of international commercial arbitration in other jurisdictions will also be useful in making recommendations. The scope of this research will also be done in Nairobi because it is the capital city of Kenya and most of the commercial transactions are done in Nairobi. The Nairobi Center for international arbitration will be the main point of reference in this study.

1.11 LITERATURE REVIEW

A lot of literature discusses the international commercial arbitration in Kenya. However most of the literature fails to point out how the legal and institutional framework of international commercial arbitration can be strengthened to make it efficient in solving disputes.

A suitable legal framework is important in facilitating international commercial arbitration. Legal framework includes the laws governing international commercial arbitration and the institutions or centers for international arbitration.

1.11.1 History of International Commercial Arbitration in Kenya.

Attiya Waris and Muthomi Thiankolou⁷² discuss international commercial arbitration. This work is however limited to the legal regime of international commercial arbitration under the Kenyan Arbitration Act, 1995. It fails to highlight the recent developments of international commercial arbitration in Kenya. These recent developments not captured by Attiya Warris and Muthomi Thiankolu include the enactment of Nairobi Centre for International Arbitration Act, 2013 as one of the laws providing for international commercial arbitration in Kenya. The said legislation also provides that there is an establishment of Nairobi Centre for International Arbitration.

Torgbor⁷³ in his analysis of arbitration legislations in Africa talks about the history of arbitration in Kenya. His work covers the arbitration laws from the time Kenya was a colony of the British until the enactment of arbitration act 1995. The enactment of Nairobi Centre for International Arbitration Act 2013 is not discussed by Torgbor.

Dorcas Owuor Ajima gives an overview of Arbitration laws in Kenya. She states that these laws include Arbitration Act, Civil Procedure, Nairobi Centre for International Arbitration and history and development of arbitration laws in Kenya. The work however fails to discuss the gaps of the NCIA Act 2013. Ajima fails to state whether there is a conflict between the NCIA Act 2013 and the Constitution of Kenya 2010 and whether the NCIA Act 2013 has conflict with the Arbitration Act 1995.

1.11.2 The Legal Framework for Nairobi Centre for International Arbitration.

The Kenyan legal framework establishes the Nairobi Centre for International Arbitration.⁷⁴ The Nairobi Centre for International Arbitration Act is an act of parliament that provides for the

⁷² Attiya Waris and Muthomi Thianklou, "International Commercial Arbitration in Kenya" in Arbitration law and Practice in Kenya(Law Africa Publishing(k)Ltd, chapter 9

⁷³ Edward Torgbor, A Comparative Study of law and Practice of Arbitration In Kenya, Nigeria and Zimbabwe, with particular Reference to current Problems in Kenya(PHD Thesis Stellenbosch)

⁷⁴ The Nairobi Center for International Arbitration Act No. 26 of 2013, section 4

establishment of a regional Centre for international commercial arbitration and the arbitral court to provide for alternative dispute resolution mechanism. The laws governing international commercial arbitration should be consistent with the international best practices. It is therefore noteworthy to know if the international commercial arbitration laws conform to the international best practices.

Kenya has ratified various international instruments for international commercial arbitration and to add on that has made steps to ensure that the legislations conform to the international best practices. The Arbitration Act of Kenya 1995 which came into force on 2 January 1996,⁷⁵ enacts the provisions of the Model law under the eight parts which corresponds to the eight chapters of the Model law under the same or similar headings.⁷⁶ The adoption of model law by Kenya is important because the principles and individual solutions adopted in the Model Law are aimed at reducing or eliminating the disparities between national laws and the problems and undesirable consequences created by uncertainties in national arbitration laws.⁷⁷

Kariuki Muigua states that the legal and institutional frameworks to support international commercial arbitration must be strengthened to meet the challenges that bedevil the system.⁷⁸ He states some of the challenges facing international commercial arbitration are national courts interference, perception of corruption or government interference, endless court proceedings, challenge of institutional capacity in terms of their number, inadequate staff and finances. In any discussion relating to legal capacity, there is a vital role to be played by the by the systematic reduction of crime and corruption in the encouragement of economic development.⁷⁹ A country suffering high levels of crime and corruption is likely to discourage investment and alienate firms⁸⁰. Research has found strong evidence that crime and corruption are frequently considered

⁷⁵ By Legal Notice 394 of 1995 pursuant to section 2 of the Act.

⁷⁶ Edward Torgbor, A Comparative Study of law and Practice of Arbitration In Kenya, Nigeria and Zimbabwe, with particular Reference to current Problems in Kenya (PHD Thesis Stellenbosch) p 87

⁷⁷ UNCITRAL's Secretariat's Explanatory Note (1986) para 7

⁷⁸ Kariuki Muigua, Making East Africa a Hub for International Commercial Arbitration: A critical Examination of the State of the Legal and institutional Framework Governing Arbitration in Kenya, May 2013

⁷⁹ Leo Graham-Dullaert, Nick Branson, & Chris Lane of Africa Justice Foundation, The Importance of Legal Capacity For Economic Development: An Undervalued Priority For Sub-Saharan Africa. Issue 3 Africa Law Today (2013)

⁸⁰ World Development Report 2013: Jobs, WORLD BANK, 25(2013)

to be key obstacles to conducting business⁸¹. However, Kariuki fails to state if the laws providing for international arbitration in Kenya have gaps or problems that need amendments to ensure effective practice of international commercial arbitration. In a nutshell, Kariuki also does not give guidelines on how to solve the challenges facing international commercial arbitration in Kenya. He also fails to state what has been to solve the problem of corruption.

Kariuki has also recognized that Kenya established the Nairobi Centre for international arbitration to facilitate international commercial arbitration in Kenya. He however fails to point out the impact the Nairobi Centre for international arbitration has had in promoting international commercial arbitration in Kenya. Nairobi Centre for International arbitration as an institution has problems hindering it from conducting its mandates effectively. These problems are not captured in Kariuki Muigua's article.

Nairobi Centre for International arbitration just like other AALCO regional Centres was established with functions that seek to give solutions to the challenges associated with the Asian-African states and their nationals concerning international commercial arbitration.⁸² It was noted that the lack of competent arbitral institutions, which could administer arbitration and other ADR processes, was a major factor in the undeveloped state of the arbitral and ADR processes in Asia and Africa (and partly in Latin America), and the many other challenges which states and private parties in these regions encounter in arbitrating abroad.⁸³ Therefore we need to ask ourselves if Kenya have a competent arbitral institution. If not what steps has been done to ensure that Kenya has a competent arbitration institutions? The chairman of Board of directors Nairobi Centre for International Arbitration Mr. Arthur Igeria once noted that in the past, some investors have had to go abroad to seek arbitration services which turned out to be expensive for them.⁸⁴ The statement by Mr. Igeria shows that there was a problem with the arbitration services in Kenya and that is the reason why investors went abroad to seek arbitration services.

⁸¹ World Development Report 2013: Jobs, WORLD BANK, 25(2013)

⁸² Amazu A, Asouzu, Some Fundamental Concerns and Issues About International Arbitration in Africa available at <https://www.mcgil.ca/files/isid/LDR.2.pdf> accessed on 6/03/2015

⁸³ See Jason C. Blackford, "An Introduction to International Arbitration (with Sample Clauses)" Practical Lawyer (June 1997), pp.79-80

⁸⁴ Business Daily, Saturday March 7, 2015 available at www.businessdailyafrica.com/Nairobi-arbitration-centre-board-takes-oath-of-office/-/539552/2060166/-/index.html accessed on 2/03/2015

According to Wilfred Mutubwa,⁸⁵ the NCIA Act 2013 has various gaps and inconsistencies that need to be rectified in order to make the NCIA work effectively. Mutubwa argues that the NCIA Act 2013 does not provide the manner of appointment and disciplinary process of the president and deputy president of the arbitral court. The appointment of other members of the arbitral court is done on merit. The work of Mutubwa is however theoretical and does not include the reality on the ground as he fails to get the views of the officials of the NCIA on the said issue. In addition, Mutubwa argues that the NCIA Act 2013 does not provide the manner of removal of the members of the arbitral court. Does it mean that in case they perform the acts outside their mandate they will not be punished? The NCIA Act 2013 should provide for the same. The work by Mutubwa however fails to state the reality on the ground if the NCIA has appointed members of the arbitral court and how their conduct is being monitored to ensure they perform their work effectively.

1.11.3 The Structure of Nairobi Centre for International Arbitration.

Kenya has established an international arbitration Centre. Although this Centre is still very young, people expect it to perform its functions properly as envisaged in the Nairobi Centre for International Arbitration Act No.26 of 2013. For this Centre to perform efficiently it must learn from well-established arbitration institutions around the world as its role model. The other institutions should provide guidance as to the rules governing the institution, the structures, the history as to why the various institutions were formed. When you look at the history of London court of International Arbitration (LCIA), you will find that it was established on the foundation of the Law Quarterly Review Report.⁸⁶ This report recommended that arbitration tribunal is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.⁸⁷ Did the formation of Nairobi Centre for International Arbitration put into consideration the recommendation as those forming the London Court of International Arbitration? This is among the question this dissertation seeks to answer.

⁸⁵ Wilfred A Mutubwa (2016) “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013”, volume 82, Issue 1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

⁸⁶ <http://www.lcia.org/LCIA/history.aspx> accessed on 2/03/2015

⁸⁷ <http://www.lcia.org/LCIA/history.aspx> accessed on 2/03/2015

The Centre has a secretariat which is headed by the registrar who is appointed by the board.⁸⁸ There is also a Board of Directors which is a governing body⁸⁹ made up of members beyond Kenya.⁹⁰ There is also an established Arbitral Court.⁹¹ The leading Arbitration Centres like London Court of International Arbitration (LCIA) and International Chamber of Commerce (ICC) have Arbitral Court. The Arbitral court of LCIA has the function of appointing tribunals, determining challenges to arbitrators, and controlling costs.⁹² Again the Arbitral court of ICC meets in plenary session once a month and in three member administrative committee twice a month, oversees the work of the arbitrators, who are appointed on a case-by-case basis.⁹³ The Courts role is to *supervise* arbitration rather than to *perform* it.⁹⁴ The NCIA Act 2013 provides for the establishment of the Arbitral Court⁹⁵ and the jurisdiction of the court.⁹⁶ The Arbitral Court of NCIA has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the Act.⁹⁷ The said function of the Arbitral Court of NCIA seems to be different from that of ICC and LCIA.

There are some tools that an arbitration institution or Centre needs to have in place to effectively compete in the business of providing arbitration administration. These tools include modern arbitration rules and expertise within its staff.⁹⁸ The NCIA is still very young for it to be successful in future it needs to ensure it has the above tools. The NCIA made the arbitration rules which were to take effect for arbitration commencing on or after December 2015.⁹⁹ This study will evaluate if the NCIA arbitration rules conform to the best international standards or practice.

⁸⁸ Nairobi Centre for International Arbitration, section 9(1)

⁸⁹ Ibid , section 6(1)

⁹⁰ Ibid , section 6(1)(e)

⁹¹ Ibid , section 21(1)

⁹² www.lcia.org/LCIA/organisation.aspx accessed on 16/04/2015

⁹³ Richard, J, Graving, the International Commercial Arbitration Institutions: How Good A Job Are They Doing?, American International Law Review, volume 4, 2011,p 332

⁹⁴ Ibid

⁹⁵ Nairobi Centre for International Arbitration Act 2013, section 21(1)

⁹⁶ Ibid , section 22(1)

⁹⁷ Ibid , section 22(1)

⁹⁸ Emilia Onyema, Empowering Africa in the 21st century through Arbitration and ADR, paper delivered during the 4th Arbitration& ADR in Africa Workshop at Conrad Hilton Hotel Cairo, Egypt 29-31 July 2008

⁹⁹ www.ncia.ac.ke

Aaron Sam in his article¹⁰⁰ states the conditions to be met for an Arbitration Centre to be regarded as suitable and conforming to the international best standards. A good example that he points out is that when an arbitrator or a respondent fails to perform certain procedural steps required by the rules, a suitable arbitration rule should provide for a way of avoiding the same problem.¹⁰¹ The shortcoming of Aaron Sam's article is that it puts major emphasis on LCIA and ICC. This study will be guided by Aaron Sam's article when establishing if NCIA meets the international best standards when compared with other Arbitration Institutions.

According to Philip Capper, a good institution should ensure that arbitral tribunal is not bias. Further it is the work of a good institution to ensure that the party appointed arbitrators are genuinely independent.¹⁰² Does the NCIA provide the impartiality of Arbitral Tribunal? This paper will seek the answer to this question.

Dorothy Aswani opines that the Arbitral institutions in Africa and Kenya are not able to compete internationally due to less marketing. Marketing arbitral institutions will attract investors.¹⁰³ The question to ask therefore is whether NCIA is well marketed as an ideal arbitration centre? This paper will answer this question because the work of Aswani fails to explain the same. The researcher will answer this question by interviewing the officials of NCIA.

Dorothy Aswani further states that most arbitration institutions lack clear framework of remuneration of arbitrators.¹⁰⁴ Aswani goes ahead to give an example of Chartered Institute of Arbitrators Kenya that has its own rules of remuneration of arbitrators but it is not limited to the Chartered Institute of Arbitrators. The issue of remuneration of arbitrators is important because it is part of the institutional structure of arbitral institution. The work of Aswani however does not explain how the arbitrators in NCIA are remunerated. This paper will explain the payment of arbitrators under NCIA.

¹⁰⁰ Aaron Sam (1991) "International Arbitration Choosing an Arbitration Institution and a Set of Rules"108 SALJ

¹⁰¹ Aaron Sam (1991) "International Arbitration Choosing an Arbitration Institution and a Set of Rules" 108 SALJ P.515

¹⁰² Philip Capper, International Arbitration: A handbook,3rd edition P.31

¹⁰³ Dorothy Aswani (2016) "Building Kenya's Future as a Global Hub for International Commercial Arbitration", volume 4 issue2 , *J Alternative Dispute Resolution Journal*147-169

¹⁰⁴ Dorothy Aswani (2016) "Building Kenya's Future as a Global Hub for International Commercial Arbitration", volume 4 issue2 , *J Alternative Dispute Resolution Journal*147-169

Dorothy further explains that there has been challenge on the issue of institutional capacity of arbitral institutions in Africa and Kenya. Most arbitral institutions lack the adequate staff to meet the demands of international commercial arbitration.¹⁰⁵ The work of Dorothy however fails to explain the issue of institutional capacity concerning the NCIA. This paper will explain the Institutional capacity of NCIA.

According to Kariuki Muigua and Ngararu Maina,¹⁰⁶ the NCIA will achieve its objectives through partnership with other regional institutions that specialize in alternative dispute resolution mechanisms for cooperation in training and building capacity in the region. The work by Kariuki Muigua and Ngararu Maina fail to state whether the NCIA has teamed up with other arbitral institutions for cooperation in training and building capacity. This paper will find out if the NCIA has made partnership with other regional institutions by interviewing the officials of the NCIA.

Kariuki Muigua and Ngararu Maina state that the NCIA will be in a position to maintain international standard for an arbitral institution by disassociating itself with the perception of unprofessionalism, corruption, institutional incapacity and lack of goodwill.¹⁰⁷ However, the work fails to state if the Centre has the problem of unprofessionalism, corruption, institutional capacity and lack of goodwill and if not how they tackle the same problem. This paper will answer the above mentioned issues. This paper will establish if the NCIA has the necessary capacity to conduct international commercial arbitration.

1.12 CHAPTER BREAKDOWN

1.12.1 Chapter one

This chapter gives an overview of what this work seeks to cover. It is the proposal of the study and it contains: the background of the study; a statement of the research problem; the literature review; the research objectives; the research questions; the research methodology; the hypotheses; the limitations; and the chapter breakdown.

¹⁰⁵ Dorothy Aswani (2016) "Building Kenya's Future as a Global Hub for International Commercial Arbitration", volume 4 issue 2, *Alternative Dispute Resolution Journal* 147-169

¹⁰⁶ Kariuki Muigua and Ngararu Maina(2016) "Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration", Volume 4 issue 1, *Alternative Dispute Resolution Journal* 169-195

¹⁰⁷ Ibid

1.12.2 Chapter two

This chapter discusses the institutional structure of Nairobi Centre for International Arbitration. This will be analyzed in terms of institutional arbitration versus the ad hoc arbitration. The main areas of discussion in institutional arbitration will be the independence of the institution, funding of the institution, the staff, equipment and facilities and reasonable charges.

1.12.3 Chapter three

This chapter will focus on the laws governing the Nairobi Centre for International Arbitration. The main laws to be discussed in this area are the Constitution of Kenya 2010, the Arbitration Act 1995, the Nairobi Centre for International Arbitration Act 2013 and the Nairobi Centre for International Arbitration (Arbitration) rules 2015.

1.12.4 Chapter four

This chapter will discuss the data and findings of the legal and institutional framework of Nairobi Centre for International Arbitration. The findings will explain if the objectives the research have been achieved, if the hypothesis has been proved and if the research questions have been answered.

1.12.5 Chapter five

This chapter summarizes the discussions in various chapters. It also gives recommendations on how to make the legal and institutional frameworks effective

CHAPTER TWO

2.0 INSTITUTIONAL STRUCTURE OF THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION

2.1 Introduction

In the previous chapter, the writer discussed the main and specific objective of the paper, the hypothesis, the research questions, the literature review and the outline of the paper.

This chapter will discuss the institutional structure of Nairobi Centre for International Arbitration. It is important because it answers the research question of the paper which seeks to discuss the institutional framework of NCIA and comparing it with that of LCIA, ICC and that of KIAC. This part of the paper will also find out if the NCIA institutional framework meets the international best practice.

Parties in international commercial dispute have some decision to make whether to choose an *ad hoc* arbitration or an institutional arbitration¹⁰⁸ Institutional arbitration is an arbitration where specialised institution intervenes and takes on the role of administering the arbitration process¹⁰⁹In *ad hoc* arbitration, the arbitration process requires parties to make their own arrangements for selection of arbitrators¹¹⁰ Institutional arbitration and ad hoc arbitration both have their advantages and disadvantages. It is also important to note the distinguishable features of ad hoc arbitration and institutional arbitration in the discussion. However, the discussion will be limited to institutional arbitration.

The writer intends to use the analysis of Collins Namachanja¹¹¹ to compare it with the Nairobi Centre for International Arbitration. The following will be the issues of discussion; funding, independence, equipment, proliferation, modern rules of arbitration, staff and reasonable charges.

¹⁰⁸ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

¹⁰⁹ Institutional vs. 'ad hoc' arbitration <http://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/> accessed on 16/07/2015

¹¹⁰ Ad hoc arbitration available at <http://www.definitions.uslegal.com>, accessed on 16/07/2015

¹¹¹ Collins Namachanja (2015) "The Challenges Facing Arbitration Institutions in Africa", volume 3 issue 2, *Alternative Dispute Resolution Journal* 138-169

2.2 Distinguishable features of ad hoc arbitration and institutional arbitration

It is important to distinguish the ad hoc arbitration and institutional arbitration to know where the Nairobi Centre for International Arbitration will be categorised. It should also be noted that Nairobi Centre for International Arbitration is the key area of discussion hence it is important to distinguish the two types of arbitration.

The following are some of distinguishable features of ad hoc arbitration and institutional arbitration¹¹²:

2.2.1 Procedural control

In institutional arbitration the parties will have the advantage of using the arbitral process that has been tried and tested and the terms and conditions already known. Therefore most of the processes are controlled by the institution. On the other hand ad hoc arbitration depends on the cooperation of the parties to arbitration which sometimes may not be easy to achieve. This means *ad hoc* arbitration has procedural challenges which are time consuming and may reduce effectiveness of arbitration process. The Nairobi Centre for International Arbitration has the terms and conditions for conducting arbitration proceedings. These terms and conditions are what are set out in the arbitration rules.¹¹³ Other Arbitration Institutions like LCIA¹¹⁴ and ICC¹¹⁵ have their own set of rules to govern the arbitration proceedings. These rules ensure that there is procedural control.

2.2.2 Administration

There are administrative matters involved in the process of arbitration which range from the fixing of fees of the arbitrator, administrative fees, fixing the time limit for the disposal of the dispute among others. These matters can be time consuming and cumbersome to deal with especially since the parties are involved in multiple tasks. Ad hoc arbitration requires the parties

¹¹² Redfern & Hunter, “*The Law and Practice of International Commercial Arbitration*”, op cit, p. 12; (London, Sweet & Maxwell, 1999, p.11-13

¹¹³ Nairobi Centre for International Arbitration Arbitration rules effective from December 2015

¹¹⁴ London Court for International Arbitration Arbitration Rules effective 1st October 2014

¹¹⁵ International Chamber of Commerce Rules of Arbitration effective 1st January 2012

to settle these administrative matters with the arbitrator which can lead to uncomfortable situations.

Institutional arbitration has an administrative secretariat, which deals with these administrative matters thereby unburdening the parties of the dispute. With the secretariat playing the role of the middle-man, the relations of the parties with each other as well with the arbitrator are maintained. For the performance of the administrative functions, specialised personnel are employed and a fee charged in the institutions leading to efficiency. Therefore, on a cost- benefit analysis of the same, institutional arbitration is more consumer- friendly.¹¹⁶ The Nairobi Centre for International Arbitration has a Registrar who is in charge of the day to day management of affairs of the Centre, in charge of other staff and the Secretary to the Board.¹¹⁷ The Board of Nairobi Centre for International Arbitration may also appoint other staff to discharge the mandate of the Centre.¹¹⁸ The London Court of International Arbitration has a company, arbitration Court and the secretariat¹¹⁹ which has specialised staff to run the affairs of the London Court of International Arbitration. On the other hand, the International Chamber of Commerce has an independent body called the International Court of Arbitration.¹²⁰ The International Court of Arbitration administers the resolution of disputes¹²¹ with the help of the Secretariat.¹²² The Secretariat and the Arbitral Court ensures that there is effective administration of arbitral proceedings.

2.2.3 Flexibility

In ad hoc arbitration, the arbitral proceedings are tailored towards the specific needs of the parties and the nature of the dispute. However, this process has its limitations as the drafting of the proceedings may involve lengthy negotiations which is time consuming and expensive. On the other hand, institutional arbitration involves the implementation of the predetermined rules by specialised arbitrators. Therefore, the choice boils down to be one of flexibility in ad hoc

¹¹⁶ Shah M & Ghandi N (2011) “Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries”, Vol. 6, Issue 4, *Journal of International Commercial Law and Technology*

¹¹⁷ Nairobi Centre for International Arbitration Act No.26 of 2013, section 9(3)

¹¹⁸ Nairobi Centre for International Arbitration Act No. 26 of 2013, section 11

¹¹⁹ Organization of London Court of International Arbitration available at <http://www.lcia.org> accessed on 7/08/2016

¹²⁰ International Chamber of Commerce Rules of Arbitration effective 1st January 2012, article 1

¹²¹ Ibid, article 1(2)

¹²² International Chamber of Commerce Rules of Arbitration effective 1st January 2012, article 1(5)

arbitration compared to predictability in institutional arbitration. On weighing the two approaches, even though flexibility might be limited under institutional arbitration, predictability in the process ensures that the parties can go ahead with the process without the fear of inconsistencies leading to a failure in the arbitration process.¹²³ The Nairobi Centre for International Arbitration has institutional rules¹²⁴ that govern arbitration proceedings hence there is a predetermined way of dealing with matters of arbitration. The same position applies to London Court of International Arbitration¹²⁵ and International Chamber of Commerce¹²⁶ where these institutions have already existing institutional rules that provide for arbitration process.

