RETHINKING CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION VIS-À-VIS KENYA'S PUBLIC INTEREST

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DECLARATION

I, WILLIAM C. GITHARA do hereby declare that this is my original work and I have not submitted it nor is it currently being submitted for a degree in another university.

Signed - .................................................................
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This thesis is submitted with my approval as the University supervisor.

Signed - .................................................................
Ms. Pauline Nyamweya
ACKNOWLEDGMENTS

To God, for who I am.

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However, any errors or omissions remain entirely mine.
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DAC - Departmental Advisory Committee
GATT - General Agreement on Trade and Tariffs
ICC - International Chamber of Commerce
ICSID - The International Center for the Settlement of Investment Disputes
TRIPs - Agreement on Trade Related Aspects of Intellectual Property
UNCITRAL - United Nations Commission on International Trade Law
UNDRIT - The International Institute for the Unification of Private Law
WTO - The World Trade Organization
LIST OF STATUTES

KENYAN STATUTES

Arbitration Act, (Act No. 4 of 1995)
Arbitration Act (Chapter 49 Laws of Kenya) (now repealed)
Companies Act, Chapter 486 Laws of Kenya
Law of Contract Act, Chapter 23 Laws of Kenya
Bills of Exchange Act, Chapter 27 Laws of Kenya
Bankruptcy Act, Chapter 53 Laws of Kenya
Contracts in Restraint of Trade Act, Chapter 24 Laws of Kenya
Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504 Laws of Kenya
Industrial Property Act No. 3 of 2001
Kenya Airports Authority Act, Chapter 395 Laws of Kenya
Banking Act, Chapter 488 Laws of Kenya
Insurance Act, Chapter 487 Laws of Kenya
Privileges and Immunities Act, Chapter 179 Laws of Kenya

ENGLISH STATUTES

Arbitration Act, 1996
County Courts Act, 1984

SOUTH AFRICAN STATUTES

Arbitration Act No 42 of 1965
Insurance Act 27 of 1943 (as amended in 1996)

STATUTES FROM OTHER COUNTRIES

Zimbabwean Arbitration Act No. 6 of 1996
Hong Kong Arbitration Ordinance
(Singapore) International Arbitration Act 23 of 1994
Swiss Private International Law Act 1987
New German Code of Arbitration
The Netherlands Arbitration Act of 1986
(Australian) International Arbitration Act of 1974
French Decree Law No. 81 – 500 of May 12 1987
LIST OF CONVENTIONS

Geneva Protocol of 1923

Geneva Convention of 1927

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The 1964 Hague Convention relating to a uniform law on the International Sale of Goods


Statute of the Hague Conference on Private International Law


The European Community Convention on the Law Applicable to Contractual Obligations (Rome Convention)

LIST OF CASES


American Safety Equipment Corp vs. J.P Maguire & Co. 391, F 2d 821 (2d. Cir. 1968)

Antaios Cia Naviera SA vs. Salen Rederierna AB (The Antaios) [1984] 3 All E. R. 229

Bremen vs. Zapata Offshore C. 407 US 1, 92 S. Ct 1907; 32L Ed. 2d 513, (1972)

Christ for All Nations vs. Appollo Insurance Co. Ltd [2002] EA 367

Glencore Grain Ltd vs. TSS Grain Millers Ltd [2002] 1 KLR 606

Hebei Import & Export Corp vs. Polytelc Engineering Co. Ltd (1999) 2 HICC Far 111 at 122 per Bolchary P J (Court of Final Appeal, Hong Kong)

Indigo EPZ Limited vs. Eastern and Southern Africa Development Bank [2002] 1 KLR 810


Loucks vs. Standard Oil Co., [224 NY 99, 111; 120 N.E. 198, 202 (1918)]


Mitsubishi Motors Corp –vs. Soler Chrysler- Plymouth Inc. 473, US 614; 105 S. Ct 3346; 87 L.Ed. 2d 444 (1985)

Richardson vs. Mellish (1824) 2 Bing

Omnium de Traitement et de Valorization SA vs. Hilmartin Limited ICC Case No, 5622 (1988)

Parsons vs. Whittemore Overseas Co. Inc. v. Societe’ Generale de l’industrie du Papier (RAKTA) 508 F 2d 969 (2d Gr. 1974)

Renusagar Power Co. vs. General Electric Co. [AIR 1994 S.C. 860: (1994) CLA Sup 1 (SC)] (an Indian Supreme Court decision)