2.2.4 Cost

Ad hoc arbitration is to avoid extra costs like the administrative fees and the high arbitration amounts charged during the course of institutional arbitration. Ad hoc arbitration does not have an arbitral institution that assists in the administrative and procedural matters. The parties are required to make all the arrangements to conduct the arbitration.¹²⁷ The Nairobi Centre for International Arbitration has administrative fees and costs for arbitrators in both international and domestic arbitration.¹²⁸ In London Court for International Arbitration, the same issue of administrative fees is available and there is a procedure of conducting of calculating arbitrators fees.¹²⁹ The issue of fees will be discussed in detail later in chapter three of the paper.

2.2.5 Enforcement

It is always stated that it is advantageous for an award to be issued by an internationally recognized institution. This statement is however not supported by statistical evidence¹³⁰. The general notion is that parties are masters of arbitration. However, in regards to institutional arbitration, it is different where the institution acquires parties' power to have final say on issues

¹²³ Shah M & Ghandi N (2011) "Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries", Vol. 6, Issue 4 *Journal of International Commercial Law and Technology*

¹²⁴ Nairobi Centre for International Arbitration rules effective December 2015

¹²⁵ London Court of International Arbitration Rules effective 1st October 2104

¹²⁶ International Chamber of Commerce rules effective 1st January 2012

¹²⁷ Ibid

¹²⁸ Nairobi Centre for International Arbitration Arbitration Rules effective December 2015, Annex 3

¹²⁹ <http://www.lcia.org> accessed on 16/08/2016

¹³⁰ Redfern & Hunter, "*The Law and Practice of International Commercial Arbitration*", op cit, p. 12; (London, Sweet & Maxwell, 1999

like appointment of arbitrators and impose its will on the parties.¹³¹ The Nairobi Centre for International Arbitration through its tribunal makes its award in writing.¹³² The tribunal of London Court of International Arbitration¹³³ and International Chamber of Commerce¹³⁴ also make awards in writing which is final and binding to the parties.

2.2.6 Confidentiality

One of the main advantages of arbitration is that awards are confidential to the parties and are not made available to the general public and consequently there is no significant difference between these two processes¹³⁵. The arbitration proceedings and all awards issued by Nairobi Centre for International Arbitration are confidential.¹³⁶ In London Court of International Arbitration, the parties are supposed keep the awards confidential.¹³⁷ However, the International Chamber of Commerce Arbitration rules do not provide if the arbitration proceedings should be confidential. The issue of confidentiality is discussed in detail in chapter three of the paper.

2.2.7 Delay

The proponents of alternative dispute resolution argue that litigation slows down the administration of justice due to unnecessary adjournments and interlocutory applications.¹³⁸ It is these delays that make people prefer alternative dispute in this regard arbitration because it is perceived to solve disputes without delay. Procedural inefficiencies and lack of cooperation may lead to delay in ad hoc system. In institutional arbitration, there is well laid down procedure of dealing with a case. The specific time limit is followed by the arbitral tribunal to solve the

¹³¹ Institutional vs ad hoc arbitration, <http://www.out-law.com/en/topics/projects--construction/international-arbitration/institutional-vs-ad-hoc-arbitration/>> accessed on 17th February, 2015

¹³² Nairobi Centre for International Arbitration rules, article 28

¹³³ London Court of International Arbitration rules, article 26

¹³⁴ International Chamber of Commerce Arbitration rules, article 31

¹³⁵ Redfern & Hunter, "*The Law and Practice of International Commercial Arbitration*", op cit, p. 12; (London, Sweet & Maxwell, 1999

¹³⁶ Nairobi Centre for International Arbitration Arbitration Rules 2015, article 33

¹³⁷ London Court for International Arbitration Arbitration rules 2014, article 30

¹³⁸ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015) <<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf>> accessed on 22 June 2015.

case.¹³⁹ The deadline set out reduces delay and enhances faster resolution of dispute. The Nairobi Centre provides procedures to be followed in solving arbitration dispute¹⁴⁰ which is important to avoid inefficiencies. Other Arbitration Institutions like International Chamber of Commerce¹⁴¹ and London Court of International Arbitration¹⁴² also provide procedures to be followed when conducting arbitration proceedings.

2.2.8 Selection of arbitrators

In *Ad hoc* arbitration, parties have a choice of selecting any number of arbitrators. When the parties are given unguided discretion to choose the arbitrators in ad hoc arbitration, the probability of choosing a partial adjudicator is higher than through the institution, which verifies and prevents the existence of any biases or similarities between the parties and the arbitrator. In institutional arbitration there is a list of arbitrators provided to the parties to choose from a pool of experienced arbitrators trained in specialised subject matter and the issue in dispute. In the issue of selection of arbitrators, institutional arbitration ensures the objectives of efficiency and specialisation is fulfilled.¹⁴³

2.3 Advantages of Institutional Arbitration

2.3.1 Arbitration rules

Most institutions have a well published set of arbitration rules. The parties who wish the institution solve their disputes should incorporate the institutional rules in their arbitration agreement. The advantage is that the parties use the rules that has already been tried by other parties and proven to be workable.¹⁴⁴ Further, the rules capture various scenarios that may arise in the arbitration process. The Nairobi Centre for International Arbitration has institutional rules

¹³⁹ Shah M & Ghandi N,(2011) “Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries”, Vol. 6, Issue 4 *Journal of International Commercial Law and Technology*

¹⁴⁰ Nairobi Centre for International Arbitration Arbitration Rules 2015, article 1

¹⁴¹ International Chamber of Commerce Arbitration Rules 2012, article 4

¹⁴² London Court of International Arbitration Arbitration Rules 2014, article 1

¹⁴³ Shah M & Ghandi N(2011) “Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries”, Vol. 6, Issue 4 , *Journal of International Commercial Law and Technology*

¹⁴⁴ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

that govern arbitration proceedings.¹⁴⁵ The institutional rules are known as the Nairobi Centre for International Arbitration Rules which came to effect on December 2015. However, the parties who wish to use the NCIA Arbitration rules should incorporate these rules in their arbitration agreement.¹⁴⁶

2.3.2 Administration

There is availability of trained staff mandated to administer arbitration. The staff has the obligation of ensuring that the time limits of arbitration are adhered to, arbitrators are appointed and that arbitrator's expenses and fees are paid.¹⁴⁷ The Nairobi Centre for International Arbitration has staff that manages the day to day activities of the Centre. To begin with, there is existence of a registrar who runs the day to day activities of the Centre.¹⁴⁸ The registrar is also in charge of the staff at the Centre and Secretary to the Board.¹⁴⁹ The registrar also has other duties related to the proceedings of the court. These duties are: maintenance of the register¹⁵⁰, enforcement of the decisions issued by the court,¹⁵¹ certifying any other order of the court,¹⁵² ensuring records of the proceedings are kept¹⁵³ and any other duty assigned by the Court.¹⁵⁴ In addition, the Board may appoint any other staff to conduct its functions.¹⁵⁵

2.3.3 Remuneration of arbitral tribunal

The parties and arbitral tribunal are not subjected to the process of discussing the issue of fixing the remuneration of the arbitral tribunal. There is already an established mechanism for determining the scale of remuneration and collection of funds from the parties that the arbitrators will be paid.¹⁵⁶ The Nairobi Centre for International Arbitration has already established

¹⁴⁵ Nairobi Centre for International Arbitration Arbitration Rules available at <http://www.nci.or.ke> accessed on 2/7/2016

¹⁴⁶ Nairobi Centre for International Arbitration Arbitration Rules, the preamble

¹⁴⁷ Ibid

¹⁴⁸ Nairobi Centre for International Arbitration Act No. 26 of 2013, section 9

¹⁴⁹ Ibid , section 9

¹⁵⁰ Ibid ,Section 10(a)

¹⁵¹ Nairobi Centre for International Arbitration Act No. 26 of 2013,Section 10(c)

¹⁵² Ibid ,Section 10(d)

¹⁵³ Ibid ,Section 10(e)

¹⁵⁴ Ibid , Section 10(f)

¹⁵⁵ Ibid , Section 11

¹⁵⁶ Margaret L Moses, The Principles and Practice of International Arbitration, Cambridge University Press,2008

mechanism for determining arbitration fees and costs.¹⁵⁷ The issue of fees and costs will be discussed in detail later in this chapter.

2.3.4 Award

The aim of the parties entering the arbitration is to ensure that the dispute is solved and that there will be an award rendered. The award rendered by the institutional arbitration has an advantage to the extent that it is usually recognized by the national courts and the international community.¹⁵⁸ The award rendered by the Arbitral tribunal of the Nairobi Centre for International Arbitration is final and binding on the parties.¹⁵⁹ As much as the award is final and binding, it gives parties the confidence to use the Nairobi Centre for International Arbitration as a preferred institution to solve their disputes. In *Transworld Safaris Ltd v Eagle Aviation and 3 others*,¹⁶⁰ Nyamu J stated:

“Awards have now gained considerable international recognition and courts, especially commercial ones, have the responsibility to ensure that the arbitral autonomy is safeguarded by the court as arbitral awards are surely and gradually acquiring the nature of a convertible currency due to their finality.”

2.4 Institutional Structure under the Nairobi Centre for International Arbitration

This section will analyse institutional structure of arbitration institution as analysed by various authors. One of the analyses will be based on Houthoff Buruma Practical Guides on International Arbitration entitled “International Commercial Arbitration, An Introduction”¹⁶¹ which provides for conditions on which to consider when choosing an arbitration institution. The series provides the following requirements needed for choosing an arbitral institution. These conditions include funding, modern arbitration rules, equipment and reasonable charges.

¹⁵⁷ Nairobi Centre for International Arbitration Arbitration Rules 2015, Annex 3

¹⁵⁸ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

¹⁵⁹ Nairobi Centre for International Arbitration Arbitration Rules 2015, article 28

¹⁶⁰ (2003) eKLR

¹⁶¹ Houthoff Buruma Practical Guides on International Arbitration, *International Commercial Arbitration, An Introduction*, 2013 edition

The writer will also be guided by analysis of Collins Namachanja in his work “The Challenges facing Arbitral Institutions in Africa”.¹⁶² The article is very important when comparing the challenges facing arbitral institutions in Africa with that of NCIA. The challenges facing Arbitration institutions in Africa may be used to make recommendations to curb the challenges facing NCIA. Hon. Justice Edward Torgbor in his work, “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa” also provides a very good insight into the challenges facing Arbitration Institution in Africa. NCIA should learn from the challenges of other Arbitration Institutions in Africa to make it more effective.

2.4.1 Funding

Hon. Justice Torgbor in his work, “Privatization of Commercial Justice through Arbitration: The Role of Arbitration institutions in Africa”¹⁶³, states that funding of Arbitration Institution is important in ensuring that arbitral services are delivered efficiently. According to Kamau Karori, Kenya and Africa institutions lack the necessary finances to carry out alternative dispute resolution which is always on high demand.¹⁶⁴ It is important to note that the arbitration institutions need money to finance their activities.¹⁶⁵ These activities include buying equipment’s to be used in the office, employing qualified staff, buying or renting out office space, training of arbitrators, marketing the arbitration institution and publishing arbitration journal of the institution. The arbitration institution may be funded by grants from donors and the government, membership fees and income from provision of arbitration services. However, the experience in Africa has shown that most arbitration institutions have failed to perform their functions well due to lack of funding. For instance the Zambia Centre for Dispute Resolution was not operational

¹⁶² Available on <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfvrsn=0> accessed on 22 June 2015

¹⁶³ Hon. Justice Edward Torgbor (2015) “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa”, volume 3 issue 2, *1 Alternative Dispute Resolution Journal* 109-121

¹⁶⁴ Kamau Karori (2014) “Emerging Perspectives and Challenges in Dispute Resolution”, volume 2 issue 1 *Alternative Dispute Resolution Journal* 180-188

¹⁶⁵ Hon. Justice Edward Torgbor (2015) “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa”, volume 3 issue 2, *1 Alternative Dispute Resolution Journal* 109-121

due to lack of funding.¹⁶⁶ The same challenge of funding is what affects Ghana Arbitration Centre according to Emmanuel Amofa, Administrator of the Ghana Arbitration Centre.¹⁶⁷

It is important to draw a comparison of the above mentioned institutions with Nairobi Centre for International Arbitration because they were formed through the initiative of Asian African Legal Consultative Organization. The question therefore is how does the Nairobi Centre for International Arbitration fund its activities? Does the Nairobi Centre for International Arbitration have Inadequate funding for its activities? During the establishment of Nairobi Centre for International Arbitration, it was intended that the Government of Kenya would fund the operation of the said Nairobi Centre for International Arbitration.¹⁶⁸ The NCIA gets funding from the Government of Kenya.¹⁶⁹ Funding of the NCIA by the Government of Kenya is important in promoting International Commercial Arbitration.

Government funding of Arbitration Centre has its share of shortcomings. To begin with, the government funding of Arbitration Centre may be inadequate.¹⁷⁰ Government bureaucracy may delay the release of money to the Arbitration Centre hence paralyzing the operations of the Arbitration Institution.¹⁷¹ Moreover, the government may interfere with the operation of the Arbitration Centre.¹⁷² When an arbitral institution relies on government for funding, the process of achieving its goals may be slow as the government may delay to release the money.¹⁷³ The situation on the ground regarding the NCIA is that the Centre is still putting up structures and one of the challenges has been delay to release funds by the Government.¹⁷⁴ A good Arbitration Institution should have various sources of funding its operation rather than depending solely on its funding from the government.

¹⁶⁶ Judge Charles Kajimanga in Hon. Justice Edward Torgbor, Torgbor (2015) “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa”, volume 3 issue 2, 1*Alternative Dispute Resolution Journal* 109-121

¹⁶⁷ Hon. Justice Edward Torgbor (2015) “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa”, volume 3 issue 2, 1*Alternative Dispute Resolution Journal* 109-121

¹⁶⁸ Peter Mutuku Mbithi, ‘International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Disputes in Kenya?’ (LL.M Thesis, University of Cape Town 2014), p.30

¹⁶⁹ Oral Interview with the Registrar of NCIA on 12th October 2016

¹⁷⁰ Ibid

¹⁷¹ Oral Interview with the Registrar of NCIA on 12th October 2016

¹⁷² Ibid

¹⁷³ Oral Interview with a Director of NCIA conducted on 8th November 2016

¹⁷⁴ Ibid

2.4.2 Independence

Hon. Justice Torgbor¹⁷⁵ states that there is need for Arbitration Institution to be independent from Government interference. In Kenya, the Nairobi Centre for International Arbitration was set up by much effort from the government.¹⁷⁶ The Government of Kenya is involved in most aspects of the Nairobi Centre for International Arbitration for example through funding.¹⁷⁷ The Government of Kenya involvement in the operations of Nairobi Centre for International Arbitration should be limited to ensure independence of the Nairobi Centre for International Arbitration. Much involvement of the government in the operations of the Nairobi Centre for International Arbitration may have a negative impact on the business community. The business community may think the government may have influence on the decisions of the Nairobi Centre for International Arbitration.¹⁷⁸ The issue of Independence of NCIA was supported by the Registrar of NCIA who stated that there should be minimal interference of government to arbitral institutions.¹⁷⁹

In other jurisdictions, the Arbitration Centres are set up by the business organizations which again do not get funding from the government.¹⁸⁰ Further, the arbitration institutions may be established by the private sector and funded by membership fees, income from dispute resolution services and grants.¹⁸¹ This step ensures that the Arbitration Institution is independent from the government.

In the case of International Chamber of Commerce, there is independence from the government because it is a non-governmental organization which is neutral.¹⁸² On the other hand you will

¹⁷⁵ Hon. Justice Edward Torgbor (2015) "Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa", volume 3 issue 2, *Alternative Dispute Resolution Journal* 109-121

¹⁷⁶ The history of formation of Nairobi Centre for Arbitration is discussed in chapter one of the paper.

¹⁷⁷ Ibid

¹⁷⁸ Ibid

¹⁷⁹ Oral Interview with the Registrar of NCIA on 12th October 2016

¹⁸⁰ Ibid

¹⁸¹ Megha Joshi, Executive Secretary and CEO of the Lagos Court of Arbitration (LCA) presentation, Hon. Justice Edward Torgbor, Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa, *Alternative Dispute Resolution Journal*, volume number 2 2015

¹⁸² <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR> accessed on 12/09/2016

find that the London Court of International Arbitration is a private, not for Profit Company limited by guarantee and is entirely neutral and independent of any organization.¹⁸³

According to Kariuki Muigua, the Government may interfere with the independence of the Arbitration Institution when selecting the members of the arbitral tribunal.¹⁸⁴ This fact is supported by Philip Capper who states that a good institution should ensure arbitral tribunal is not bias.¹⁸⁵ Further it is the work of a good institution to ensure that the party appointed arbitrators are genuinely independent. The officials of the Nairobi Centre for International Arbitration are appointed by the Government of Kenya which may hinder independence of arbitration processes.

According to Dorothy Aswani,¹⁸⁶ the decisions of the arbitral tribunal should be final. Finality of the decisions of the arbitral tribunal ensures that there is no interference by the national courts hence there is independence of the arbitral institution.

2.4.3 Equipment and facilities

According to Houthoff Buruma,¹⁸⁷ an Arbitration institution should have modern facilities and equipment. Equipment and facilities are among the minimum tools required by an Institutional Arbitration.¹⁸⁸ An Arbitration Institution should have equipment necessary to facilitate arbitration process. Equipment in this case includes communication tools in the Arbitration Institution. The equipment should be modern and conforming to the current technology. The facilities in this case include a building with spacious rooms to conduct arbitration process. Nairobi Centre for International Arbitration has the modern equipment and facilities to conduct arbitration? According to the Registrar of NCIA, the NCIA has modern facilities capable of

¹⁸³ <http://www.lcia.org/Frequently-asked-Questions.aspx> accessed on 12/09/2016

¹⁸⁴ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015) <<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf>> accessed on 22 June 2015

¹⁸⁵ Philip Capper, *International Arbitration: A handbook*, 3rd edition P.31

¹⁸⁶ Dorothy Aswani (2016) "Building Kenya's Future as a Global Hub for International Commercial Arbitration", volume 4 issue 2, *1 Alternative Dispute Resolution Journal* 147-169

¹⁸⁷ Houthoff Buruma, *Practical Guides on International Arbitration* entitled, "International Commercial Arbitration, An Introduction 2013 edition

¹⁸⁸ Emilia Onyema, *Empowering Africa in the 21st century through Arbitration and ADR*, paper delivered during the 4th Arbitration & ADR in Africa Workshop at Conrad Hilton Hotel Cairo, Egypt 29-31 July 2008

hosting arbitration proceedings.¹⁸⁹ This is supported by the fact that the judiciary of republic of Kenya used the facilities of NCIA to conduct mediation.¹⁹⁰ However, it is mandatory for NCIA to have the modern equipment and facilities. Currently the NCIA has equipment and facilities to conduct arbitration proceedings but they are not yet adequate.¹⁹¹

Some of the Arbitration Institutions in Africa have modern equipment and facilities to enhance arbitration. In Nigeria for example, the Lagos Court of Arbitration has a new building with spacious rooms, modern communication equipment and facilities that is useful in conducting arbitration process.¹⁹² Nairobi Centre for International Arbitration should also have a building with spacious rooms, modern communication equipment and facilities like the Lagos Court of Arbitration. Currently the Nairobi Centre for International Arbitration has offices at the Cooperative Bank House, 7th floor along Haile Selassie Avenue in Nairobi.¹⁹³ The said building does not belong to the NCIA.¹⁹⁴ A good Arbitration Institution should have its own building which is spacious with the necessary facilities in order to run its operations effectively.

The International Chamber of Commerce moved to its new headquarters in 2013. The new headquarters is easily accessible to the visitors. It has modern conference facilities and spacious meeting rooms.¹⁹⁵ With the new headquarters, the ICC is seen as a best venue for ICC trainings, conferences and meetings. The building has seven floors which provide office space, meeting rooms and other facilities.¹⁹⁶

The London Court of International Arbitration has various offices that conduct arbitration proceedings. One of the offices is in London. The other office is in India where the needs of users in India have been catered for starting from 1st June 2016.¹⁹⁷ The LCIA also has a partnership with the Government of Mauritius and the Mauritius International Arbitration Centre. The Partnership is known as the LCIA-MIAC Arbitration Centre which was officially launched

¹⁸⁹ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

¹⁹⁰ Ibid

¹⁹¹ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

¹⁹² Hon. Justice Edward Torgbor, (2015) "Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa", volume 3 issue 2, *Alternative Dispute Resolution Journal* 109-121

¹⁹³ Nairobi Centre for International Arbitration available at <http://www.ncia.or.ke> accessed on 20/07/2016

¹⁹⁴ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

¹⁹⁵ www.iccwbo.org/About-icc/organization/icc-Headquarters accessed on 12/09/2016

¹⁹⁶ www.iccwbo.org/About-icc/organization/icc-Headquarters accessed on 12/09/2016

¹⁹⁷ <http://www.lcia-india.org> accessed on 12/09/2016

on July 2011.¹⁹⁸ In addition, the London Court of International Arbitration collaborated with Dubai International Financial Centre in 2008 to provide dispute resolution services. This collaboration is known as DIFC-LCIA Arbitration Centre.¹⁹⁹

According to the Registrar of NCIA, an arbitral institution cannot easily operate alone in providing services in international commercial arbitration.²⁰⁰ An arbitral institution requires partnership with other institutions in order to learn how they manage their affairs.²⁰¹ The question to ask therefore is NCIA in partnership with other arbitral institutions? The NCIA is in the process of seeking partnership with other arbitral institutions.²⁰² The NCIA officials have visited Beijing and Tehran with a view of seeking partnership that will help NCIA offer quality services of international commercial arbitration.²⁰³ Further, the NCIA is already in collaboration with the Kuala Lumpur Arbitration Centre with the purpose of sharing knowledge in the field of International commercial arbitration.²⁰⁴ It can therefore be concluded that the NCIA is on a right path in partnering with other arbitral institutions with a view of improving service delivery to the users.

2.4.4 Qualified Staff

According to Houthoff Buruma Practical Guides on International Arbitration entitled, “international Commercial Arbitration, An Introduction”²⁰⁵, a good institutional framework should consist of qualified staff. The staff in an arbitration institution is responsible for the administration of international commercial arbitrations under institutional rules. The staff duties may also include: assist the parties to arbitral proceedings and also the arbitrators on procedural matters²⁰⁶, help in sharing the institutional knowledge with the stakeholders and other

¹⁹⁸ www.lcia-miac.org accessed on 12/09/2016

¹⁹⁹ www.difc-lcia.org accessed on 12/09/2016

²⁰⁰ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

²⁰¹ Ibid

²⁰² Oral Interview with a Director of NCIA conducted on 8th November 2016

²⁰³ Ibid

²⁰⁴ Oral Interview with a Director of NCIA conducted on 8th November 2016

²⁰⁵ Houthoff Buruma Practical Guides on International Arbitration, International Commercial Arbitration, An Introduction, 2013 edition

²⁰⁶ The PCA and other International Arbitral Institutions: Developments in Mauritius available at <http://www.arbitration-icca.org/media/13371679808210/international-arbitral-institutions-and-their-developments-in-Mauritius-judith-levine.pdf> accessed on 20/07/2016

users²⁰⁷, establish and manage deposits, in charge of billing and payments and ensure all the facilities of arbitration institution are in order.²⁰⁸

The organization of Nairobi Centre for International Arbitration consists of different departments with different staff. The Nairobi Centre for International Arbitration has the Board of Directors which is responsible with the administration of the Centre.²⁰⁹ The Board of directors were already appointed.²¹⁰ The appointments to the Board of Directors should however be on merit to ensure efficient and quality services are offered by the NCIA. The question therefore to ask is, are the Board of Directors qualified to manage the affairs of the NCIA effectively? According to John Ohaga, the Director of NCIA, one of the qualifications for one to be appointed the Director of the NCIA was that one needed to have the knowledge of international commercial arbitration.²¹¹ It can therefore be concluded that the Board of Directors are well equipped with the necessary knowledge in international commercial arbitration useful for managing NCIA.

The Board of Directors may appoint other staff and officers to discharge the functions of the centre.²¹² In addition there is established Arbitral Court²¹³ with other staff. The staff in Arbitral Court includes: a president²¹⁴, two deputy president²¹⁵ and fifteen other members who shall be leading international arbitrators.²¹⁶ Currently, the Arbitral court does not have any members.²¹⁷ The Registrar's office of NCIA currently has nine staff members helping in carrying out the function of the NCIA.²¹⁸ The staff members in the registrar's office have different qualifications that are useful in carrying out their duties.²¹⁹ Apart from the necessary qualifications that the staffs have, the NCIA has an internal programme of training its staff on matters to do with arbitration.²²⁰ The NCIA conducted joint event with the ICSID procedure training programme

²⁰⁷ Ibid

²⁰⁸ Ibid

²⁰⁹ Nairobi Centre for International Arbitration Act no. 26 of 2013, Section 6(1)

²¹⁰ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

²¹¹ Oral Interview with the Director of NCIA conducted on 8th November 2016

²¹² Nairobi Centre for International Arbitration Act no. 26 of 2013, Section 11

²¹³ Ibid, Section 21(1)

²¹⁴ Ibid, Section 21(2)(a)

²¹⁵ Ibid, Section 21(2)(b)

²¹⁶ Ibid, Section 21(c)

²¹⁷ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

²¹⁸ Ibid

²¹⁹ Ibid

²²⁰ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

during the UNCTAD conference held in Nairobi this year.²²¹ Therefore, NCIA is on the right path on conducting training to its staff.

When compared to the organization of staff in London Court of International Arbitration, the organization of staff of NCIA is similar with few differences. For instance the structure of LCIA is made of a Company, Arbitration Court and the Secretariat.²²² The Company has a Board which comprises of prominent London based arbitration practitioners. The Board facilitates the development of London Court of International Arbitration business and general administration which include appointing members of the tribunal.²²³ The Arbitral Court of London Court of International Arbitration has 35 members and in addition there is representatives of associated institutions and former president of other leading arbitral institutions from the world.²²⁴ The Arbitral Court is responsible for appointing tribunal determining challenges to arbitrators and power in controlling costs.²²⁵ The Secretariat of the LCIA is headed by the Registrar based in London. The Registrar is responsible for the day to day administration of disputes referred to the LCIA.²²⁶ Therefore, it can be concluded that NCIA meets international best standards.

In the case of International Chamber of Commerce, the institution has International Court of Arbitration and the Secretariat.²²⁷ The International Court of Arbitration has a president, vice president and other members. It is the work of the International Arbitration to administer the resolution of disputes by the arbitral tribunal.²²⁸ The only body mandated to arbitration under the International Chamber of Commerce is the International Court of Arbitration.²²⁹ The Secretariat of the International Court of Arbitration is responsible in assisting the court to administer its mandate.²³⁰

²²¹ Ibid

²²² <http://www.lcia.org> accessed on 15/07/2015

²²³ <http://www.lcia.org> accessed on 15/07/2015

²²⁴ <http://www.lcia.org> accessed on 15/07/2015

²²⁵ <http://www.lcia.org> accessed on 15/07/2015

²²⁶ <http://www.lcia.org> accessed on 15/07/2015

²²⁷ <http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration> accessed on 17/07/2015

²²⁸ International Chamber of Commerce Arbitration Rules, Article 1(2)

²²⁹ International Chamber of Commerce Arbitration Rules, Article 1(2)

²³⁰ Ibid, article 1(5)

In Rwanda, the Kigali International Arbitration Centre is comprised of the Board of Directors and a General Secretary under the direction of Secretary General.²³¹ The Secretariat is responsible for the day to day management of the Centre.²³² The registrar is the one responsible for the case management and other staff.²³³ The governance Board is comprised of seven members appointed by the private sector federation from professional associations and international members with knowledge and practice in arbitration and alternative dispute resolution. There is also an International Advisory Board comprised of renowned international arbitrators responsible for advising the Board of Directors.²³⁴ These organs are therefore responsible for the management of the Centre. The staff required should therefore be qualified in order to perform administrative functions of the arbitration institutions effectively.

Most of the arbitration institutions in Africa lack the adequate staff required to effectively administer arbitration proceedings.²³⁵ This position has also been supported by Dorothy Aswani who states there has always been a challenge on the capacity of arbitration institutions to meet demands of international commercial arbitration.²³⁶ Kamau Karori also states that most arbitration institutions in Kenya and Africa have limited number of qualified and experienced arbitrators.²³⁷ For arbitration to be successful there is need to have adequate qualified staff. The staffs of NCIA are not adequate and more staff needs to be employed in order to enhance efficiency.²³⁸ According to a director of the NCIA, NCIA will need more staff in order to offer services efficiently.²³⁹ The NCIA needs assisting counsel, stenographers and clerks who will play

²³¹ Kigali International Arbitration Centre Arbitration Rules 2012, Article 2

²³² Kigali International Arbitration Centre Annual Report July 2012-June 2013

²³³ Ibid

²³⁴ Kigali International Arbitration Centre Annual Report July 2012-June 2013

²³⁵ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015) <<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf>> accessed on 22 June 2015

²³⁶ Dorothy Aswani (2016) "Building Kenya's Future as a Global Hub for International Commercial Arbitration", volume 4 issue 2,1 *Alternative Dispute Resolution Journal* 147-169

²³⁷ Kamau Karori (2014) "Emerging Perspectives and Challenges in Dispute Resolution", 1 *Alternative Dispute Resolution Journal* 181-189

²³⁸ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

²³⁹ Oral Interview with a Director of NCIA conducted on 8th November 2016

a bigger role in ensuring quality service delivery.²⁴⁰ The qualified staffs in arbitration institutions are instrumental in providing competence in administering and supervising arbitrations.²⁴¹

The organization structure of Nairobi Centre for International Arbitration as compared with that of London Court of International Arbitration, International Chamber of Commerce and Kigali International Arbitration is illustrated in appendix four (4). The table is important in analyzing the various structures of arbitral institutions and how they perform their duties. The table shows how the above named arbitral institutions have arranged their departments and how the employees in the departments perform their duties.

2.4.5 Reasonable charges

According to Houthoff Buruma Practical Guides on International Arbitration entitled, “international Commercial Arbitration, An Introduction,²⁴² a good institutional framework of Arbitration Centre should ensure that there exist reasonable charges to the arbitration process.

The charges in this case include the administrative fees and also fees payable to the arbitrators. These charges apply to both the ad hoc arbitration and institutional arbitration. However, this paper will be limited to institutional arbitration. Some of arbitral institutions determine their fees depending on the amount in dispute or time spent.

According to Dorothy Aswani,²⁴³ one of the challenges facing arbitration institutions in Africa and Kenya has been determination of arbitral fees and arbitral costs. Dorothy states that there has been lack of certain framework on the remuneration of arbitrators and that’s why there has been a problem with foreigners who have been confused on what to pay when dealing with African arbitrators.²⁴⁴ The issue of remuneration of arbitration has always been left to a specific institutional guideline. It is therefore important to have a specific institutional guideline providing for remuneration of arbitrators.

²⁴⁰ Oral interview with the director of NCIA conducted on 8th November 2016

²⁴¹ Hon. Justice Edward Torgbor (2015) “Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa”, volume 3 issue 2,1 *Alternative Dispute Resolution Journal* 109-121

²⁴² Houthoff Buruma Practical Guides on International Arbitration, International Commercial Arbitration, An Introduction, 2013 edition

²⁴³ Dorothy Aswani (2016) “Building Kenya’s Future as a Global Hub for International Commercial Arbitration”, volume 4 issue 2, 1 *Alternative Dispute Resolution Journal* 147-169

²⁴⁴ Ibid

In institutional arbitration, the fees to be paid by the parties are stated in the institutional rules. As much as the fees to be paid in the arbitration process are stipulated in the institutional rules, it is important to know how the said fees are determined. Most institutions have a mechanism for determining the scale of remuneration and collecting from the parties the money from which the arbitral tribunal will be paid without directly involving the arbitrators²⁴⁵. The NCIA Arbitration rules provides for arbitration fees and costs. There are also fees for an emergency arbitrator. The fees of emergency arbitrator for Nairobi Centre for International Arbitration, International Chamber of Commerce, London Court of International Arbitration and Kigali International Arbitration Centre are illustrated in appendix three. There is registration fee of US Dollars 100 for international arbitration and Kenya Shillings 1000 for domestic arbitration paid by the claimant²⁴⁶.

The arbitration fees and costs of various arbitration institutions are highlighted in appendix two (2). The table in Appendix 2 compares the arbitrator's fees, emergency arbitrator's fees and arbitration costs of the NCIA, LCIA, ICC and KIAC. The table is important in showing that the NCIA offers reasonable charges of arbitration process as compared to other arbitral institutions. The arbitration fees of NCIA are therefore competitive as highlighted in the table.

According to Kariuki Muigua and Ngararu Maina,²⁴⁷ pricing strategy is one of the determinants of a successful arbitration institution. The pricing strategy will include the arbitration fees and expenses. The arbitration fees and expenses should be that of the normal market value. When compared with the ICC arbitration rules, the rates charged by the Nairobi Centre for International Arbitration is relatively lower hence reasonable for the users.

2.5 Conclusion

This part of the paper discussed the institutional framework of the NCIA and whether it meets the international best standard. Nairobi Centre for International Arbitration is a young arbitration

²⁴⁵ Shah M & Ghandi N (2011) "Arbitration: One Size Does Not Fit All: Necessity of Developing Institutional Arbitration in Developing Countries", Vol. 6, Issue 4 *Journal of International Commercial Law and Technology*

²⁴⁶ NCIA arbitration rules, annex 1

²⁴⁷ Kariuki Muigua and Ngararu Maina, "Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration", volume 4 issue 1, 1 *Alternative Dispute Resolution Journal* 169-195

centre²⁴⁸. It is therefore still growing and has its share of challenges. Some of these challenges include funding, interference from the government, availability of qualified staff and facilities to enhance arbitration process. The challenges discussed above should be used to come up with strategies that will make Nairobi Centre for International Arbitration more effective and improve its service delivery.

The best way forward for Nairobi Centre for International Arbitration to solve its challenges is to learn how the more established Arbitration Centres in Africa and Europe have laid down their structures that help in solving the problems that may arise.

On the issue of funding, the NCIA should find other avenues of funding its activities rather than depending solely on the Government of Kenya. This may include subscription from users, grants and partnership with other arbitral institutions.

On the issue of independence, the NCIA should maintain minimum contact with the Government of Kenya in its operation. The Government of Kenya should only be useful in funding the operation of the Centre but should not taking part in running the activities of the NCIA.

The NCIA should employ more staff to ensure that there is effective and efficient delivery of arbitration services to the people.

The adequate facilities are important for conducting arbitration proceedings. The NCIA should have its own building that has spacious conference rooms for conducting arbitration proceedings.

From the above discussion, the NCIA institutional framework meets the international best standard however there should be some improvements to make it more efficient in service delivery.

The next chapter will discuss the laws governing Nairobi Centre for International Arbitration and evaluate them with the laws of other arbitral institutions.

²⁴⁸ Nairobi Centre for International Arbitration was established in 2013 under the Nairobi Centre for International Arbitration Act of 2013

CHAPTER THREE

3.0 AN ASSESMENT OF THE LAWS GOVERNING NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION

3.1 Introduction

In chapter two, the writer discussed the institutional structure of Nairobi Centre for International Arbitration. The discussion analyzed if the institutional structure of Nairobi Centre for International Arbitration conforms to the International best practice of International commercial arbitration. The writer drew major lessons from the Arbitral Institutions in Africa. In addition, the discussion compared the Institutional structure of Nairobi Centre for International Arbitration with that of the London Court of International Arbitration, International Chamber of Commerce and Kigali International Arbitration Centre.

In this chapter, the writer will discuss the various laws governing the Nairobi Centre for International Arbitration and find out whether they meet international best standards as compared with arbitral institutions namely: the ICC, LCIA and KIAC. The discussion will highlight the gaps in the laws, the potential conflict with the Constitution and how the gaps can be filled. According to Kariuki Muigua and Ngararu Maina in their work “Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration”,²⁴⁹ for Nairobi Centre for International Arbitration to be attractive it should come up with laws, policies and institutional framework that promote arbitration and Alternative Dispute Resolution Mechanisms. The Nairobi Centre for International Arbitration has the laws governing its operation which include the Nairobi Centre for International Arbitration Act, the Constitution of Kenya 2010, the Arbitration Act 1995 and the Nairobi Centre for International Arbitration Rules 2015.

²⁴⁹ Kariuki Muigua and Ngararu Maina(2016) “Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration”, volume 4 issue 1, *Alternative Dispute Resolution Journal* 169-195

3.2 The Constitution of Kenya 2010

This is the supreme law of the Republic hence it is binding to everybody and all state organs and different levels of government.²⁵⁰ The Constitution is also said to be supreme by virtue that it is the highest authority in the legal system.²⁵¹ According to Hans Kelsen pure theory of law, a legal system consists of norms that exist in a hierarchy.²⁵² Hans Kelsen suggests that the Constitution is above other norms hence other laws acquire their validity from the Constitution. The Constitution provides for arbitration as an alternative dispute resolution mechanism.²⁵³ It is therefore in this regard that the Constitution is an important law that governs the Nairobi Centre for International Arbitration.

The Constitution sets out the principles governing any law to be enacted hence any law inconsistent with it is not valid.²⁵⁴ Therefore in its interpretation, the drafters of the Constitution intended that the interpretation should be done in a way that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms.²⁵⁵ According to Kariuki Muigua in his work entitled “Constitutional Supremacy over Arbitration in Kenya”,²⁵⁶ he states that Arbitration should be conducted in a way that it conforms to the Constitutional values and principles and any derogation may be challenged as being unconstitutional. Other laws enacted by the parliament or the Nairobi Centre for International Arbitration to regulate arbitration should therefore conform to the Constitution of Kenya 2010.

²⁵⁰ Constitution of Kenya 2010, article 2(1)

²⁵¹ Limbach, J. (2001), ‘The Concept of the Supremacy of the Constitution’, Vol. 64, No. 1 *The Modern Law Review*, p. 1-10 at p.1.

²⁵² Hans Kelsen, Introduction to the problems of legal theory(1992)(trans LB Paulson & LS Paulson

²⁵³ Constitution of Kenya 2010, article 159

²⁵⁴ Ibid , article 2(4)

²⁵⁵ Constitution of Kenya, article 259(1)

²⁵⁶ Kariuki Muigua, Constitutional Supremacy over Arbitration In Kenya”(2016), Volume 4 Issue 1, *Chartered Institute of Arbitration Kenya Journal* 110-141

3.3 The Arbitration Act 1995

The substantive law governing arbitration in Kenya still remains the Arbitration Act 1995. It is the law that provides the domestic and international arbitration.²⁵⁷ Arbitration has been defined as any arbitration whether it is administered or not by a permanent arbitral institution.²⁵⁸

The Arbitration Act 1995 was amended by the Arbitration Amendment Act 2009 which came into operation on 1st January 2010.²⁵⁹ According to Dorothy Aswani,²⁶⁰ the Arbitration Act 1995 adopted the UNICTRAL Model Law definition of international arbitration.²⁶¹ Dorothy further explains that there is inclusion of the word commercial in the UNICITRAL Model law that gives a wider scope that covers all commercial relationships as also included in the Arbitration Act. It can therefore be noted that inclusion of the term commercial means that the Act provides for International Commercial Arbitration.²⁶²

The arbitral proceedings and the enforcement of arbitral awards are provided in this Act. For instance according to Arbitration Act,²⁶³ the international award will be binding and enforced according to the New York Convention in which Kenya is a signatory.²⁶⁴

The amended Arbitration Act introduced mechanisms under section 10 to reduce national court interference in the arbitral processes.²⁶⁵ The national courts can intervene in the appointment of tribunal²⁶⁶, setting aside of arbitral award,²⁶⁷ application by a party to challenge arbitrator,²⁶⁸ stay

²⁵⁷ Otiende Amolo “Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya(2014) volume 2 number 1, *Chartered Institute of Arbitrators Kenya Journal* 92-105

²⁵⁸ Arbitration Act 1995, section 3(1)

²⁵⁹ Prof.Paul Musili Wambua (2013) “The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya”, *Chartered Institute of Arbitrators Kenya Journal* 15-33

²⁶⁰ Dorothy Aswani (2016) “ Building Kenya’s Future as a Global Hub for International Commercial Arbitration”, volume 4 issue2 , *Chartered Institute of Arbitration Kenya Journal* 147-169

²⁶¹ UNICTRAL Model Law, article 1 defines international arbitration the same way as defined by the Arbitration Act 1995

²⁶² Dorothy Aswani (2016) “Building Kenya’s Future as a Global Hub for International Commercial Arbitration”, volume 4 issue2 , *Chartered Institute of Arbitration Kenya Journal* 147-169

²⁶³ Arbitration Act 1995, section 36(2)

²⁶⁴ See chapter one of the paper

²⁶⁵ Prof.Paul Musili Wambua (2013) “The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya”, *Chartered Institute of Arbitrators Kenya Journal* 15-33

²⁶⁶ Arbitration Act 1995, section 12

²⁶⁷ Ibid , Section 35

²⁶⁸ Ibid , Section 14

of legal proceedings,²⁶⁹ grant of interim orders²⁷⁰ and application to get evidence to be used in the arbitration proceedings.²⁷¹ However, the intervention of the courts is only allowed as provided in the Arbitration Act. This position can be challenged as being unconstitutional because the Constitution gives the High Court unlimited jurisdiction.²⁷² It can also be argued that the High Court has supervisory jurisdiction over any tribunal²⁷³ hence section 10 of Arbitration Act 1995 is unconstitutional. In the intervention as to the arbitral awards, it has been argued that there is only one way to intervene in the enforcement of arbitral awards. In the case of *Nyutu Agrovet Limited V Airtel Networks Limited*,²⁷⁴ the courts stated that parties have no right to appeal against the setting aside ruling of the High Court. Mwera J as he then was stated:

“My view is that the principle on which the arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from courts, for determination by a body put forth by themselves, and adding to all that as in this case, the arbitrators award shall be final, it can be taken as long as the given award subsist it is theirs. But in the event it is set aside as it was the case here, that decision of the High court remains final and their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless of course they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so”.

The reality on the application of section 10 of Arbitration Act 1995 has been a mixed. In some circumstances the courts have played minimal role in interference of arbitration proceedings. On the other hand the courts have also restrained totally from interfering with the arbitral proceedings. There have been some instances whereby the courts have failed to fully implement section 10 of the Arbitration Act 1995. In *Tononoka Steels Limited v E. A Trade and Development Bank*,²⁷⁵ the court held:

²⁶⁹ Arbitration Act 1995, Section 6

²⁷⁰ Ibid , Section 7

²⁷¹ Ibid , Section 28

²⁷² Constitution of Kenya 2010, article 165

²⁷³ Ibid , article 165(3)

²⁷⁴ (2015) eKLR

²⁷⁵ 2(2000) EA 536

“That even where the court intervenes in any arbitration proceedings or any matter that should be referred to arbitration, it would only be a section of the subject matter in dispute and not the substantive matter”.

In the case of *Pentecostal Assemblies of God V Reverend John Malwenyi and others*,²⁷⁶ the applicant sought to have the award set aside on the premise that it had no date, signatures of all arbitrators, designation of the place where it was made and no reasons for the award. The court upheld the award in spite of the provisions of section 32 of the Act. The Judge never considered the effect of applying section 32 of the Act.

In the case of *Prof. Lawrence Gumbe & another V Hon. Mwai Kibaki & others*,²⁷⁷ the High Court recognized the limited intervention by courts in arbitration proceedings. The court held:

“Our Arbitration Act, section 10 is based on the United Nations Model Law on arbitration and all countries that have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented.”

The Act provides for the party autonomy.²⁷⁸ In this scenario, the party is entitled to select the arbitrator it wishes to use in the arbitration proceedings. According to James Tugee,²⁷⁹ the Arbitration Act recognizes party autonomy by giving parties power to: power to determine the number of arbitrators,²⁸⁰ power to agree on the language to be used in proceedings,²⁸¹ power to determine the rules of procedure to be used by the arbitral tribunal in the conduct of proceedings,²⁸² power to agree on the place of arbitration,²⁸³ power to agree on the procedure for challenging arbitrator²⁸⁴ and power to agree on the procedure of appointing the arbitrator.²⁸⁵ In

²⁷⁶ (2006)eKLR

²⁷⁷ Misc Application no.1025 of 2004

²⁷⁸ Arbitration Act 1995, section 12

²⁷⁹ James Tugee, An Overview of Arbitration in Kenya, available at www.academia.edu/3057430/OVERVIEW-OF-ARBITRATION-IN-KENYA

²⁸⁰ Arbitration Act 1995, section 11(1)

²⁸¹ Ibid , section 23(1)

²⁸² Arbitration Act 1995, section 20(1)

²⁸³ Ibid , section 21(1)

²⁸⁴ Ibid , section 14(1)

the case of *Kenya Oil Company Limited and Another V Kenya Pipeline Company*,²⁸⁶ the court held:

“The principle of party autonomy underpinning arbitration is premised on the platform that provided that it does not offend structures imposed by law. Parties in a relationship have a right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had”.

As compared to the Nairobi Centre for International Arbitration Act 2013, there is no party autonomy as the Act gives the arbitral tribunal power to determine the procedure to govern proceedings of the arbitral court.²⁸⁷

3.4 Nairobi Centre for International Arbitration Act 2013

According to the long title of Nairobi Centre for International Arbitration Act 2013, this is an Act of Parliament to provide for the establishment of a regional centre for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes.

The Nairobi Centre for International Arbitration is established under section 4 of the said Act. It is a body corporate with perpetual succession and a common seal. The Centre is supposed to have its headquarters in Nairobi. The Nairobi Centre for International Arbitration has various functions which include promote, facilitate and encourage the conduct of international commercial arbitration in accordance with the Act; administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices; develop rules encompassing conciliation and mediation processes and organize international conferences, seminars and training programs for arbitrators and scholars.²⁸⁸ In ensuring it performs its work

²⁸⁵ Ibid , section 12

²⁸⁶ Civil Appeal no.102 of 2012

²⁸⁷ Nairobi Centre for International Arbitration Act No 26 of 2013, section 26

²⁸⁸ Ibid , section 5

well, the Nairobi Centre for International Arbitration Act has a Board of Directors, Secretariat and Arbitral Court.²⁸⁹

The Arbitral Court has exclusive original and appellate jurisdiction to hear and determine all the disputes referred to it according to the Act.²⁹⁰ After hearing the disputes, the Arbitral Court makes a decision which is final.²⁹¹ According to Kariuki Muigua and Ngararu Maina in their work, “Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration”²⁹² the Nairobi Centre for International Arbitration Act is not clear on the role of the Arbitral Court and the national courts. It appears to be confusion with the national courts as provided in the constitution. Firstly, according to Wilfred Mutubwa,²⁹³ the Constitution in article 162 defines the system of Courts in Kenya and the hierarchy. Mutubwa argues that the Nairobi Centre for International Arbitration Act creates Arbitral Court. The Constitution gives any other act of parliament power to create any other court.²⁹⁴ Some of the Courts created so far by Act of Parliament are the Environmental and Land Court and Industrial Court. The said courts have exclusive jurisdictions to handle matters before them just like the High Court. The Question to ask therefore is the Arbitral Court one of the Courts purported to be created under section 162, 163, 164 and 165 of the Constitution? The Arbitral Court is not one of the Courts to be created under article 162 of the Constitution hence the confusion as to its role. The Arbitral Court is not one of the Courts created under section 162 of the Constitution of Kenya 2010. The Arbitral court has its own original and appellate jurisdiction hence there is confusion on its role.

On the issue of jurisdiction, the Nairobi Centre for International Arbitration Act 2013 under section 22 shows that Arbitral Court is not subject to supervisory or appellate jurisdiction of the High Court or any other court created by the constitution.²⁹⁵ As discussed earlier, any law that is

²⁸⁹ Nairobi Centre for International Arbitration Act No 26 of 2013, section 21

²⁹⁰ Ibid, Section 22(1)

²⁹¹ Nairobi Centre for International Arbitration Act 2013, Section 22(2)

²⁹² Kariuki Muigua and Ngararu Maina(2016) “Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration”, volume 4 issue 1, *Chartered Institute of Arbitrators Kenya Journal* 169-195

²⁹³ Wilfred A Mutubwa(2016) The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013, Volume 82, Issue1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

²⁹⁴ This can be seen in article 162, 163, 164 and 165 of the Constitution

²⁹⁵ Wilfred A Mutubwa(2016) “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013”, Volume 82, Issue1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

inconsistent with the Constitution is null and void. It can therefore be concluded that on the issue of jurisdiction of arbitral Court is unconstitutional.

Wilfred Mutubwa²⁹⁶ has argued that the Nairobi Centre for International Arbitration Act has a gap on the manner of appointment of the president and deputy president of the arbitral court and the disciplinary. The members of the arbitral court are appointed by the Board of directors.²⁹⁷ The member's appointment is purely on merit and can be reappointed after five years.²⁹⁸ When it comes to the president and deputy, the Nairobi Centre for International Arbitration Act fails to provide for their competitive recruitment. The president and the deputy president of the tribunal should be appointed competitively because they are senior most members of the arbitral court hence higher qualifications should be set for them. Mutubwa further argues that the Nairobi Centre for International Arbitration Act fails to provide for manner of removal of members of the arbitral court. This is not a good practice because members may engage on acts which are contrary to their mandate and go unpunished.

According to Wilfred Mutubwa, the Nairobi Centre for International Arbitration Act 2013 also has some conflict with the Arbitration Act 1995. The conflicts are in party autonomy and flexibility, confidentiality, specific expertise and court assistance and finality of award.

On the issue of confidentiality, the Nairobi Centre for International Arbitration Act provides for confidentiality of documents, materials and information where all the directors, agents, employees are required to maintain confidentiality of materials they come across.²⁹⁹ The said Act goes ahead to provide that the national Courts can direct publication of the information.³⁰⁰

The Nairobi Centre for International Arbitration Act provides that the Arbitral court award is final.³⁰¹ According to Mutubwa, the Act fails to provide for any enforcement provisions however, provides under section 25 that the rules should be formed to cater for the enforcement. Lack of enforcement mechanisms will lead to challenge of the award before the national courts.

²⁹⁶ Ibid

²⁹⁷ Nairobi Centre for International Arbitration Act, section 21

²⁹⁸ Ibid , section 21(4)

²⁹⁹ Nairobi Centre for International Arbitration Act 2013, section 15

³⁰⁰ Nairobi Centre for International Arbitration Act 2013, section 15

³⁰¹ Nairobi Centre for International Arbitration Act 2013, section 22(2)

Wilfred Mutubwa argues that the issue of party autonomy and flexibility is important in arbitration. Mutubwa states that parties are free to agree on the manner of arbitration. According to Mutubwa,³⁰²The Nairobi Centre for International Arbitration Act 2013, gives the arbitral tribunal power to determine its procedures to govern proceedings of the arbitral court.³⁰³ This denies the parties right to choose their own procedures. Therefore parties choosing to use Nairobi Centre for International Arbitration will be disadvantaged as far as party autonomy is concerned. It is my view that the Nairobi Centre for International Arbitration Act 2013 should therefore be amended to include party autonomy.

According to Dr. Kariuki Muigua and Ngararu Maina³⁰⁴ it is important for the Nairobi Centre for International Arbitration to ensure its guiding laws and regulations are clear to avoid confusion. In my opinion, clarity of laws and regulations will help in promoting the Nairobi Centre for International Arbitration as a hub for international commercial arbitration.

3.5 Nairobi Centre for International Arbitration (Arbitration) Rules 2015

In this section, the writer will discuss the institutional rule of Nairobi Centre for International Arbitration. The discussion will find out if the institutional rules of Nairobi Centre conform to the International best standard for international commercial arbitration. The institutional rules of London Court of International Arbitration and International Chamber of Commerce will be compared with that of Nairobi Centre for International Arbitration.

According to Philip Capper, one of the factors to consider when choosing an arbitration institution is the applicable rules of that arbitration institution.³⁰⁵ The rules should be analyzed to check if there is any unusual feature. The features to be checked include the rules of procedure of the said institution.³⁰⁶The details of the arbitration rules should be known to the parties before making an informed decision of using the services of an Arbitration Institution. It is noteworthy

³⁰² Wilfred A Mutubwa(2016) “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013”, Volume 82, Issue1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

³⁰³ Nairobi Centre for International Arbitration Act 2013, section 23

³⁰⁴ Kariuki Muigua and Ngararu Maina(2016) “Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration”, volume 4 issue 1, *Chartered Institute of Arbitrators Kenya Journal* 169-195

³⁰⁵ Philip Capper, *International Arbitration: A handbook*,3rd edition, p. 33

³⁰⁶ *Ibid*, p. 33

to say that the parties should therefore read and understand the arbitration rules before making an informed decision of the Arbitration Institution to choose.

One of the challenges that arbitration institutions in Africa face is inadequate legal and institutional framework.³⁰⁷ The institutions may have enacted legislations which do not conform to the UNICITRAL model law, the international standard of arbitration.³⁰⁸

The practice of international commercial arbitration is dynamic. The rules, laws and procedures in international arbitration keep on changing. It is therefore important for parties in arbitration to choose an arbitral institution with the rules that conform to the recent development and changes in international commercial arbitration.

The analysis of arbitration rules should also be done on an Arbitration Institution that is known or is familiar. In case the Arbitration Institution is an unfamiliar institution, the arbitration rules should be analyzed to detect the weaknesses and the gaps.³⁰⁹ The above mentioned analysis will ensure that the parties are not disadvantaged in any way during the arbitral process.³¹⁰ The arbitral rules can be checked using some of the arbitration rules of well-established Arbitration Institutions like LCIA, ICC and also the UNCITRAL arbitration institutions which are regarded as the standard arbitration rules.

This paper will take the approach given by Aaron Sam in determining suitable institutional arbitration rules. The writer has narrowed down to Aaron Sam's criteria because Aaron Sam clearly discusses the major components of an institution rule. The major components of institutions rules as discussed by Aaron Sam to be discussed in this paper will include; must be acceptable to both common law and civil-law jurisdiction, the extent to which they permit direction to be given to the proceedings by the arbitrator, provision for the use of expert, method of solving delaying tactics, definition of arbitrator's jurisdiction, provision of interim measures of protection and the way of introducing additional parties.

³⁰⁷ Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015) <<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf>> accessed on 22 June 2015

³⁰⁸ *ibid*

³⁰⁹ Philip Capper, *International Arbitration: A handbook*, 3rd edition, p. 33

³¹⁰ *Ibid*, p. 33

3.5.1 Acceptable to both common law and civil-law jurisdiction

According to Aaron Sam in his work “International Arbitration Choosing an Arbitration Institution and a Set of Rules”,³¹¹ an institutional rule should provide procedure that is acceptable to both the common law and civil law jurisdiction. It is noteworthy to say that Legal systems arise due to different cultural backgrounds for example the Francophone and Anglophone.³¹² In Africa for example the countries that were colonized by the British majorly adopted the common law jurisdiction. In arbitration proceedings the issue of different legal systems may arise among parties. Before deciding on the seat of arbitration it is therefore important to understand host country’s law.³¹³ A suitable institutional rule should provide a flexible procedure that is applicable to both the common law and civil-law jurisdiction. The use of both systems is important in meeting the expectations and needs of an international trade market effectively.³¹⁴

For instance according to Duncan Bagshaw, the Registrar of Mauritius Arbitration Centre, one of the reasons why Mauritius attracts investors as a seat of arbitration is its hybrid legal regime based on both civil and common law:³¹⁵ with a legal tradition anchored in French law, and the recent adoption of legislation based on common law. It is therefore important to note that majorly you will find that hybrid procedural rules had to be developed because of the cases involving parties from civil and common law jurisdictions. In these instances the tribunal had no option but to provide solutions no matter the difference in the parties’ legal system.³¹⁶ The Nairobi Centre for International Arbitration rules should also be drafted to ensure that it is a

³¹¹ Aaron Sam, International Arbitration Choosing an Arbitration Institution and a Set of Rules(1991) 108 SALJ503

³¹² Mauro Rubino-Sammartano, International Arbitration Law and Practice (Kluwer Law International 2001)

³¹³ Mauro Rubino-Sammartano, International Arbitration Law and Practice (Kluwer Law International 2001)

³¹⁴ Aaron Sam, International Arbitration Choosing an Arbitration Institution and a Set of Rules(1991) 108 SALJ503

³¹⁵ Mauritian legal tradition see S. Moollan, *Breve introduction a la novella loi mauricien sur l’arbitrage international, in revue de ll’Arbitrage, Vol. 2009mIssue 4, P.934 to 936*

³¹⁶ Rolf Trittman and Boris Kasolowsky “Taking Evidence in Arbitration Proceedings between Common law and Civil Law Traditions-The Development of a European Hybrid Standard for Arbitration Proceedings”, *UNSW Law Journal Volume 31(1)* available at <https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlaw18arbitration.pdf> accessed on 2/2/2016

hybrid of both the civil law and common law. A hybrid of the civil law and common law should cater for the needs of parties in all jurisdictions.

3.5.2 Provision for the use of expert

Aaron Sam in his work, *International Arbitration Choosing an Arbitration Institution and a Set of Rules*³¹⁷ states that in choosing an arbitration rules, the drafters of the institutional rules should ensure that there is provision for the use of experts. In arbitration proceedings the use of experts may be required which may include party-appointed experts or tribunal appointed experts³¹⁸ because there are disputes which the arbitrator may lack the necessary knowledge required to apply in making a decision for example the disputes in construction.³¹⁹ Again the experts may be called to report and explain on complex issues and also make some clarifications on some information in the arbitral proceedings.³²⁰ In the case of *Corfu Channel (U.K v Alb)* the court stated that the arbitral tribunal has the mandate to make use of the expert to get information that is important in getting the truth in arbitration proceedings.³²¹ It is in these instances that the arbitrator will require a qualified expert who will give him the necessary information to guide him when making judgments. The experts may either be called upon to give evidence by the party to arbitration agreement or arbitral tribunal.³²² However, this may occur depending on the type of legal system. In arbitration proceedings majorly conducted where parties owe allegiance to common law jurisdiction always provide testimony for party appointed expert whereas parties from civil law jurisdiction tend to use testimony of party appointed experts.³²³

³¹⁷ Aaron Sam, (1991)“International Arbitration Choosing an Arbitration Institution and a Set of Rules” 108 SALJ503

³¹⁸ Giovanni De Berti, *Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator* available at http://www.dejalex.com/pdf/pubbb_11_AYIA.pdf. accessed on 2/02/2006

³¹⁹ Ibid p. 513

³²⁰ Ruth Fenton, *A Civil matter for a Common Expert: How should Parties and Tribunals Use Experts in International Commercial Arbitration?*, *Pepperdine Dispute Resolution Law Journal*, Volume 2 issue 6, p.1

³²¹ *Corfu Channel (U.K v Alb)* 1949 I.C.J.4,20(Apr.9)

³²² Dr. Klaus Sachs, *Experts: Neutrals or Advocates*, available at <http://www.josemigueljudice-arbitration.com/xms/files/02-TEXTOS-ARBITRAGEM/01-Doutrina -scholar> accessed on 29/2/2016

³²³ See Alexandra Weiss and Karin Bungi locatelli, *Der Vom Schiedsgericht bestellte Experte-Ein Überblick aus Sichtneines Internationalen Schiedsgerichts mit Sitz in der Schweiz*, *ASA Bulletin*,3/2004,pp. 479 et seq at pp. 480-482;Martin Hunter *Expert Conferencing and New Methods*.

Party-appointed experts usually use their knowledge to come up with opinions regarding the issue at hand which they put in a report.³²⁴ The tribunal will therefore rely on the party appointed opinion in the report to solve the dispute. However, because expert's opinions may not be the same, the tribunal will have to critically examine the report before coming up with its conclusion.³²⁵ In the Arbitration Act of Kenya, the parties may appoint an expert or may decide that the tribunal appoints the expert.³²⁶

Party appointed experts have its limitations as discussed below. To begin with, the opponents of party appointed experts argue that it is bias.³²⁷ They state that the experts may tend to make an argument that favours the party that appointed them.³²⁸ This is because party- appointed expert to arbitral proceedings always help the party appointing them.³²⁹ Another issue of consideration is the reports submitted to the tribunal. The opponents of party appointed expert argue that reports submitted may not be clear.³³⁰ The lack of clarity is due to experts making long and complex reports in order to ensure what they report make sense of their expertise.³³¹ The danger with these long complex reports is that it may fail to focus on what the party wants the tribunal to hear and may be outside the scope that the tribunal needs to efficiently solve in the arbitral proceedings.³³² Lastly, the method of examining the party-appointed experts may raise the issue of efficiency.³³³ For instance, leading counsel may lead the expert to raise issue that the tribunal may not find it useful in making a decision on the arbitral proceedings.³³⁴

³²⁴ Ruth Fenton, A Civil matter for a Common Expert: How should Parties and Tribunals Use Experts in International Commercial Arbitration?, *Pepperdine Dispute Resolution Law Journal*, Volume 2 issue 6, p.1

³²⁵ *Ibid*

³²⁶ Arbitration Act, section 27

³²⁷ Dr. Klaus Sachs, Experts: Neutrals or Advocates, available at <http://www.josemigueljudice-arbitration.com/xms/files/02-TEXTOS-ARBITRAGEM/01-Doutrina-scholar> accessed on 29/2/2016

³²⁸ *Ibid*

³²⁹ *Ibid*, para 19

³³⁰ *Ibid*

³³¹ Jones, Party appointed Expert Witnesses, P.138

³³² Wolfgang Peter, Witness "conferencing" *Arbitration International*, vol 18, No.1, pp. 47

³³³ Dr. Klaus Sachs, Experts: Neutrals or Advocates, available at <http://www.josemigueljudice-arbitration.com/xms/files/02-TEXTOS-ARBITRAGEM/01-Doutrina-scholar> accessed on 29/2/2016

³³⁴ *Ibid*

Tribunal appointed experts may itself decide to appoint an expert as provided for in the arbitration rules or arbitration laws. This can be seen for example in the UNICITRAL Model Law which provides³³⁵:

“Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report it on specific issues to be determined by the arbitral tribunal”.³³⁶ It should however be noted that Arbitration Act of Kenya allows the tribunal to appoint experts if the parties agree to the same.”

A suitable arbitration rule should therefore make provision for the use of expert witnesses. The NCIA Arbitral Tribunal has the power to appoint experts to report to the tribunal to give evidence on specific issues depending with the area of specialization.³³⁷ This expert should however not be bias to any party to the arbitration proceedings.³³⁸ The London Court of International Arbitration rules also provide that the arbitral tribunal may appoint experts to be relied on in arbitration proceedings.³³⁹

In conclusion, as much as the arbitration rules should have a clause to provide for experts, the clause can also be made to ensure that the arbitrator being appointed is an expert in the dispute at hand. This provision will save time and costs in the arbitration proceedings.³⁴⁰ The NCIA rule should therefore be guided by cost benefit analysis in the provision of experts in arbitration proceedings.

3.5.3 Method of solving delaying tactics

In an arbitration proceeding, a party may decide to adopt certain techniques to ensure a delay in proceedings especially when it has every reason to belief that the award will be made against them.³⁴¹ This is why according to Aaron Sam in his work, “International Arbitration Choosing an

³³⁵ Arbitration Act, section 27

³³⁶ UNICITRAL MODEL LAW, Article 26

³³⁷ NCIA Arbitration Rules, article 22.1

³³⁸ Ibid

³³⁹ London Court of International Arbitration Rules,2014, article 21

³⁴⁰ Norman Mururu (2013) Towards efficiency and economy in Arbitration ,volume 1 number 1, Alternative Dispute Resolution Journal, 7-14

³⁴¹ Aaron Sam (1991) “International Arbitration Choosing an Arbitration Institution and a Set of Rules” 108 SALJ503

Arbitration Institution and a Set of Rules,”³⁴² an institutional rule should provide instances where parties can avoid delaying tactics.

The delays happens in the following ways;³⁴³ failure to perform certain procedural steps required, challenging appointment of arbitrators, nominating an arbitrator who is likely to be challenged by the opposing side, challenging the jurisdiction of the tribunal, making application to the local courts, objecting various procedural steps and noting an appeal. According to Dorothy Aswani,³⁴⁴ parties to arbitration proceedings may use courts to delay proceedings. However, this can be avoided by setting up arbitral tribunal or courts with the power to make final decisions without the interference by the courts.³⁴⁵

A suitable arbitration rule should therefore provide for the best way of countering the delaying tactics stated above.

When an arbitrator or a respondent fails to perform certain procedural steps required by the rules, a suitable arbitration rule should provide for a way of avoiding the same problem.³⁴⁶ This issue has been well captured by the NCIA. To begin with, on the issue of award, NCIA provides³⁴⁷

“If any arbitrator fails to comply with the mandatory provisions of any applicable law relating to the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators may proceed in his absence and state in their award the circumstances of the other arbitrator’s failure to participate in the making of the award”.

In LCIA rules, if there is a disagreement as to the award, the majority of the arbitrators will be the one to make the final award.³⁴⁸

Parties have the right to challenge the appointment of an arbitrator or arbitrators but this should only be allowed for the right purposes and should not be misused. An ideal arbitration rule

³⁴² Ibid

³⁴³ Ibid

³⁴⁴ Dorothy Aswani (2016) “Building Kenya’s Future as a Global Hub for International Commercial Arbitration”, volume 4 issue2 , *Chartered Institute of Arbitration Kenya Journal* 147-169

³⁴⁵ Dorothy Aswani (2016) Building Kenya’s Future as a Global Hub for International Commercial Arbitration, volume 4 issue2 , *Chartered Institute of Arbitration Kenya Journal* 147-169

³⁴⁶ Aaron Sam (1991) “International Arbitration Choosing an Arbitration Institution and a Set of Rules”(108 SALJ P.515

³⁴⁷ NCIA Arbitration Rules, Article 28.4

³⁴⁸ LCIA Arbitration Rules, Article 26.5

should therefore rectify this problem by limiting grounds for challenging appointment of arbitrator and provide for expeditious resolution for the same.³⁴⁹ The NCIA arbitration rules provide that a party can challenge appointment of arbitrator if the arbitrator is seen to be bias.³⁵⁰ The LCIA arbitration rules states all the appointed arbitrators should remain impartial³⁵¹ but it fails to provide the process for challenging appointment of arbitrator. The same issue is well captured in ICC arbitration rules. A party may make an application to the Secretariat challenging appointment of an arbitrator who is not independent.³⁵²The Arbitration Act states that the arbitrator's appointment may be challenged if there is a reason to believe that the arbitrator is biased.³⁵³ The challenge to appointment of arbitrator is supposed to be made within 15 days of formation of Arbitral Tribunal.³⁵⁴ This is a reasonable time that will help in expeditious resolution of dispute. Furthermore, in some instances the arbitrator may refuse to sign the award. If that occurs in arbitral proceedings under NCIA, provides the signatures of the majority arbitrators or (failing a majority) of the chairman shall be sufficient, provided that the reason for the omitted signature is stated in the award by the majority or chairman.³⁵⁵

The NCIA rule should provide mechanism to curb delaying tactics used by the parties in arbitration proceedings. This is important in ensuring faster resolution of disputes.

3.5.4 Definition of arbitrator's jurisdiction

According to Aaron Sam in his work entitled "International Arbitration Choosing an Arbitration Institution and a Set of Rules³⁵⁶," the institutional rule should clearly define the arbitrator's jurisdiction. According to Black's Law Dictionary, jurisdiction is the legal right by which judges exercise their authority. Mohammed Nyaoga³⁵⁷ opines that when the arbitrators are conducting

³⁴⁹ Ibid

³⁵⁰ NCIA Arbitration Rules, article 10.1

³⁵¹ LCIA Arbitration Rules, 2014 article 5.3

³⁵² ICC Arbitration Rules, Article 14.1

³⁵³ Arbitration Act 1995, section 13(1)

³⁵⁴ Ibid, article 10.2

³⁵⁵ NCIA Arbitration Rules, article 28.6

³⁵⁶ Aaron Sam, International Arbitration Choosing an Arbitration Institution and a Set of Rules(1991) 108 SALJ

³⁵⁷ Mohammed Nyaoga , The Jurisdiction and Power of the Arbitrator in Githu Muigai Arbitration Law and Practice in Kenya(2013) Law Africa

their duties, they should always consider not acting beyond their scope. In the case of *Nyangau v Nyakwara*³⁵⁸ the court held:

“Arbitration proceedings under an order of the court, the arbitrator must act within either the stipulated time or that extended by agreement.”

It should be noted that in solving arbitration disputes, problems may arise as to whether the arbitrators have the jurisdiction to determine certain questions of the dispute.³⁵⁹ When faced with the question of jurisdiction, the arbitral tribunal decides the matter in two ways. Firstly, the tribunal may decide on the issue as a preliminary question.³⁶⁰ Secondly, the tribunal may decide the issue at the stage of arbitral award.³⁶¹ This follows the doctrine of kompetenz kompetenz which is modeled on the UNICITRAL Model Law. The Kenya Arbitration Act also follows the UNICITRAL Model Law. In the case of *Safaricom Limited V Ocean view limited beach Hotel and Salim Sultan Mooloo and Alsai (k) Limited others*³⁶² Nyamu J, as he then was, sitting in the Court of Appeal held:

“Although the English Arbitration Act 1996 is not exactly modeled on the Model Law unlike our Act, I fully endorse the principles as outlined in the CHANNEL CASE (Supra) because they are in line with the arbitral tribunal’s jurisdiction as set out in section 17 of the Arbitration Act of Kenya. The section gives the arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration.”

Further, in the case of *Boniface Waweru v Mary Njeri & Tai Yun Hwang*,³⁶³ Ojwang J as he then was stated

“That jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the question”.

This problem may arise pertaining to the specific laws of the countries. The party raising objection as to the competence of the arbitrators may decide to file a case in the national courts.

³⁵⁸ (1986)KLR

³⁵⁹ Ibid P. 520

³⁶⁰ Kariuki Muigua, The Arbitration Act: A Review of Arbitration Act, 1995 of Kenya Vis-à-vis Arbitration Act 1996 of United Kingdom available at <http://www.kmco.co.ke/attachments/article/75/075-ARBITRATION-ACT-REVIEW.pdf> accessed on 21/1/2016

³⁶¹ Ibid

³⁶² (2010)eKLR

³⁶³ H.C Misc Application No. 639 of 2005 reported

A suitable arbitration rule should provide a way of solving this dispute expeditiously without involving the national courts.³⁶⁴ The applications to the court pertaining jurisdiction may drag the arbitral proceedings.³⁶⁵ This usually happens by allowing the tribunal itself to solve the dispute.³⁶⁶

There are conditions for determining if the arbitrators have jurisdiction. According to Mohammed Nyaoga, the arbitrator's jurisdiction may be determined by the parties to a dispute.³⁶⁷ In the case of *Structural Construction Company Limited v International Islamic Relief*,³⁶⁸ the High Court declined to enforce an award against a party that had not participated in the arbitral proceedings. The court held:

“The arbitral tribunal has no powers to make an award that binds third parties or what is stated in the Arbitration Act.”

According to Kariuki Muigua, parties give arbitrators jurisdiction through the binding agreement to arbitrate in solving dispute.³⁶⁹ In the case of *Blue Limited v Jaribu Credit Traders Limited*³⁷⁰ the court stated that the arbitration clause is a distinct contract that creates obligation to the contracting parties to arbitrate.

Karuki Muigua further argues that arbitrator's jurisdiction will be known by establishing that the dispute which the parties agreed to arbitrate is contemplated by the parties.³⁷¹ This is supported by the case of *William Oluande v American Life Insurance Co. (Kenya) Ltd*³⁷² where the court stated that in determining arbitrator's jurisdiction, there must be a clear reading of the arbitration agreement between the parties. In addition, the arbitrator's jurisdiction may be determined by the

³⁶⁴ Ibid

³⁶⁵ Peter Mutuku Mbithi, 'International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Disputes in Kenya?' (LL.M Thesis, University of Cape Town 2014).

³⁶⁶ Ibid

³⁶⁷ Mohammed Nyaoga, *The Jurisdiction and Power of the Arbitrator in Githu Muigai Arbitration Law and Practice in Kenya*(2013) Law Africa

³⁶⁸ (2006) eKLR Misc cause no. 596 of 2005

³⁶⁹ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, Glenwood publishers 2012, P 93

³⁷⁰ (2008) eKLR

³⁷¹ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, Glenwood publishers 2012,p.94

³⁷² (2006) eKLR

valid appointment of arbitrators.³⁷³ This is because the procedure of appointment of arbitrator must have been followed as provided in the arbitration proceeding.

The NCIA arbitration rules provide that the arbitration tribunal has the power to rule on its own jurisdiction.³⁷⁴ Likewise the Arbitration Act gives the Arbitral tribunal power to rule on its own jurisdiction.³⁷⁵ The LCIA arbitration rules also provide that arbitral tribunal has the power to rule on its jurisdiction.³⁷⁶ On the other hand the ICC arbitration rule does not provide if the arbitral tribunal has the power to rule on its own jurisdiction.

In conclusion, the issue of arbitrator's jurisdiction should always be handled considering the origin of arbitrator's jurisdiction as discussed above. The NCIA rules should have provisions that states how the arbitrator's jurisdiction is created and when the issue of arbitrator's jurisdiction arises, it can easily be solved.

3.5.5 Provision of interim measures of protection

Aaron Sam in his work "International Arbitration Choosing an Arbitration Institution and a Set of Rules"³⁷⁷ states that an institutional rule should provide for interim measures of protection. It is of importance to note that provisional measures are grants of temporary relief issued to protect the rights of parties pending the final determination of the case.³⁷⁸ In the case of *Don Wood Co. Ltd v Kenya Pipeline Ltd*, Ojwang J as he then was stated:

"The courts jurisdiction to grant injunctive relief under section 7 of the Act was meant to preserve the subject matter of the suit pending the determination of the issues between the parties."

³⁷³ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, Glenwood publishers 2012

³⁷⁴ NCIA Arbitration Rules, article 24.1

³⁷⁵ Arbitration Act 1995, section 17(1)

³⁷⁶ LCIA Arbitration rules, 2014, Article 23.1

³⁷⁷ Aaron Sam (1991) "International Arbitration Choosing an Arbitration Institution and a Set of Rules" 108 SALJ

³⁷⁸ Shadat Mohamed, *A Critical Analysis of Arbitral Provisional Measures in England and Wales*, PHD Thesis 17th January 2014, p.2

Various reasons have been made to justify the importance of provision of interim measures. Firstly, interim measures help in minimizing any loss during arbitral proceedings³⁷⁹. Secondly, they also facilitate enforcement of awards³⁸⁰. A party to the arbitration proceedings is the one under duty to request provision of interim measures.³⁸¹ Then the arbitral tribunal will order interim measures. This position is further supported by UNCITRAL Model law³⁸². It is also important to know that the power to order interim measures is at the discretion of the arbitrator³⁸³. However, the issuance of interim measures is normally restricted on national arbitral laws and the contents of parties' contract.³⁸⁴ A clear point to note here is that granting arbitral tribunal power to make interim measures is vital in making the arbitral proceedings more effective and efficient.³⁸⁵

Oscar Reyden in his LLM thesis “ On the Legal Frameworks and Substantive Standards Governing the Granting of Interim Measures in International Commercial Arbitration,”³⁸⁶ states that “In arbitration process one of the parties may decide to go to court to seek interim measures against a decision of the arbitrators. The court may however fail to grant the specific relief that the party has applied for.”³⁸⁷ It would therefore be of great importance if the institutional rules gave the arbitrators power to grant interim measures.³⁸⁸ Empowering of arbitrators to grant such orders is regarded as a best practice of institutional rules.³⁸⁹ The NCI grants the arbitral tribunal power to order interim measures and conservatory orders they deem fit.³⁹⁰ These orders include:

³⁷⁹ Dana Renee, How to best protect party rights: The Future of Interim Relief in International Commercial Arbitration under the Amended UNCITRAL Model Law, 25(3) American International Law Review, 2010, 586 (protect party rights)

³⁸⁰ Ibid

³⁸¹ Ali Yesilirmak, Provisional Measures in international Commercial Arbitration (Kluwer Law international 2005) p.167

³⁸² Article 17 of Model law provides that a party may make a request for any provisional measures in accordance with principle of party autonomy

³⁸³ Ali Yesilirmak, Interim and conservatory measures in ICC Arbitral Practice in ICC International Court of Arbitration Bulletin, Vol.11/No.1, 2000, P.33

³⁸⁴ Born Gray B, International Commercial Arbitration, Volume II, Kluwer Law International, 2009

³⁸⁵ Maffezini v The Kingdom of Spain, procedural order no.2, 28 October 1999 published in XXVII YCA17(2002)

³⁸⁶ Oscar Reyden, On the Legal Frameworks and Substantive Standards Governing the Granting of Interim Measures in International Commercial Arbitration (LLM Thesis 2011) available at <http://lup.lub.lu.se/student-papers/record/2296168/file/2343343.pdf> accessed on 28/08/2015

³⁸⁷ Aaron Sam (1991) “International Arbitration Choosing an Arbitration Institution and a Set of Rules” (108 SALJ P.552

³⁸⁸ Ibid

³⁸⁹ Ibid

³⁹⁰ NCI Arbitration Rules, article 26

ordering party to provide for security of the dispute and also making orders for preservation, storage, sale and disposal of property.

The LCIA arbitration rules also provide that an interim measure may be granted by the arbitrator on request by a party.³⁹¹ The ICC arbitration rules on the other hand provide that an interim measure may be ordered by the tribunal upon receiving a request by a party.³⁹² The Arbitration Act of Kenya also gives the arbitral tribunal power to order a party to take any interim measure of protection that it deems fit.³⁹³ However, the Arbitration Act is silent on the specific type of relief to be ordered which means the tribunal may make any relief it feels it is appropriate to the party's needs.

The NCIA rules states that by agreeing to use the NCIA, the parties are not allowed to seek any order from the court of law.³⁹⁴ This is not a good practice because minimum court intervention should be allowed in arbitration as provided in section 10 of the Arbitration Act 1995. It however seems that the NCIA arbitration rules takes away this provision which is very important.

The role of the court will be important where there is breach of rule of natural justice. In the case of *Sadrin Kurji and another V Shalimar Limited and 2 others*³⁹⁵ the court held:

“Arbitration process as provided for by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence in exceptional cases, in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors.”

The rule should provide instances where the court can intervene and provide interim measures in order to protect parties from suffering irreparable harm.

3.5.6 The way of introducing additional parties.

Aaron Sam in his work entitled “International Arbitration Choosing an Arbitration Institution and a Set of Rules”³⁹⁶ states that institutional rules should provide scenarios of introducing new

³⁹¹ LCIA Arbitration Rules, article 25.1

³⁹² ICC Arbitration Rules, article 28(1)

³⁹³ Arbitration Act of Kenya, section 18

³⁹⁴ NCIA Arbitration rules. Article 26.3

³⁹⁵ (2006)eKLR

parties. This is also known as consolidation of proceedings. Consolidation of proceedings is defined as the act of bringing together into one single case several independent proceedings already initiated.³⁹⁷ Some institutions have rules providing for the consolidation of proceedings while others do not. The proponents of consolidation argue that it enhances efficiency³⁹⁸ and minimizes problems of granting inconsistent awards.³⁹⁹ Leonard Obura Aloo in his work, “Consolidation of Commercial Arbitration: Institutional and Legislative Responses”,⁴⁰⁰ argues that consolidation of proceedings is important in minimizing granting of inconsistent awards because in arbitration proceedings chances of appeal and reviewing of awards are limited and may be allowed on instances where there is irregular issuance of awards. On the issue of efficiency, Leonard Obura Aloo argues that consolidation of proceedings saves time and money when the disputes are similar and evidence is presented by one expert once rather than being presented by different experts many times.

Consolidation of proceedings have been discouraged on the fact that it reduces party autonomy to that the issue of enforcement difficulties that it may create.⁴⁰¹ Arbitration agreement only applies to the parties to the agreement hence compelling parties to consolidate proceedings without their consent will be undermining their freedom.⁴⁰²

One of the reasons why parties choose arbitration is because of confidentiality of the process. If parties have an agreement on confidentiality, consolidation of proceedings would undermine confidentiality.⁴⁰³ Leonard Obura Aloo⁴⁰⁴ argues that in consolidation of proceedings a party may come across information about the party which is not supposed to be known hence defeating the purpose of confidentiality in arbitration proceedings.

³⁹⁶ Aaron Sam (1991) “International Arbitration Choosing an Arbitration Institution and a Set of Rules”) 108 SALJ

³⁹⁷ Gilliéron Philippe and Luc Pittet. “Article 4 - Consolidation of Arbitral Proceedings (Joinder), Participation of Third Parties.” In *Swiss Rules of International Arbitration: Commentary*, edited by Tobias Zuberbuhler, Klaus Müller, and Philipp Habegger, 36 - 44. Zurich, Basel, Geneva: Kluwer Law International, 2005.

³⁹⁸ Consolidation of Arbitral proceedings, p. 141

³⁹⁹ Chiu, Julie C. “Consolidation of Arbitration Proceedings and International Commercial Arbitration” (1990) vol 7 no 2 *J of Int Arb* 53, p.56

⁴⁰⁰ Leonard Obura Aloo(2015) “Consolidation of Commercial Arbitration: Institutional and Legislative Responses”, volume 3 number 1, *Alternative Dispute Resolution Journal* 138-161

⁴⁰¹ Consolidation of Arbitral proceedings p.142

⁴⁰² Ibid.

⁴⁰³ Ibid. 143

⁴⁰⁴ Leonard Obura Aloo(2015) “Consolidation of Commercial Arbitration: Institutional and Legislative Responses”, volume 3 number 1, *Alternative Dispute Resolution Journal* 138-161

According to Leonard Obura Aloo⁴⁰⁵ another problem associated with consolidation of proceedings is the enforcement. He argues that there are defenses which a losing party in consolidation proceedings may use as stated in article V (1) of the New York Convention. According to article v (1) of the New York Convention, the losing party may say that the party may argue that the composition of the tribunal was not according to the original agreement. However, in my opinion consolidation of proceedings should not be compelled on parties. Consolidation of proceedings is only done after a party request to be enjoined therefore the issue of original agreement on composition of arbitral tribunal should not arise.

In consolidation of proceedings, there is also a chance that the procedural rights may be interfered with. For instance, if the party had chosen one arbitrator to solve the dispute, the other parties may want to add other arbitrators to the proceedings. However, this can be solved by parties agreeing on the number of arbitrators they want to solve the dispute.

The problems associated with consolidation of proceedings may be solved in various ways. Chui provides four approaches of solving the problem of consolidation of proceedings.⁴⁰⁶ To begin with, Chiu states that parties could make provisions of consolidation of proceedings in their contract. Courts may decide to order for consolidation of proceedings through construction of arbitration legislation and the rules governing procedure. In addition, the arbitration legislations could be amended to provide courts with powers to compel consolidation. Finally, rules that encourage consolidation can be formulated by the arbitration institution and arbitrators.

It is noteworthy to say that consolidation of proceedings is provided in the NCIA arbitration rules. Consolidation of proceedings in NCIA is achieved by a party making application to consolidate the arbitration proceedings with other arbitration proceedings.⁴⁰⁷ However, consolidation of proceedings will only be allowed where all parties support consolidation of arbitration proceedings, the claims made are under the same arbitration agreement and where the claims are made under different arbitration agreement, the arbitration involve the same parties.⁴⁰⁸ The LCIA Arbitration rules does not provide for the consolidation of arbitral

⁴⁰⁵ Ibid

⁴⁰⁶ Chiu, Julie C. "Consolidation of Arbitration Proceedings and International Commercial Arbitration" (1990) vol 7 no 2 *J of Int Arb* 53

⁴⁰⁷ NCIA Arbitration Rules, article 16

⁴⁰⁸ Ibid

proceedings. On the other hand, the ICC arbitration rules provide that a party makes a request to the ICC Court for consolidation of arbitral proceedings.⁴⁰⁹

It is therefore important for the NCIA rules to ensure that consolidation of proceedings is only done where parties agree and no party should be compelled to consolidating arbitration proceedings.

3.5.7 Confidentiality

Wilfred Mutubwa in his work Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute,⁴¹⁰ states that one of the reasons why parties choose arbitration over litigation is because of confidentiality of arbitration proceedings and awards issued. It is therefore important to note that an institutional rule should have a clause that provides for confidentiality of proceedings. The Nairobi Centre for International Arbitration rules provide for arbitration proceedings and awards to remain confidential unless it is agreed otherwise by the parties.⁴¹¹ This applies as well to the London Court of International Arbitration where the arbitration proceedings and awards are supposed to be kept confidential.⁴¹²

Wilfred Mutubwa further argues that there are exceptions to the principle of confidentiality in arbitration proceedings under the Constitution of Kenya 2010. These instances include the right to access information, national values and principles of governance and fair hearing. According to L. Obura Aloo and Edmond Wesonga in their work, “What is there to Hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010”,⁴¹³ although the Constitution 2010 promotes arbitration as one of the alternative dispute resolution mechanisms, the issue of transparency is compromised. The authors argue that constitution provides the freedom of information and that any member of the public may ask for arbitration proceedings to be open to the public. This scenario is against the principle of

⁴⁰⁹ ICC Arbitration rules, article 10

⁴¹⁰ Wilfred Mutubwa(2016) Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute, volume 4, issue 2,1*Alternative Dispute Resolution Journal* 72-96

⁴¹¹ Nairobi Centre for International Arbitration rules 2015, article 33

⁴¹² London Court of International Arbitration arbitration rule, article 30

⁴¹³ L. Obura Aloo and Edmond Kadima Wesonga (2015) What is there to hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010, volume 3 number 2,1 *Alternative Dispute Resolution Journal* 1-29

confidentiality. In my view the principle of confidentiality should only be waived on specific information depending with the agreements between the parties.

As much as there are exceptions to the principle of confidentiality, Wilfred Mutubwa argues that they pose a threat to confidentiality. According to Wilfred Mutubwa, confidentiality should be protected by parties drafting agreements stating the extent to which confidentiality is permitted. The parties should also choose juridical seat that put sanctions on the breach of confidentiality. The arbitral tribunal with the consent of the parties may have award that is not reasoned out so as to avoid embarrassing documents and trading secrets. This suggestion is not good because if the arbitral tribunal makes an error, the parties will be disadvantaged when appealing the decision of the arbitral tribunal. Further, the parties should provide an agreement that such information will only be disclosed through enforcement or challenge by any other party.

According to L. Obura Aloo and Edmond Wesonga in their work, “What is there to Hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010”,⁴¹⁴ there are discussions against the principle of confidentiality in arbitration proceedings. The authors states that confidentiality leads to inconsistency in final decisions. This is in my view is perhaps that the judgments in the arbitration proceedings are not published and therefore one cannot get precedents on the way the case was concluded. They also state that the issue of confidentiality is just on paper but in reality there is no confidentiality this is because when the issue of enforcement of any decision made by the arbitral tribunal will have to be subjected to the court process. Further, confidentiality is opposed because the quality of services can be compromised leading to poor quality.⁴¹⁵ The arbitration proceedings may be of poor quality because when conducted in private there is limited accountability.⁴¹⁶ In my view in order to solve the issue of accountability, a mechanism should be put in place to ensure that there is accountability even if the arbitration proceedings are conducted in private.

It is also important to note that the issue of confidentiality depends with the parties in arbitration proceedings. For instance, according to L. Obura Aloo and Edmond Wesonga in their work,

⁴¹⁴ Ibid

⁴¹⁵ L. Obura Aloo and Edmond Kadima Wesonga (2015) What is there to hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010, volume 3 number 2, 1
*Alternative Dispute Resolution Journal*1-29

⁴¹⁶ Ibid

“What is there to Hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010”⁴¹⁷ the arbitration proceedings involving the government should be open to public and only held in private if the affairs of the State will be affected in a negative way.

In conclusion, there has been an attempt to protect the principle of confidentiality in arbitration. A legislation on confidentiality should be put in place to protect confidentiality. The rule should provide clearly the instances where confidentiality should be allowed and where it should not be allowed.

3.5.8 Supervision of arbitrators

According to Margaret Moses,⁴¹⁸ one of the important things for a lawyer representing his client in a dispute is to choose an arbitrator. The arbitral rules may provide for appointing a sole arbitrator or three arbitrators. For instance the NCIA Arbitration Rules provide that a sole arbitrator or three arbitrators will be appointed.⁴¹⁹ Under the LCIA rules, a sole arbitrator or three arbitrators may be appointed.⁴²⁰ The same position applies to the ICC arbitration rules 2012⁴²¹ and KIAC arbitration rules 2012.⁴²²

The choice of number of arbitrators has its advantages and disadvantages. According to Margaret Moses,⁴²³ a sole arbitrator may be chosen because it is less costly and faster to make final decisions because there will be less consultation with other arbitrators. On the hand the proponents of three arbitrators argue that three arbitrators bring on board more knowledge and experience as compared to one arbitrator.⁴²⁴ When appointing arbitrators, the appointing authority should ensure that the arbitrators have the necessary knowledge and experience in the dispute at hand, their availability, ability to speak fluently in the language the parties choose and reputation.⁴²⁵ It is therefore important to know how the arbitrators are supervised and why they

⁴¹⁷ Ibid

⁴¹⁸ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

⁴¹⁹ Nairobi Centre for International Arbitration rules 2015, article 5

⁴²⁰ London Court of International Arbitration rules 2014, article 5.2

⁴²¹ International Chamber of Commerce arbitration rules 2012, article 12

⁴²² Kigali International Arbitration rules 2012, article 12

⁴²³ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

⁴²⁴ Ibid

⁴²⁵ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

should be supervised. According to Paul Ngotho,⁴²⁶ one of the challenges facing arbitrators in Africa is corruption. Ngotho argues that some arbitration proceedings have been affected by corruption which in some way the arbitrators have been the participant. Patrick Wachira Nguyo in his work, “Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration”,⁴²⁷ also confirms that the issue of corruption has affected the arbitration proceedings. Therefore it is important for steps to be taken to ensure that arbitrators are not involved in corruption. According to Dorothy Aswani,⁴²⁸ arbitration practitioners should have a way of dealing with corruption. The arbitrators involved in corruption should be punished by ensuring they are not allowed to participate in any arbitration proceedings.

3.5.9 Supervision of Awards.

According to Margaret Moses,⁴²⁹ the parties to arbitration proceedings always expect the award granted to be final. It is therefore the duty of arbitrators to render an enforceable award.⁴³⁰ If the award is not enforceable, a party may challenge the same in the national courts. Further, an award is not enforceable will mean that the arbitrators are not competent therefore may scare the investors from choosing the arbitrators of that institution. The award is said to be valid if it is consistent with the parties’ agreement, chosen rules and the applicable law.⁴³¹ Margaret Moses⁴³² argues that the validity of the award can be determined by analyzing the formalities of the award. By formalities, the award should be in writing, supported by reasons, dated and place of arbitration named, signed by the arbitrators, final and binding and filed and registered by the arbitral tribunal. The issue of formalities is also echoed by Karuki Muigua who states that an award should be cogent, complete, certain, consistent, final and enforceable.⁴³³ The NCIA rules provide that the arbitral tribunal should make its award in writing state the reasons upon which it

⁴²⁶ Paul Ngotho, Challenges Facing Arbitrators in Africa, East Africa International Arbitration Conference. Nairobi (July, 2014) Available at <http://www.ngotho.co.ke>

⁴²⁷ Patrick Wachira Nguyo, Arbitration in Kenya: Facilitating Access to Justice by Identifying and Reducing Challenges Affecting Arbitration, LLM Thesis UON 2015, p.14

⁴²⁸ Dorothy Aswani (2016) “Building Kenya’s Future as a Global Hub for International Commercial Arbitration”, volume 4 issue 2, *Alternative Dispute Resolution Journal* 147-169

⁴²⁹ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, pp.179

⁴³⁰ *Ibid*, pp.139

⁴³¹ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, pp.184

⁴³² *Ibid*, pp.184

⁴³³ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, p.151

is awarded.⁴³⁴ The award shall also be final and binding.⁴³⁵ In the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*⁴³⁶ Court of Appeal held:

“One of the grounds relied on to invite the superior courts intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the states powers are exercised.”

The LCIA on the other hand provide that the award shall be in writing and should state reasons which the award is based.⁴³⁷ The award rendered under LCIA is also final and binding.⁴³⁸ On the other hand the ICC rules provide that the award shall be in writing and shall state the reason upon which it is issued.⁴³⁹ In addition the award shall be binding.⁴⁴⁰ The KIAC rules provide that the award shall state the reasons upon which it is made.⁴⁴¹

The award should also be scrutinized to ensure quality is guaranteed to the parties.⁴⁴² Some institutional rules provide for the scrutiny of awards before communication to the parties. The LCIA rules provide that within 28 days of receipt of any award, a party may by written notice to the registrar request the arbitral tribunal to correct the award as to any error in computation, clerical, ambiguity, or mistake.⁴⁴³ According to ICC arbitration rules, a party may make application to the secretariat within 30 days of receipt of the award for the correction of an

⁴³⁴ NCIA arbitration rules 2015, article 28.1

⁴³⁵ Ibid , article 28.12

⁴³⁶ (2009) eKLR

⁴³⁷ LCIA arbitration rules 2014, article 26.2

⁴³⁸ Ibid , article 26.8

⁴³⁹ ICC arbitration rules 2012, article 31(2)

⁴⁴⁰ Ibid, article 34(6)

⁴⁴¹ KIAC arbitration rules 2012, article 38

⁴⁴² Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

⁴⁴³ London Court of International Arbitration arbitration rules 2012, article 27.1

error.⁴⁴⁴ Moreover, the arbitral tribunal on its own motion may correct a clerical, computation or typographical error.⁴⁴⁵ The NCIA provide that a party may write a notice to the Registrar for correction of an award within 30 days of receipt of the award.⁴⁴⁶ On the other hand, the KIAC rules provide that a party may make an application for the interpretation and correction of the award to the Secretariat within 15 days of receipt of the award.⁴⁴⁷

In conclusion, the discussion of supervision of awards shows that the NCIA rules have put in place measures to ensure that the quality of awards is supervised efficiently. The NCIA rules conform to the best practice of international arbitration.

3.5.10 Emergency Arbitration

According to Dr. Bernd Ehle, emergency arbitration came into existence with a view to solve parties desires without which the parties may suffer irreparable damage.⁴⁴⁸ Some of the desires include: preserve or restore of status quo, protection of sensitive information and preservation of evidence to be used in alternative dispute resolution.⁴⁴⁹ Further, emergency arbitration was important in reducing a party's disadvantage during the time of filing a request for arbitration and formation of arbitral tribunal.⁴⁵⁰ During this period, a party may be in need of interim measures and the best way possible is through appointment of emergency arbitrator other than rushing to national courts under certificate of urgency.⁴⁵¹

The ICC provides that a party may make application for emergency relief.⁴⁵² However, the application will only be allowed when it is received by the secretariat prior to the transmission of the file to the arbitral tribunal. The decision of the Emergency arbitrator shall take the form of an order.⁴⁵³

⁴⁴⁴ International Chamber of Commerce arbitration rules 2012, Article 35(2)

⁴⁴⁵ International Chamber of Commerce arbitration rules 2012, article 35(1)

⁴⁴⁶ Nairobi Centre for International Arbitration arbitration rules 2015, Article 29.1

⁴⁴⁷ Kigali International Arbitration Centre arbitration rules 2012, article 40

⁴⁴⁸ Dr. Bernd Ehle(2013)Emergency Arbitration in Practice in Christopher Muller/Antonio Rigozzi(eds) New Developments in International Commercial Arbitration 2013

⁴⁴⁹ Ibid

⁴⁵⁰ Ibid

⁴⁵¹ Ibid

⁴⁵² ICC arbitration rules, article 29(1)

⁴⁵³ Ibid, section 29(2)

Some of the features of emergency arbitration are: default application, timing for application for emergency of relief, speedy appointment and timetable, standard and scope of relief and enforcement.

Bernd Ehle states that emergency arbitration is automatic because parties have agreed to arbitrate therefore any party can make an application for emergency arbitration.⁴⁵⁴

On timing of application of emergency relief, Bernd states that in some institutions, emergency relief can be filed at the time of filing a request for arbitration.⁴⁵⁵ In other institutions, the request for emergency arbitration is done before request of arbitration is filed.⁴⁵⁶ This is vital where a party needs urgent measures. However, this provision can be abused hence there is need to put strategies to avoid abuse.⁴⁵⁷ Abuse can be avoided by charging high costs of initiating the emergency arbitration.⁴⁵⁸ Charging high costs is against the principle of access to justice. Access to justice for all is possible if it is affordable but when emergency arbitration is expensive the party that cannot afford it will be disadvantaged.

There is the issue of speedy appointment and timetable whereby the arbitral institution should provide the emergency arbitrator as soon as they receive the application.⁴⁵⁹ Emergency arbitrator upon being appointed has a duty of issuing a timetable of proceedings within the shortest time possible. In the case of ICC, the emergency arbitrator is appointed after two days.⁴⁶⁰ The NCI provide that the registrar shall appoint the emergency arbitrator within two days upon payment of fees.⁴⁶¹

On the issue of enforcement, the emergency arbitrator has the mandate to make his decision either an order or an interim award.⁴⁶² The NCI arbitration rules provide that the emergency

⁴⁵⁴Dr. Bernd Ehle(2013) Emergency Arbitration in Practice in Christopher Muller/Antonio Rigozzi (eds)New Developments in International Commercial Arbitration

⁴⁵⁵ Ibid

⁴⁵⁶ Dr. Bernd Ehle(2013) Emergency Arbitration in Practice in Christopher Muller/Antonio Rigozzi(eds) New Developments in International Commercial Arbitration 2013

⁴⁵⁷ Dr. Bernd Ehle(2013)Emergency Arbitration in Practice in Christopher Muller/Antonio Rigozzi(eds) New Developments in International Commercial Arbitration 2013

⁴⁵⁸ Ibid

⁴⁵⁹ Ibid

⁴⁶⁰ Appendix V article 2(1)

⁴⁶¹ NCI Arbitration rules 2015,schedule 3 article 1.2

⁴⁶² Dr. Bernd Ehle(2013) Emergency Arbitration in Practice in Christopher Muller/Antonio Rigozzi(eds) New Developments in International Commercial Arbitration 2013

arbitrator may make an order or award.⁴⁶³ In the case of ICC, the emergency arbitrator's decision shall take the form of an order.⁴⁶⁴

Therefore the NCIA arbitration rules should provide measures that allow emergency arbitrator to be appointed at the shortest time possible to allow parties to get interim relief or measures.

3.5.11 Relative costs

According to Margaret L Moses, parties to arbitration proceedings have the obligation to pay the arbitrators fees and administrative costs of the institution.⁴⁶⁵ In most cases the arbitrators fees is set by the arbitration institution. According to J.B Havelock, the award of costs in arbitration proceedings is important because of the expenses incurred by the parties.⁴⁶⁶ The costs incurred may be a liability for arbitrator's fees and expenses which include: arbitrator's fees, costs for hiring meeting rooms, fees payable to any technical or legal advisor and disbursements.⁴⁶⁷ The arbitral institutions may also incur costs of fees and expenses in hiring an arbitrator for the parties and charge appointment fee.⁴⁶⁸ In addition, the costs include the legal fees and expense incurred by parties indirectly like hiring services of an advocate, travelling expenses and other allowances.⁴⁶⁹

The costs of arbitration in NCIA shall be determined by the NCIA as per the schedule of fees and costs.⁴⁷⁰ The costs of the arbitration other than the legal or other expenses incurred by the parties shall be determined by the LCIA Court in accordance with the schedule of costs.⁴⁷¹ According to the ICC, the costs of arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the court depending with the commencement of arbitration.⁴⁷² In the case of KIAC, the arbitral tribunal shall state the amount of costs of

⁴⁶³ NCIA arbitration rules 2015, article 23

⁴⁶⁴ ICC arbitration rules 2012, Appendix v article 6(1)

⁴⁶⁵ Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008

⁴⁶⁶ J B Havelock, *Costs and Interests in Githu Muigai*, *Arbitration Law and Practice in Kenya*, (2013) Law Africa, 160

⁴⁶⁷ *Ibid*, 161

⁴⁶⁸ *Ibid*, 163

⁴⁶⁹ *Ibid*, 172

⁴⁷⁰ Schedule 2 of Nairobi Centre for International Arbitration rules 2015

⁴⁷¹ LCIA Arbitration rules 2014, Article 28.1

⁴⁷² ICC arbitration rules 2012, article 37(1)

arbitration when making the final awards unless the parties have agreed otherwise.⁴⁷³ The costs in arbitration proceedings should therefore factor in all the issues discussed above. The costs should be reasonable and affordable to the parties of arbitration proceedings.

It is important to note that the costs might not be enforceable. According to J B Havelock, the costs in arbitration proceedings will only be enforced when it is contained in the arbitral award and the same costs is quantified. In the case of *Kenfit Ltd V Consolata Fathers*,⁴⁷⁴ the applicant applied for an order to enforce an arbitral award as a judgement of the court. The respondent had made remarks that the award cannot be enforced because the arbitrator had not provided for costs. The court held that the application was premature to the extent that the arbitrator had failed to determine all the questions referred to him including the matters of costs.

The comparisons of the NCIA Arbitration rules, ICC Arbitration rules and LCIA Arbitration rules is captured in the table of comparison of arbitration rules in appendix 3. The table is important in providing an analysis of the arbitration rules of various arbitral institutions. The various aspects of the arbitration rules are captured in the comparative table of rules. The comparisons of the rules of NCIA with other institutions are vital in determining if the NCIA rules meet the best international standards. The other institutions were chosen as a guide because they are established arbitral institutions which have been tried and tested for many years by arbitral practioners.

3.6 Conclusion

In this chapter, the writer discussed the various laws governing Nairobi Centre for International Arbitration. The laws were the Constitution of Kenya 2010, the Arbitration Act 1995, the Nairobi Centre for International Arbitration Act 2013 and the Nairobi Centre for International Arbitration Rules 2013. The purpose of this part of the paper was to discuss the laws governing the NCIA and whether they meet international best standard as compared to other arbitral institutions.

The Substantive law governing Arbitration proceedings in Kenya remains to be the Arbitration Act 1995. On the other hand the Nairobi Centre for International Arbitration Act is important

⁴⁷³ KIAC arbitration rules 2012, article 42

⁴⁷⁴ (2005) eKLR

because it is the Act that establishes the Nairobi Centre for International Arbitration and gives out its mandate and how it should carry out its business.

There are gaps in the NCIA Act 2013 that do not conform to the international best practice of arbitration. However, there are gaps which need to be reviewed to make it clear for carrying out international commercial arbitration.

On the issue of Institutional rules, the objective of the discussion was to find out if the Nairobi Centre for International Arbitration rules conforms to the international best standard of arbitration rules. The writer used the work of Aaron Sam as the key guiding reference for the criteria to be used when establishing if an institutional rule. The institutional rule of London Court of International Arbitration and International Chamber of Commerce were compared with that of Nairobi Centre for International Arbitration.

The above discussion clearly shows that NCIA arbitration rules and meets the requirement of Aaron Sam for the institutional rules which is seen as the best international practice.

In comparison with other institutional rules, the comparative table of arbitration rules shows much resemblance of NCIA rules with other best known arbitration institutions. Most of the articles of institutional rule of Nairobi Centre for International Arbitration resemble that of the London Court of International Arbitration. Does this mean that NCIA cannot come up with its own rules that do not resemble the LCIA? In my opinion there is no harm with the rules of NCIA being similar with that of LCIA because international commercial arbitration is the same everywhere and will be subjected to the same principles of arbitration.

It can therefore be concluded that the Nairobi Centre for International arbitration rules are on the right path in meeting the best internationally recognized arbitration rules. Moreover, the laws governing NCIA meet the international best standard as compared to LCIA, ICC and KIAC.

The next chapter will discuss the findings of the paper. The chapter will discuss if the research questions have been answered, the main and specific objective of the paper have been achieved and test the hypothesis.

CHAPTER FOUR

4.0 DATA ANALYSIS AND FINDINGS ON THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE NAIROBI CENTRE FOR INTERNATIONAL ARBITRATION

4.1 Introduction

In chapter three, the writer discussed the laws governing Nairobi Centre for International Arbitration. The discussion analyzed if the institutional structure of Nairobi Centre for International Arbitration conforms to the International best practice of International commercial arbitration. The writer drew major lessons from the Arbitral Institutions in Africa. In addition, the discussion compared the Institutional structure of Nairobi Centre for International Arbitration with that of the London Court of International Arbitration, International Chamber of Commerce and Kigali International Arbitration Centre.

In this chapter, the writer will discuss the data collected and findings of the paper. The writer will provide answers to the main and specific objectives of the study, the hypothesis and research questions. Basically, this chapter will report on the data collected on chapter two and chapter three of the study. Firstly, the researcher will report on the data from various academic writings on the institutional framework of NCIA and the laws governing NCIA as discussed in chapter two and three of the study respectively. Secondly, the researcher will supplement the discussions of various academic writings of chapter two and chapter three of three of the study with the interviews that were conducted with the Registrar of the NCIA and the director of NCIA.

In order to evaluate the findings of chapter two and three of the paper, interviews were conducted. The researcher relied on focused interviews for collecting data from the Registrar of the NCIA and a Director of the NCIA. The two respondents were chosen because of their experience in the field of international commercial arbitration and because they are the officials of the NCIA hence they were very knowledgeable about the institutional structure of NCIA.⁴⁷⁵

⁴⁷⁵ Focused interview is a type of type of interview meant to focus attention on the given experience of the respondent and its effects. See C.R Kothari, RESEARCH METHODOLOGY Methods and Techniques, 2nd Revised edition, p.97

The researcher carried out the interviews on a structured way.⁴⁷⁶ The researcher emailed the interviewees a set of predetermined questions prior to the date of the interviews. The questions sent to the respondents for interview were open ended where the interviewee was free to express a response.⁴⁷⁷ The list of questions sent to the respondents is found at appendix 4.

4.2 Data and findings on the institutional framework of Nairobi Centre for International Arbitration

In chapter two of the work, the researcher discussed the institutional framework of the NCIA. The discussion started by discussing the various types of arbitration. These were the institutional arbitration and ad hoc arbitration. The researcher found out that the NCIA is categorized as the institutional arbitration. This position was supported by the Registrar of NCIA who said that the NCIA is the only institutionalized arbitration in Kenya.⁴⁷⁸ There was an argument that Chartered Institute of Arbitrators of Kenya is an institutionalized arbitration. The Chartered Institute of Arbitrators of Kenya is not an institutionalized arbitration because it only appoints arbitrators to administer arbitration proceedings.⁴⁷⁹

The discussion in chapter two was also based on the following issues: the equipment and facilities, the qualified staff, funding of the institution, independence of NCIA, charges of the arbitration proceedings.

4.2.1 On whether the NCIA has adequate and modern equipment and facilities

The research found out that the NCIA has the necessary equipment and facilities necessary for administering arbitration proceedings.⁴⁸⁰ The Registrar of NCIA stated that the NCIA facilities have been used by the Judiciary of the Republic of Kenya in administering mediation.⁴⁸¹ This shows that the facilities are up to the standard required to provide arbitration proceedings.

⁴⁷⁶ The interviews carried on a structured way involve the use of already determined questions for interview as a way of obtaining information. See C.R Kothari, RESEARCH METHODOLOGY Methods and Techniques,^{2nd} Revised edition, p.97

⁴⁷⁷ Open ended questions are important when the interviewer wishes to get a respondents level of information. See Bill Taylor, Gautam Sinha and Taposh Ghoshal, Research Methodology, A Guide for Researchers in Management and Social Sciences, Prentice-Hall of India Private Limited 2007

⁴⁷⁸ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁷⁹ Ibid

⁴⁸⁰ Oral Interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁸¹ Ibid

However, there have been some repairs being conducted on the offices of the NCIA to make more ideal for conducting arbitration proceedings. The repairs will be complete in the next two months.⁴⁸²

4.2.2 Funding

On the issue of funding, the NCIA has had a big challenge.⁴⁸³ The funds released to the NCIA are not adequate to help it function effectively in delivery of services. Moreover, the process of releasing the money to the NCIA has been slow due to the government bureaucracy.⁴⁸⁴ The problem of funding has made it difficult for the NCIA to put up structures quickly in readiness for conducting arbitration proceedings under other functions mandated by the NCIA by the NCIA Act 2013. For example as it is now the NCIA has been unable to own its building with its offices currently they have rented offices space from Cooperative Bank House.⁴⁸⁵

4.2.3 On whether the NCIA has qualified staff

The NCIA has qualified staff that helps in the day to day management of the Centre.⁴⁸⁶ Currently, the NCIA has nine staff given different roles for the day to day management of the arbitral institution.⁴⁸⁷ In addition, the NCIA has Board of Directors who also provides leadership.⁴⁸⁸ The members of the Board of Directors are qualified because they are experts in international commercial arbitration.⁴⁸⁹

4.2.4 On whether the NCIA provide reasonable charges

On the charges for conducting the arbitration proceedings under the NCIA, they are competitive as compared with other arbitral institutions.⁴⁹⁰ It is therefore the competitiveness of NCIA charges a reason for investors to choose NCIA.⁴⁹¹ The NCIA compared the charges of other

⁴⁸² Oral Interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁸³ Oral interview with a Director of NCIA conducted on 8th November 2016

⁴⁸⁴ Ibid

⁴⁸⁵ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁸⁶ Ibid

⁴⁸⁷ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁸⁸ Oral Interview with a Director of NCIA conducted on 8th November 2016

⁴⁸⁹ Ibid

⁴⁹⁰ Oral Interview with a Director of NCIA conducted on 8th November 2016

⁴⁹¹ Ibid

arbitral institutions for conducting arbitration proceedings before drafting their own charges.⁴⁹² The drafters of NCIA made sure that the charges of conducting arbitration proceeding under NCIA are competitive as compared to other arbitral institutions.⁴⁹³

4.2.5 On whether the NCIA is independent from interference of the Government.

The Government of Kenya will always be involved in the affairs of the NCIA because NCIA is a creation of the Government and not a private entity.⁴⁹⁴ The Government of Kenya will always be involved in the funding the NCIA. In addition the Government of Kenya may be involved in the recruitment of the staff of NCIA.⁴⁹⁵ The involvement of the Government of Kenya on the affairs of the NCIA should only be allowed to the extent that it does not hinder the independence of the NCIA.⁴⁹⁶ If the government of Kenya gets involved too much in the affairs of the NCIA, the investors may be reluctant to choose NCIA to conduct their arbitration proceedings because they may think there will be bias especially involving the state as a party to the arbitration proceedings.⁴⁹⁷

It can therefore be concluded that the institutional framework of NCIA meets the international best standard but more efforts needs to be put to make it better.

4.3 Data analysis and findings on the laws governing Nairobi Centre for International Arbitration

In chapter three of the paper, the writer evaluated the laws governing the NCIA. The laws evaluated included: the Constitution of Kenya 2010, the Arbitration Act 1995, The NCIA Act 2013 and the NCIA Arbitration Rules 2015.

The Constitution of Kenya 2010 was chosen because it is the supreme law of the land and all laws should conform to it and any inconsistencies will mean it is not valid.⁴⁹⁸ Further, the Constitution provides for arbitration as an alternative dispute resolution.⁴⁹⁹

⁴⁹² Oral Interview with a Director of NCIA conducted on 8th November 2016

⁴⁹³ Ibid

⁴⁹⁴ Oral Interview with a Director of NCIA conducted on 8th November 2016

⁴⁹⁵ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁹⁶ Ibid

⁴⁹⁷ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁴⁹⁸ Constitution of Kenya 2010, article 2(4)

According to Mutubwa,⁵⁰⁰ there is a confusion regarding the jurisdiction of the Arbitral court of the NCIA. Mutubwa argues that by virtue of section 22 of the NCIA Act 2013, the arbitral court is not subject to supervisory or appellate jurisdiction of the high court or any other court created by the constitution. It therefore follows that this provision is unconstitutional. This position was supported by the Registrar of NCIA who stated that there is confusion as to the arbitral court created under the NCIA Act 2013.⁵⁰¹ The Registrar of NCIA further stated that it is the confusion on the issue of jurisdiction that has even led to the delay on the appointment of members of the arbitral tribunal.⁵⁰² The Registrars argument was that the NCIA Act 2013 should be amended to include arbitral tribunal with administrative functions rather than the arbitral court. On the other hand, a director of the NCIA was of the opinion that the arbitral court should be abolished completely because it is expensive to maintain.⁵⁰³

According to Mutubwa,⁵⁰⁴ the NCIA Act provides that arbitral court award is final.⁵⁰⁵ The Act however fails to provide for enforcement mechanisms. This position was supported by the director of NCIA who stated that the NCIA Act 2013 should be amended to provide for enforcement mechanism of arbitral awards issued by the Arbitral court.⁵⁰⁶

On party autonomy, Mutubwa argues that the NCIA Act 2013 does not provide party autonomy. The arbitral tribunal has power to determine its procedures to govern arbitration proceedings of arbitral court.⁵⁰⁷ This denies the parties the right to choose their own procedures. This position was supported by the director of NCIA who stated that as much as the Arbitration Act 1995 remains the substantive law of arbitration in Kenya, the NCIA Act 2013 should be amended to

⁴⁹⁹ Constitution of Kenya 2010, article 159

⁵⁰⁰ Wilfred A Mutubwa(2016) “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013”, Volume 82, Issue1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

⁵⁰¹ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁵⁰² Ibid

⁵⁰³ Oral interview with a Director of NCIA Conducted on 8th November 2016

⁵⁰⁴ Wilfred A Mutubwa(2016) “The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013”, Volume 82, Issue1, *the International Journal of Arbitration, Mediation and Dispute Management* 134-145

⁵⁰⁵ NCIA Act 2013, Section 22(2)

⁵⁰⁶ Oral interview with a Director of NCIA Conducted on 8th November 2016

⁵⁰⁷ NCIA Act 2013, section 23

provide for party autonomy.⁵⁰⁸ It is important for the NCIA Act 2013 to be amended to clear all the confusion in order to make the NCIA perform its work efficiently.

The NCIA arbitration rules were issued on 24th December 2015.⁵⁰⁹ The rules have different features that conform to the best international practice of arbitration as discussed earlier in chapter 3 of the paper. However, the NCIA arbitration rules are seen to be more similar to that of the LCIA. Does this mean that NCIA could not come up with rules that are not similar to LCIA Arbitration rules 2014? According to the Registrar of NCIA, there is no harm when the NCIA rules are similar to that of LCIA for one reason.⁵¹⁰ The international commercial arbitration is similar everywhere therefore the same rules apply everywhere with minor modifications.⁵¹¹ It is also important to note that the arbitration rules should also be sensitive to the local law of the country.⁵¹²

4.4 Other findings

The research also found out some of the challenges that the NCIA faces as an emerging arbitral institution in the East Africa region. The NCIA faces stiff competition from other arbitral institutions in the region like the KIAC who is keen in establishing itself as the arbitral institution to watch in the East Africa region.⁵¹³

The NCIA being a government institution, it lacks all the full support from the Government of Kenya.⁵¹⁴ The Government has been slow in releasing funds to ensure that the NCIA takes off quickly and starts offering the international commercial arbitration services.⁵¹⁵ The position on the ground is that the NCIA has not handled any arbitration proceedings since its establishment.⁵¹⁶

⁵⁰⁸ Oral interview with a Director of NCIA Conducted on 8th November 2016

⁵⁰⁹ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁵¹⁰ Ibid

⁵¹¹ Oral interview with the Registrar of the NCIA conducted on 12th October 2016

⁵¹² Ibid

⁵¹³ Oral interview with the Registrar of the NCIA conducted on 12th October 2016

⁵¹⁴ Ibid

⁵¹⁵ Oral interview with the Registrar of the NCIA conducted on 12th October 2016

⁵¹⁶ Ibid

The NCIA has not promoted itself well as an arbitral institution providing international commercial arbitration services.⁵¹⁷ However, the NCIA is in the direction in promoting itself as an attractive arbitral institution to choose and that's why the NCIA is organizing a conference to market itself to the investors.⁵¹⁸ The conference will also educate the society as a whole about the NCIA.⁵¹⁹

4.5 Conclusions

From the foregoing, it can be stated that the existing legal and institutional framework conforms to the best standards of international commercial arbitration but more needs to be done. There is still a gap that needs to be filled. The research has shown that there are some inconsistencies in the NCIA Act 2013. The NCIA Act is not clear as to the issue to do with the Arbitral court. The NCIA Act needs to be amended to provide for an arbitral tribunal rather than the arbitral court. The arbitral tribunal should be given administrative function where the

The officials of the NCIA have shown that they are in the process of fixing the gaps in the legal and institutional framework of the NCIA. The NCIA is seeking partnership and collaboration with other arbitral institutions with a view of sharing knowledge on how to effectively offer international commercial arbitration services. In addition, the NCIA officials identified some gaps in the NCIA Act 2013 and sent the recommendations to the Attorney General for review. The recommendations provided for which sections of the NCIA Act 2013 needs to be amended to improve service delivery of the NCIA.

In the next chapter, the writer will make conclusions and recommendations to the paper.

⁵¹⁷ Oral interview with the Registrar of the NCIA conducted on 12th October 2016

⁵¹⁸ Oral interview with a Director of the NCIA conducted on 8th November 2016

⁵¹⁹ Ibid

CHAPTER FIVE

5.0 THE CONCLUSION AND RECOMMENDATION

5.1 Introduction

In chapter four, the writer discussed the findings of the paper. The discussion was based on the main and specific objective of the paper, the hypothesis and the research questions.

In this chapter, the writer discusses the conclusion and recommendation of the paper. The discussion will start by giving a summary of the whole paper. After the summary, the writer will make conclusion of the whole paper and make recommendations. The recommendations will be made on the institutional rules of the Nairobi Centre for International Arbitration, institutional structure of Nairobi Centre for International Arbitration and further area of research.

5.2 Summary

The main objective of the study was to examine if the Nairobi Centre for International Arbitration meets the international best standard for an ideal Arbitration Centre. The research has shown that the NCIA is an ideal Arbitration Centre. This has been shown on the legal and institutional framework of the Nairobi Centre for International Arbitration. The researcher conducted desk research on the laws governing the NCIA. The substantive laws governing NCIA were analyzed by the researcher. Further, the researcher made analysis on the article of various authors' contribution on the laws governing the NCIA. To supplement the desk research analysis of the laws governing the NCIA, the researcher interviewed the registrar of NCIA and a Director of NCIA to get their views about the laws governing the NCIA. The officials of the NCIA stated that the current laws of NCIA are conducive for international commercial arbitration. However, there are some ambiguous provisions on the laws that need to be amended to make the laws clear and effective for conducting arbitration proceedings.

On the institutional structure, the researcher analyzed what the law provides on the organization of the NCIA. This was supported by the analysis of various authors' contribution on the institutional structure. The writer went ahead to interview some of the officials of the NCIA. The officials interviewed included, the Registrar of the NCIA whose information was useful on the organization of the NCIA. A Board of Director of the NCIA was also interviewed as a way of

obtaining information about the NCIA. In addition, the researcher interviewed some of the staff of the NCIA.

The institutional rules of NCIA are based on the UNICITRAL Model which is the standard rule for international commercial arbitration.

The specific objectives of the research were three: to examine if the legal and institutional framework of NCIA meets the best standard of international arbitration; to examine how NCIA carries out its mandate and if they meet the international best standard as compared to other arbitral institutions like the LCIA, ICC and KIAC; and to make proposals for reform.

The writer reviewed various materials on the history of formation of Nairobi Centre for International Arbitration. The materials on the history of formation of the Nairobi Centre for International Arbitration were useful to determine the foundation of the Nairobi Centre for International Arbitration, the legislations governing Nairobi Centre for International Arbitration and whether the legislations conform to the international best practice of arbitration. The materials relied upon were important in discussing the history of arbitration in Kenya.

On the institutional structure of Nairobi Centre for International Arbitration, the writer relied on written text on other arbitral institutions in Africa to find out the challenges that they face and compare it with that of Nairobi Centre for International Arbitration. In addition, other materials that discussed the general requirements for an ideal institutional structure of an Arbitration Centre were relied upon to discuss the institutional structure of Nairobi Centre for International Arbitration. The discussion also relied on the institutional structure of the International Chamber of Commerce and the London Court of International Arbitration. The discussion confirmed that NCIA institutional framework meets the international best practice however some few improvements need to be done.

In the discussion for chapter three of the paper, the researcher discussed various laws governing NCIA and whether they meet international best standard for arbitration as compared to other arbitral institutions namely: LCIA, ICC and KIAC. The laws discussed included the Constitution of Kenya 2010, Arbitration Act 1995, NCIA Act 2013 and the NCIA Arbitration rules 2015. The writer used materials that provide for the general criteria to be used when enacting an institutional rule. The material was useful in analyzing if the Nairobi Centre for International

Arbitration conforms to the best practice of international commercial arbitration. In this case the writer compared the institutional rules of Nairobi Centre for International Arbitration with that of the LCIA, ICC and that of KIAC. The discussion confirmed that the NCIA has laws meeting the international best standard.

The third objective has been achieved as the writer has made proposals for reforms in chapter five.

The paper sought to address the following questions. Firstly, what is the institutional framework of NCIA and does it meet international standards. . To answer the research questions, the writer looked at the history of formation of the Nairobi Centre for International Arbitration, the enactment of the law governing the Nairobi Centre for International Arbitration, the institutional rules governing the Nairobi Centre for International Arbitration, the Institutional Structure of Nairobi Centre for International Arbitration. The writer analyzed the various articles that state what a good institutional framework of Arbitral institution should entail. The discussion was based on the following issues: institutional and *ad hoc* arbitration, qualified staff, reasonable charges, equipment and facilities, funding and independence of the arbitral institutions. The first hypothesis was that the institutional framework of NCIA meets international best standard. The hypothesis has been proved in the paper. The writer further interviewed the Registrar of NCIA and a Director of NCIA about the above mentioned issues who confirmed that the NCIA institutional structure meets the international standards.

Secondly, doe the laws governing NCIA meet the international best standard for arbitration when compared with other arbitral institutions? The paper has compared the legal and institutional framework of Nairobi Centre for International Arbitration with that of the LCIA, ICC and KIAC. The institutional rule of Nairobi Centre for International Arbitration was compared with that of the LCIA, ICC and KIAC. The comparison is discussed in chapter two of the paper. The writer further put a table of institutional rules of the Nairobi Centre for International Arbitration, LCIA, ICC and KIAC as seen in appendix 3. On the Institutional framework, the writer discussed the comparisons of Nairobi Centre for International Arbitration with that of LCIA, ICC and KIAC in chapter three of the paper. The second hypothesis was that the laws governing NCIA meet international best standard as compared to LCIA, ICC and KIAC. This hypothesis has also been

proved as the officials of the NCIA interviewed stated that the NCIA meets international best standards as discussed earlier in chapter two of the paper.

Thirdly, what is the way forward for Nairobi Centre for International Arbitration in ensuring that its legal and institutional framework meets the best international standard of international commercial arbitration? Kenya needs to adopt some practical measures from other Jurisdictions in order to make the legal and institutional framework of Nairobi Centre for International Arbitration better as an Arbitration Centre. The proposal for reforms should be made on the laws governing the NCIA and the institutional structure of NCIA. Chapter five has discussed the proposal for reforms. The third hypothesis was that NCIA has put in place the legal and institutional framework conforming to the best practice of international commercial arbitration.

The third hypothesis has been proved. Kenya has enacted laws that promote international commercial arbitration. The Constitution of Kenya in article 169 provides for alternative dispute resolution whereby arbitration is one of it. There is Arbitration Act chapter 49 laws of Kenya which provide for domestic and international arbitration. The Nairobi Centre for International Arbitration Act was enacted in 2013 with the aim of promoting international commercial arbitration in Kenya. The said Act further establishes the Nairobi Centre for International Arbitration. The Nairobi Centre for International Arbitration has its offices in Cooperative Bank House in Nairobi along Haile Selassie Avenue.⁵²⁰ The institutional rules governing arbitration proceedings in the Nairobi Centre for International Arbitration was enacted in 2015. The above mentioned laws are essential for international commercial arbitration however there are some gaps that need to be rectified to improve efficiency of conducting arbitration proceedings.

The Nairobi Centre for International Arbitration has several staff and determines that help in its day to day management. The Centre has the Board of Directors which is responsible with the administration of the Centre.⁵²¹ In addition the Board of Directors may appoint other staff and officers to discharge the functions of the centre.⁵²² As discussed earlier in chapter two, the NCIA

⁵²⁰ Note 194

⁵²¹ Nairobi Centre for International Arbitration Act no. 26 of 2013, Section 6(1)

⁵²² Nairobi Centre for International Arbitration Act no. 26 of 2013, Section 11

has several qualified staff essential for management of the affairs of the Centre. Moreover, the NCIA has several equipment and facilities useful for conducting arbitration proceedings.⁵²³

The institutional structure of the NCIA at the moment is able to handle international commercial arbitration.⁵²⁴ However, more measures need to be put in place to ensure that they are more effective.

The research was limited to the Nairobi Centre for International Arbitration and what changes has transpired since the promulgation of the Constitution of Kenya 2010.

5.3 Conclusion

This paper discussed the legal and institutional framework of Nairobi Centre for International Arbitration. The Institutional rules were discussed to find out if they conform to best standard of international arbitration.

On whether the Nairobi Centre for International Arbitration is ideal for arbitration, the writer has discussed the institutional rules of Nairobi Centre for International Arbitration and the institutional structure of Nairobi Centre for International Arbitration. A comparison was made to the International Chamber of Commerce, London Court of International Arbitration and Kigali International Arbitration Centre.

It can be concluded from the study that the Nairobi Centre for International Arbitration is ideal for international commercial arbitration with some recommended improvements. The discussion has shown that practical measures has been put in place to ensure Nairobi Centre for International Arbitration is ideal for international commercial arbitration. The Government of Kenya enacted Arbitration Act that conforms to the UNICTRAL Model law which is regarded as the international best standard for international commercial arbitration. The Nairobi Centre for International Arbitration Act was enacted which establishes the Nairobi Centre for International Arbitration. Apart from the Arbitration Act and Nairobi Centre for International Arbitration Act, institutional rules governing the Nairobi Centre for International Arbitration was enacted. The

⁵²³ See chapter two of the paper

⁵²⁴ Oral interview with the Registrar of NCIA conducted on 12th October 2016

institutional rule of Nairobi Centre for International Arbitration conforms to the International best standard of arbitration.

On the institutional structure, the Nairobi Centre for International Arbitration has facilities that help in the discharge of its duties. The facilities include the conferences for meeting and a room to conduct arbitration proceedings.⁵²⁵ The Centre has its offices in Nairobi at the Corporative Bank house along Haile Selassie Avenue.⁵²⁶

The NCIA has staff that performs different tasks. There is Board of Directors which is responsible for the administration of the Centre. The Board of directors may appoint other staff to perform the function of the Centre. There is also Arbitral Court with other staff in the name of the president, two deputy president and other fifteen members.

The Nairobi Centre for International Arbitration gets funding from the Government.⁵²⁷ The Centre should get other avenues of collecting money rather than depending solely on the Government.

On independence, there is some involvement of the Government in the operation of Nairobi Centre for International Arbitration. The Government of Kenya is responsible for appointing the Board of Directors.⁵²⁸ The involvement of the Government in running the arbitration Centre may scare away investors and users for fear of biasness by people closely related to the Government of the day. Therefore, there should be minimal government interference.

The charges of the Nairobi Centre for International Arbitration Centre are reasonable as compared to other arbitration institutions like the International Chamber of Commerce and London Court of International Arbitration.

As compared to the International Chamber of Commerce, London Court of International Arbitration, Nairobi Centre for International Arbitration is on the right path in conforming to the international best practice of arbitration. Nairobi Centre for International Arbitration should learn more from the International Chamber of Commerce and London Court of International

⁵²⁵ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁵²⁶ Ibid

⁵²⁷ Oral interview with the Director of NCIA conducted on 8th November 2016

⁵²⁸ Oral interview with the Registrar of NCIA conducted on 12th October 2016

Arbitration on areas that it has shortcomings. For example on funding, the Nairobi Centre for International Arbitration can partner with other organizations to fund its activities.

5.4. Recommendation

For Nairobi Centre for International Arbitration to be ideal and to conform to the international best standard of arbitration, the researcher makes the following recommendations.

5.4.1 Short term Recommendations on the legal and institutional structure of NCIA

.The NCIA Act 2013 should be amended to create the manner of appointment of the president and deputy president of the Arbitral Court on merit. The law as it is, it is only the other members of the arbitral tribunal who are subject to competitive selection process.⁵²⁹ Further, the Act does not provide for the removal of the members of the arbitral court. The members of arbitral court are supposed to serve for a term of five years with an option of reappointment.⁵³⁰ The Act fails to provide for mechanisms of removal of members of arbitral court. This is not good because suppose the members are not in a position to perform their duties properly it means they will still be in office and this will derail quality service delivery.

The NCIA Act 2013 should be amended to provide mechanisms for enforcement of arbitral award. As it is now, the said Act provides that the Arbitral court award is final⁵³¹ and section 25 the Act provides that the rules should be formed to cater for the enforcement of arbitral award

The Nairobi Centre for International Arbitration should have its own source of funding from its activities, donations and subscriptions from the members in addition to the government funding.

The Nairobi Centre for International Arbitration should have its own facilities to conduct arbitration proceedings. These facilities include its own buildings and equipment to conduct arbitration just like the International Chamber of Commerce, London Court of International Arbitration and Kigali International Arbitration Centre have their own buildings with its offices to conduct arbitration proceedings. Currently, the Nairobi Centre for International Arbitration

⁵²⁹ Ibid, section 21(4)

⁵³⁰ Ibid, section 21(4)

⁵³¹ Nairobi Centre for International Arbitration Act 2013,Section 22(2)

does not have its own building. The building with the offices of Nairobi Centre for International Arbitration belongs to the Cooperative Bank and it is rented.⁵³²

On the charges of arbitration proceedings, I found out that the Nairobi Centre for International Arbitration provides normal rates as compared to that of International Chamber of Commerce and London Court of International Arbitration. However, these charges are still high to a normal citizen wishing to solve dispute through Nairobi Centre for International Arbitration. According to J B Havelock in his work entitled “Costs and Interest”⁵³³ says arbitration is not cheap because there is need to pay fees to arbitrators, expert witness costs, arbitration rooms to be hired and other related services. I therefore recommend that the Nairobi Centre for International Arbitration should ensure that arbitration is cheap.

More qualified staff should be recruited to ensure that there is faster and efficient resolution of disputes. Currently, the number of staff is not adequate.⁵³⁴ Further, there should be training of arbitrators with diverse educational and professional background. For example in construction disputes, it is important for an arbitrator to have a background in engineering which will make his work easier. The training will be useful in developing arbitrators and arbitration. The NCIA has conducted some training to its staff.⁵³⁵

The Nairobi Centre for International Arbitration should also develop arbitration practice notes and notes to arbitrators which will be used in case administration and management.

According to Dorothy Aswani,⁵³⁶ one of the problems associated with Arbitral Institutions in Africa is that the institutions are not known as a result of poor communication. It is my opinion that the Nairobi Centre for International Arbitration to maintain a user friendly websites detailing its latest arbitration rules and list of arbitrators and where arbitrator’s panels can be found.

⁵³² Oral Interview with the Registrar of NCIA conducted on 12th October 2016

⁵³³ J B Havelock, Costs and Interests in Githu Muigai, *Arbitration Law and Practice in Kenya*,(2013) Law Africa, 157

⁵³⁴ Oral interview with the Registrar of NCIA conducted on 12th October 2016

⁵³⁵ Ibid

⁵³⁶ Dorothy Aswani (2016) Building Kenya’s Future as a Global Hub for International Commercial Arbitration, volume 4 issue 2, *Alternative Dispute Resolution Journal* 147-169

5.4.2 Medium term Recommendations on the legal and institutional framework of NCIA

The business community should have the power to determine how the Board of Directors conducts their business. This will ensure that all the stakeholders have a say in the way the Arbitration Centre is administered. This will be achieved by amending the NCIA Act to provide for the same.

The appointment of the Board of directors should be made by the private sector and business community in order to avoid government interference in the selection process. As it is now, the Board of directors are appointed by the government.

The discussion in the paper earlier showed that the jurisdiction of the arbitral court is inconsistent with the constitution therefore it is null and void. The Act should be amended to remove the arbitral court and replace it with the arbitral tribunal which should provide administrative role in the arbitral proceedings conducted by the Centre.

The Act fails to recognize the principle of party autonomy. The Act gives arbitral tribunal power to determine its procedures to govern arbitration proceedings of the arbitral court.⁵³⁷ The parties are denied the chance to choose how the arbitral proceedings should be conducted. The Act should therefore be amended to provide for the party autonomy.

According to the director of NCIA, the NCIA Act should be amended to change the structure of the Act to provide for domestic arbitration and the international arbitration. On the issue of supervision of awards, the rules should provide that all the awards should always be formal according to the UNCITRAL Model Law which a standard framework for international commercial arbitration so the awards can be enforceable.

The arbitration rule should provide for mechanism for supervision of arbitrators to ensure that they do not involve themselves in corruption. If the arbitrators involve themselves in corruption, there should be mechanism for punishing the said arbitrator.

On the issue of confidentiality, the arbitration rule should provide clear instances where confidentiality should be allowed.

⁵³⁷ Ibid, section 23

As discussed earlier consolidation of proceedings is a trend allowed by various arbitration rules. However, its application should be allowed with caution. Consolidation of proceedings should only be allowed to the extent that they are agreed by the parties and that no party is forced to consolidate the proceedings.

The arbitration rules should provide instances where the courts can be allowed to intervene and provide interim measures for parties and protect them from irreparable harm. The court intervention should however be minimal as the parties may decide to abuse the process.

On the issue of arbitrator jurisdiction, there are various ways in which arbitrator's jurisdiction is created as discussed in chapter three of the paper. The arbitration rules should provide for mechanisms of how arbitrator's jurisdiction and its duties.

Chapter three discussed various ways in which parties may use delaying tactics in arbitration proceedings. The NCIA arbitration rule should provide for mechanism to reduce delaying tactics by the parties.

The use of experts in arbitration proceedings was well discussed in chapter three. The NCIA arbitration rule should provide for instances where an expert in area of dispute at hand is appointed as this will save time and cost.

5.4.3 Long term Recommendation on the legal and institutional framework of NCIA

The Nairobi Centre for international arbitration should be made a non-profit organization which may be limited by guarantee and managed by the business community just like the International Chamber of Commerce and London Court of International Arbitration Centre. As of now, the NCIA is a state organization

The Nairobi Centre for International Arbitration should adopt modern technology to enhance efficiency in arbitration proceedings. An online arbitration should be introduced and promoted. Disputes can be submitted online

The Government should also advocate for training of professionals on alternative dispute resolution by giving loans and providing scholarship.

The Nairobi Centre for international Arbitration should make ensure that it keeps on updating its institutional rules to accommodate the emerging trends in international commercial arbitration.

The Nairobi Centre for international Arbitration should form partnership with other established Arbitration Centres. The partnership will be useful for growth as the Centre will gain valuable lessons and experience on how to develop international commercial arbitration. A good example is seen in the partnership of London Court of International Arbitration with the Mauritius International Arbitration Centre as discussed earlier in the paper.

The NCIA Arbitration rules should reflect the local sensitivity of the law. As of now it is so similar with the LCIA arbitration rules 2014.

5.4.4 Further Research

The paper further recommends that further research be carried out in this field so as to promote growth and improvement. NCIA is a young arbitration institution therefore more research needs to be done in order to improve service delivery. Further research should be done on the way of improving institutional structure of NCIA. As stated earlier, the NCIA is still setting up its structures hence the need for more research needs to be done to find the best way of improving its institutional structure so that it meets international best practice of international commercial arbitration.

This work is important because it forms the basis of research on NCIA. Further research should include the review of the Nairobi Centre for International Arbitration Act 2013 to be sensitive to the local laws which include the Constitution of Kenya 2010 and Arbitration Act in order to avoid confusion.

In addition, more training should be done to the staff to enhance effective delivery of services. The Nairobi Centre for international arbitration should also consider partnering with other arbitral institutions for funding and education. As it is now, the NCIA receives funding from the government which is not adequate for its operations which is a threat to the way the NCIA carry out its duties. Further research will be useful in helping the NCIA to reduce input costs, create value on its operations and make profits because it is a state corporation.

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APPENDIX 1

COMPARATIVE TABLE OF INSTITUTIONAL STRUCTURE OF ARBITRAL INSTITUTIONS

In order to analyze the Institutional structure of Arbitral institutions, I came up with a comparative table of the Arbitration Institutions.

The following table shows organizational structure of the Nairobi Centre for International Arbitration, the London Court of International Arbitration, International Chamber of Commerce and Kigali International Arbitration Centre. The London Court for International Arbitration and International Chamber of Commerce is chosen because of their high repute in international commercial arbitration. Further, they have been in existence for a long time and their capabilities have been tried and tested.

The Kigali International Arbitration has been chosen because it is an emerging Arbitration Centre in East African region hence can offer good lessons on the way it has established its institutional structure.

The information on the organization structure of Nairobi Center for International Arbitration is available at the Nairobi Centre for International Arbitration Act no 26 of 2013, the Nairobi Centre for International Arbitration Arbitration rules 2015, and the official website of the Nairobi Centre for International Arbitration.

The organizational structure of London Court of International Arbitration is found on the official website of the said centre which is <http://www.lcia.org/LCIA/organisation.aspx> accessed on 28/06/2016.

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ORGANIZATIONAL STRUCTURE	NCIA	LCIA	ICC	KIAC
Company	There is no structure known as a company but there is Board of directors responsible with administration of the Centre The board of directors may appoint other staff to discharge duties of the Centre.	Is a not for profit company limited by guarantee. The board is concerned with the operation and development of the Centre The board is not concerned with the case administration.	There is no structure known as a company	There is no structure known as a company but exists Board of Directors consisting of six members appointed by the Rwanda Private Sector Federation Board of directors is the supreme organ of the Centre.
Arbitration Court	Consists of a president, two deputy presidents and 15 members of leading international arbitrators. Has exclusive original and appellate jurisdiction to hear all disputes referred to it.(article 22(1) of the NCIA ACT no. 26 of 2013.	Made up of 35 members, plus representatives of associated institutions and former presidents Appoints tribunal Determines challenges to arbitrators Controls costs.	It is called international court of arbitration Made up of president, vice president, members and alternate members Administers ICC arbitration Fix place of arbitration Conform, appoints and replaces arbitrators Setting and managing cost of arbitration Oversee emergency arbitrator proceedings Scrutinizing	There is no arbitration court.

			and approval of all arbitral awards	
Secretariat	Headed by the Registrar responsible for day to day management of the disputes.	Headed by the Registrar Responsible for day to day management of disputes	Comprised of permanent staff of more than 80 lawyers and support personnel Headed by Secretary General Divided into nine case-management teams each dealing with cases related to certain region or language group.	Has secretary General and other staff. Secretary general is the Chief Manager of the Board
Supporting organs	Does not have	Does not have	Does not have	There is committee of arbitrators and advisory committee set up by the Board of Directors The advisory committee advises the Centre on the selection of persons to carry out duties of arbitrators

CONCLUSION

From the above table, it can be stated that the organizational structure of the NCIA meets the international best standard as compared with other institutions. The NCIA has structures with exclusive functions that help carry out arbitration effectively.

REFERENCES

1. NCIA- Nairobi Centre for International Arbitration Arbitration Rules 2015
2. LCIA- London Court for International Arbitration Arbitration Rules 2014
3. ICC- International Chamber of Commerce Arbitration Rules 2012
4. KIAC- Kigali International Arbitration Centre Arbitration Rules 2012

APPENDIX 2

COMPARATIVE TABLE OF ARBITRATION FEES AND COSTS

In analyzing the arbitration fees and costs of arbitral institutions, the researcher came up with the following comparative table of arbitration fees and costs of the NCIA, LCIA, ICC and KIAC. The arbitration fees and costs of NCIA are available at first schedule, part 3 of the NCIA Arbitration rules 2015. On the other hand, the information on arbitration costs and fees of KIAC is available at Annex 1 of the KIAC arbitration rules 2012. The information of ICC arbitration costs and fees is available at Appendix III article 4 of the ICC Arbitration Rules 2012. In addition, the Arbitration fees and costs of LCIA are available at www.lcia.org/Dispute-Resolution-Services/Schedule-of-costs-lcia.arbitration.aspx accessed on 28/09/2015.

The table also highlights the emergency arbitration fees and costs of the NCIA, LCIA, ICC and KIAC. The emergency proceedings fees and costs of the NCIA are available at the NCIA Arbitration Rules 2015 in Annex 5. The information of LCIA emergency arbitration costs is available on the schedule of LCIA arbitration costs at www.lcia.org/Dispute-Resolution-Services/Schedule-of-costs-lcia.arbitration.aspx accessed on 28/09/2015. In addition, the information on emergency arbitration proceedings is available at annex 11 of KIAC arbitration rules 2012

INSTITUTION	ARBITRATION FEES FOR AMOUNT IN DISPUTES IN US \$	ARBITRATION COSTS FOR AMOUNT IN DISPUTE IN US \$	EMERGENCY ARBITRATION FEES IN US \$	EMERGENCY ARBITRATION COSTS IN US \$
NCIA	<p>Up to 50,000 is charged 1000</p> <p>From 50,001 to 100,00 to be charged 2000</p> <p>From 100,001 to 500,000 to be charged 4,000</p> <p>From 500,001 to 1,000,000 to be charged 8,000</p> <p>From 1,000,001 to 2,000,000 to be charged 16,000</p> <p>From 2,000,001 to 5,000,000 to be charged 16,000+2.8% above 2,000,000</p> <p>From 5,000,001 to 10,000,000 to be charged 100,000+0,6% above 5,000,000</p> <p>From 10,000,001 to 50,000,000 to be charged 130,000+0.05% above 10,000,000</p> <p>Above 50,000.001 to be charged 150,000+0.002% above 50,000,000</p>	<p>Up to 50,000 to be charged 700</p> <p>From 50,001 to 100,001 to be charged 700+0.2% above 50,000</p> <p>From 100,001 to 500,000 to be charged 800+0.35% above 100,000</p> <p>From 500,001 to 1,000,000 to be charged 1,800+0.6% above 50,000</p> <p>From 1,000,001 to 2,000,000 to be charged 4800+0.12% above 1,000,000</p> <p>From 2,000,001 to 5,000,000 to be charged 6,000,000+0.2% above 2,000,000</p> <p>From 5,000,001 to 10,000,000 to be charged 12,000+0.18% above 5,000,000</p> <p>Above 10,000,001 to be charged 21,000</p>	<p>International arbitration fees is 1000</p> <p>Domestic arbitration fees is Ksh 200,000</p>	<p>International arbitration costs 1000</p> <p>Domestic arbitration costs Ksh10,000</p>
LCIA	<p>Administrative tribunal fees charged at hourly rates not exceeding 675</p>	<p>There is registration fee of 2625</p> <p>Time spent by the secretariat in administration of the arbitration whereby the Registrar or the Deputy Registrar is</p>	<p>Fees is 30,000</p>	<p>Non-refundable application fees of 12,000</p>

		<p>paid 375 per hour, Counsel paid 337.5 per hour, case administrators paid 2625 per hour, casework accounting functions paid 225 per hour</p> <p>Parties jointly and severally liable.</p>		
ICC	<p>Up to 50,000 to be charged a minimum of 3,000 and a maximum of 18.0200%</p> <p>Between 50001 to 100,000 to be charged 2.6500% minimum and a maximum of 13.5680%</p> <p>From 1,000,001 to 2,000,000 to be charged a minimum of 0.6890% and a maximum of 3.6040%</p> <p>From 200,001 to 500,000 to be charged 1.3670% minimum to 6.8370% maximum</p> <p>From 500,001 to 1,000,000 to be charged 0.9540% minimum to 4.0280%</p> <p>From 1000,001 to 2,000,000 to be charged 0.6890 minimum and 3.6040%</p> <p>From 2,000,001 to 5,000,000 to be charged 0.3750% minimum and 1.3910% maximum</p> <p>From 5,000,001 to</p>	<p>Up to 50,000 to be charged 3,000</p> <p>From 50.001 to 100,000 to be charged 4.73%</p> <p>From 100,001 to 200,000 to be charged 2.53%</p> <p>From 200,001 to 500,000 to be charged 2.09%</p> <p>From 500,001 to 1,000,000 to be charged 1.51%</p> <p>From 1,000,001 to 2,000,000 to be charged 0.95%</p> <p>From 2,000,001 to 5,000,000 to be charged 0.46%</p> <p>From 5,000,001 to 10,000,000 to be charged 0.25%</p> <p>From 10,000,001 to 30,000,000 to be charged 0.10%</p> <p>From 30,000,001 to 50,000,000 to be charged 0.09%</p> <p>From 50,000,001 to 80,000,000 to be charged 0.01%</p> <p>From 80,000,001 to 500,000,000 to be</p>	Fees is 30,000	Administrative Expense is 10,000

	<p>10,000,000 to be charged 0.1280% minimum and 0.9100% maximum</p> <p>From 10,000,001 to 30,000,000 to be charged 0.0640% minimum and 0.2410% maximum</p> <p>From 30,000,001 to 50,000,000 to be charged 0.0590% minimum and 0.2280% maximum</p> <p>From 50,000,001 to 80,000,000 to be charged 0.0330% and 0.1570% maximum</p> <p>From 80,000,001 to 100,000,000 to be charged 0.0210% minimum and 0.1150% maximum</p> <p>From 100,000,001 to 500,000,000 to be charged 0.0110% minimum and 0.0580% maximum</p> <p>Over 500,000.000 to be charged a minimum of 0.100% and a maximum of 0.0400%</p>	<p>charged 0.0035%</p> <p>Over 500,000,000 to be charged 113.215</p>		
KIAC	<p>Up to 50,000 to be charged 1,000</p> <p>From 50,001 to 100,000 to be charged 1500</p> <p>From 100 001 to 200 000 to be charged 2000</p> <p>From 200 001 to 500 000 to be charged 4000</p> <p>From 500 001 to 750</p>	<p>Up to 50,000 to be charged 750</p> <p>From 50,001 to 100,000 to be charged 750 +0.5% of the amount over 50,000</p> <p>From 100 001 to 200 000 to be charged 1000 +0.5% amount over 50 000</p> <p>From 200 001 to 500 000 to be charged</p>	The amount to be determined by the Centre	The amount to be determined by the Centre

	<p>000 to be charged 6000</p> <p>From 750 001 to 1000 000 to be charged 8000</p> <p>From 1000 001 to 1 500 000 to be charged 10 000</p> <p>From 1 500 001 to 2 000 000 to be charged 12 000</p> <p>From 2 000 000 to 2 500 000 to be charged 14 000</p> <p>From 2 500 000 to 3 000 000 to be charged 16 000</p>	<p>1500 +0.167% of the amount over 200,000</p> <p>From 500 001 to 750 000 to be charged 2000+0.8% of the amount over 500 000</p> <p>From 750 001 to 1 000 000 to be charged 4 000+0.4% of the amount over 750 000</p> <p>From 1 000 001 to 2 000 000 to be charged 5000+0.2% of the amount over 1 000 000</p> <p>From 2000 001 to 3 000 000 to be charged 7000+0.2% of the amount over 2 000 000</p> <p>From 3 000 001 to 4 000 000 to be charged 9 000 000+0.2% of the amount over 3 000 000</p> <p>From 4 000 001 to 5 000 000 to be charged 11 000+0.2% of the amount over 4 000 000</p> <p>From 5 000 001 to 6 000 000 to be charged 13 000+0.2% of the amount over 5 000 000</p> <p>From 6 000 001 to 7 000 000 to be charged 15 000 000+0.2% of the amount over 6 000 000</p> <p>From 7 000 001 to 8</p>		
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		<p>000 000 to be charged 17000+0.2% of the amount over 7 000 000</p> <p>From 8 000 001 to 9 000 000 to be charged 19 000+0.2% of the amount over 8 000 000</p> <p>From 9 000 001 to 10 000 000 to be charged 21000+0.2% of the amount over 9 000 000</p> <p>Over 10 000 000 to be charged 23 000</p>		
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CONCLUSION

From the above table it can be concluded that the NCIA arbitration fees is moderate as compared to fees provided by other arbitration fees.

REFERENCES

1. NCIA –Nairobi Centre for International Arbitration(Arbitration) Rules 2015
2. LCIA –London Court of International Arbitration Arbitration Rules 2014
3. ICC – International Chamber of Commerce Arbitration Rules 2012
4. KIAC –Kigali International Arbitration Centre Arbitration Rules 2012

APPENDIX 3

COMPARATIVE TABLE OF ARBITRATION RULES

The following table gives a comparison of arbitration rules of various arbitration institutions. The rules are: NCIA Arbitration rules adopted to take effect for arbitration commencing on or after 1st March 2015, LCIA Arbitration Rules effective 1st October 2014, ICC Rules of Arbitration in force as from 1st January 2012 and the Kigali International Arbitration Centre Arbitration Rules 2012

ASPECT OF ARBITRATION	INSTITUTIONAL ARBITRATION			
	NCIA	LCIA	ICC	KIAC
Commencement of Arbitration	Party submits written request for arbitration to the Registrar of NCIA(article 1)	Party wishing to commence arbitration delivers a written request to the registrar of LCIA court (article 1)	Party submits a request of arbitration to the secretariat at any offices specified in the internal rules (article 4)	Party submits a written request for arbitration to the Secretariat (article 5)
Formation of Arbitral Tribunal	It includes sole arbitrator or all arbitrator where more than one(article 5)	Includes sole arbitrator or the arbitrators where more than one.(article 5.2) No party or tribunal appoints the arbitrator under the arbitration agreement. It is the duty of LCIA Court(article 5.7)	Includes sole arbitrator or three arbitrators (article 12) If three arbitrators are to be appointed each party shall nominate one arbitrator(article 12(4))	Includes sole arbitrator or three arbitrators(article 12) If parties fail to appoint arbitrator the Centre shall appoint the arbitrator(article 12)
Emergency Arbitration	At any time prior to the formation or expedited formation of the Arbitral	Any party may apply to LCIA court for expedited formation of	A party that needs urgent interim or conservatory measures that cannot await the	A party needing urgent interim measures may apply for Emergency

	<p>Tribunal, any party may make an application for emergency measures pursuant to the Emergency Arbitrator Rules in Schedule 3.(article 27.1) An order or award made by the emergency arbitrator shall be binding on the parties when rendered(article 27.6)</p>	<p>arbitral tribunal under article 5(article 9A) any party may apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or expedited formation of the Arbitral Tribunal(article 9.4)</p>	<p>constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V(article 29(1)) The emergency arbitrator’ s decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator(article 29(2))</p>	<p>Arbitration under Emergency Arbitration Rules Schedule II (article 34) The parties may undertake to comply with the order made by the emergency arbitrator (article 34)</p>
<p>Seat of Arbitration</p>	<p>The parties may agree in writing the seat (or legal place) of their arbitration. Failing such agreement, the seat of arbitration shall be NAIROBI, KENYA unless the Arbitral tribunal determines, having regard to all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more</p>	<p>The parties may agree in writing the seat (or legal place) of their arbitration at any time before the formation of the Arbitral Tribunal and, after such formation, with the prior written consent of the Arbitral Tribunal(article 16.1)</p>	<p>The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties(article 18(1)) The arbitral tribunal may deliberate at any location it considers appropriate(article 18(3))</p>	<p>Parties agree on the seat of arbitration. If the parties fail to agree the Centre will choose for them.(article 23)</p>

	appropriate.(article 17.1)			
Challenge to Jurisdiction of Tribunal	The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement(article 24.1)	The Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement(article 23.1)	It does not provide	The Arbitral Tribunal shall have the power to rule on its own jurisdiction (article 31)
Interim and Conservatory Measures	Arbitral tribunal shall have the power unless otherwise agreed by the parties to order any party to provide security for all or part of the dispute.(article 26)	The arbitrator may, at the request of the party grant interim measures(article 25.1)	the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate(article 28(1))	Arbitral tribunal may order interim or conservatory measures upon request by the party. However, the parties may agree otherwise (article 33)
The Award	The Arbitral tribunal shall make its award in writing within a period of 3 months from the date of close of final oral or written submissions and, unless all parties agree in writing otherwise, shall state the reasons upon which its award is based(article 28.1) All awards shall be	Shall be in writing unless otherwise agreed and shall state reasons which the award is based. (article 26.2) The Arbitral Tribunal may make separate awards on different issues at different times, including interim payments on account of any claim or cross-	The award shall state the reasons upon which it is Based(article 31(2)) Every award shall be binding on the parties(article 34(6)) On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or	Arbitral tribunal may make separate awards on different issues at different times.(article 38) Shall state reasons for which is made and shall be seen to have been made at the place of arbitration and date set therein. (article 38) In case of an error on the award, the tribunal on its own may make

	<p>final and binding on the parties(article 28.12) A party may write a notice to the Registrar for correction of an award within 30days of receipt of the award(article 29.1)</p>	<p>claim(article 26.1) Every award (including reasons for such award) shall be final and binding on the parties(article 26.8) Within 28 days of receipt of any award, a party may by written notice to the Registrar (copied to all other parties) request the Arbitral Tribunal to correct in the award any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature(article 27.1)</p>	<p>any errors of similar nature contained in an award(article 35(1)) Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party(article 35(2))</p>	<p>corrections and submit within 15 days of the date of such award. A party may also make an application for the interpretation and correction of the award to the Secretariat within 15 days of receipt of the award(article 40)</p>
Consolidation of Proceeding	<p>By request of a party may consolidate arbitration proceedings(article 16)</p>	<p>Does not provide</p>	<p>The court, by request of party may consolidate proceedings (article 10)</p>	<p>Proceedings may be consolidated upon request by the parties(article 11)</p>
Arbitral Court and Registrar	<p>The functions of Arbitral Court shall be performed in its name by the President or Vice-President of the Arbitral Court or by a division of three or five</p>	<p>The functions of the LCIA Court under the Arbitration Agreement shall be performed in its name by the President of the LCIA Court (or</p>	<p>There is an International Court of Arbitration(Court) of the international chamber of commerce which is an independent</p>	<p>Does not provide</p>

	<p>members of the Arbitral Court appointed by the President or Vice-President of the Arbitral Court, as determined by the President(article 3.1) The functions of the Registrar under these Rules shall be performed by the Registrar or any deputy Registrar of the NCIA. Where the functions relate to the Arbitral Court the Registrar shall perform such functions under the supervision of the Arbitral Court.(article 3.2)</p>	<p>any of its Vice-Presidents, Honorary Vice-Presidents or former Vice-Presidents) or by a division of three or more members of the LCIA Court appointed by its President or any Vice-President(article 3.1) The functions of the Registrar under the Arbitration Agreement shall be performed under the supervision of the LCIA Court by the Registrar or any deputy Registrar(article 3.2)</p>	<p>arbitration body of the ICC.(article 1(1))</p>	
Costs	<p>The costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the NCIA in accordance with the Schedule of Fees & Costs (Schedule 2). The Claimant pays a non-refundable registration fee of US\$100 for international arbitration and Ksh</p>	<p>The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the “Arbitration Costs”) shall be determined by the LCIA Court in accordance with the Schedule of Costs.(article 28.1)</p>	<p>The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration(article 37(1)) The final award shall fix the costs</p>	<p>The arbitral tribunal shall state the amount of costs of arbitration when making the final award unless the parties have agreed otherwise(article 42) The claimant pays a non-refundable registration fee of US\$250 (article 43)</p>

	1000 for domestic arbitration(schedule 2, Annex I		of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties(article 37(4))	
Confidentiality	Arbitration proceedings and all the awards should remain confidential unless otherwise agreed by the parties (article 33)	The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain(article 30)	Does not provide	The parties and arbitral tribunal shall treat the arbitration proceedings confidential.(article 48)

CONCLUSION

From the above table, it can be concluded that the NCIA Arbitration rules meet international best standards.

REFERENCES

1. NCIA- Nairobi Centre for International Arbitration(Arbitration) Rules 2015
2. LCIA- London Court of International Arbitration Rules 2014

3. ICC- International Chamber of Commerce Rules 2012
4. KIAC-Kigali International Arbitration Centre Rules 2012

APPENDIX 4

LIST OF INTERVIEWEES AND INTERVIEW SCHEDULE

The following officials of Nairobi Centre for International Arbitration were interviewed:

- a) The Registrar of NCIA on 12th October 2016 at NCIA offices at Co-operative Bank House, 7th floor along Haile Selassie Avenue, Nairobi
- b) The Director of NCIA on 8th November 2016 at TRIPLEOKLAW ADVOCATES offices, ACK Garden House, 1st Ngong Avenue, Nairobi

The officials of the NCIA received the questions for discussion in advance through their official emails before the date for interview. The respondents received the same set of questions.

The following were questions for the interview:

1. What is the legal framework of NCIA?
2. What is the conflict between NCIA Act 2013 with the Constitution of Kenya 2010?
3. What is the conflict between Arbitration Act 1995 with the NCIA Act 2013?
4. Do the NCIA arbitration rules conform to the best practice of international commercial arbitration?
5. Why are the NCIA arbitration rules similar to the LCIA Arbitration rules 2014?
6. What is the institutional framework of NCIA?
7. How does NCIA raise funds for management of its functions?
8. Does the NCIA have qualified staff?
9. What is the total number of staff at NCIA?
10. How long have the staff been employed?
11. Does the NCIA provide training to its staff?
12. What kind of training does the NCIA offer to its staff?
13. How many training to the staff has been conducted so far?
14. Does the NCIA have the necessary facilities and equipment for conducting arbitration proceedings?
15. Has the NCIA partnered with any already established arbitral institution?

16. How does the NCIA market itself as an attractive arbitral institution to choose to conduct arbitration proceedings?
17. What are the challenges facing NCIA?

APPENDIX 5

THIS IS TO CERTIFY THAT: **Permit No. : NACOSTI/P/16/7115/10755**

MR. MICHAEL WANJALA MUYALA **Date Of Issue : 17th June,2016**

of UNIVERSITY OF NAIROBI, 28784-100 **Fee Received :ksh 1000**

NAIROBI,has been permitted to conduct

research in Nairobi County

on the topic: STRENGTHENING THE

LEGAL AND INSTITUTIONAL

FRAMEWORK FOR INTERNATIONAL

COMMERCIAL ARBITRATION IN KENYA: A

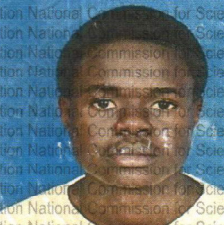
CASE OF NAIROBI CENTRE FOR

INTERNATIONAL ARBITRATION


for the period ending:

13th June,2017

Muyala
Applicant's Signature




Shimmu B. S.
Director General
National Commission for Science, Technology & Innovation



CONDITIONS

- 1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit.**
- 2. Government Officers will not be interviewed without prior appointment.**
- 3. No questionnaire will be used unless it has been approved.**
- 4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.**
- 5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.**
- 6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice.**



REPUBLIC OF KENYA
National Commission for Science, Technology and Innovation
RESEARCH CLEARANCE PERMIT
Serial No. A 9623
CONDITIONS: see back page