The Fehmarn [1957] 2 Lloyd’s Report 551
Tononoka Steels Limited vs. The Eastern and Southern Africa Development Bank [2002 EA 536]

Tropical Food Products International vs. The Eastern & Southern African Trade Development (PTA) Bank Nairobi HCCC 1534 of 2001 (Milimani Commercial Court (unreported))

1.1 Introduction: The Model Law and the Need for Uniformity

With increasing globalization there has been a concerted effort to harmonize the law on international trade as a way of enhancing trade globally. One of the efforts in this area is the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. Kenya is one of the many countries across the globe, that have adopted the UNCITRAL model law more or less unchanged as its basic arbitration framework. This was done through the enactment of the Arbitration Act 1995.

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on 21st June 1985. The Model law was drawn up as a result of an initiative by the Asian-African Legal Consultative Committee. It provides a legal framework characterized by two main strands, which are, firstly, the liberalization of international arbitration by limiting the role of national courts, and secondly, the emphasizing of party autonomy by allowing parties the freedom to choose how their disputes should be determined. There is furthermore a defined core of mandatory provisions intended to ensure fairness and due process. In addition, the Model law contains a framework for conducting international commercial arbitration so that in the event of the parties being unable to agree on procedure, the arbitration can still be completed. Finally, there is the incorporation of provisions to aid enforcement of awards and to clarify certain controversial practical issues.

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3 Act No. 4 of 1995
5 Ibid.
In 1995, the General Assembly of the United Nations recommended that all states give due consideration to adopting the Model law in view of the desirability of uniformity of the arbitral procedures and the specific needs of international commercial arbitration practice. Indeed, common wisdom is that a significant variation from the Model law in a domestic statute relating to international arbitration is inimical to the comity and harmonization, which underpin it⁶.

Similarly there have been many efforts towards harmonization of conflict of law rules. These include the work of The Hague Conference on Private International Law⁷ as well as those by the International Institute for the Unification of Private Law (UNIDROIT)⁸. The Hague Conference on Private International Law is a treaty organization that oversees conventions designed to develop a uniform system of conflicts of laws while UNIDROIT seeks unification in the substantive private law in such areas as sale of goods, personal law among others. Thus although the UNIDROIT looks to the substantive law it inevitably has to deal with conflict of law issues while considering inter-jurisdictional legal relations.

The efforts to harmonize conflict of law rules are based on the understanding that to apply one legal system against another in international disputes may never be entirely satisfactory and a uniform approach to conflicts would produce international standards as globalization leads to even more international commerce. The world however remains divided and different countries have different interests even in international commerce where on the face of it one may be tempted to think of one global trading community. There is therefore a latent conflict between interests of different states. For example, where developed states from the west advocate free trade in manufactured goods from which their already established multinational enterprises stand

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⁶Ibid. p. 21

⁷The Hague conference on Private International Law was established in 1955 by 15 European states that were already working together for the harmonization of Private International Law. It was established through the Statute of the Hague Conference on Private International Law, which entered into force on 15th July 1955. The Statute in Article 1 states the purpose of the Conference to be the progressive Unification of the rules of Private International Law. Kenya is not a member of the conference, which currently has 67 members from across the five continents.

⁸The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organization with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and coordinating private and, in particular, commercial law as between states and groups of states. The UNIDROIT has 16 members who are predominantly European save for Japan, which is the only non-European member. Kenya is thus not a member.
Model law and others, like England, who have taken the bulk of the Model Law provisions but supplemented them with other provisions.\textsuperscript{12} The rationale for the adoption of the Model Law is to ensure the country's conformity with the rest of the world and to ensure that the law of a particular country makes it attractive to investors and other business people who will be encouraged to do business in that country because they are assured that in case of a dispute they can resort to arbitration (if it is the agreed dispute resolution mechanism) under a law they have confidence in. The Model Law thus establishes a regime for international commercial arbitration and reflects modern thinking and practice amongst international commercial arbitrators and practitioners.\textsuperscript{13}

The conflict rules enacted in the Model Law and in turn adopted into the Kenyan Arbitration Act are thus tailored to facilitate the autonomy of the parties without let or hindrance. Section 29 of the Act provides that the substance of the dispute shall be governed by the law chosen by the parties and failing such choice by the rules of law that the arbitral tribunal considers appropriate given all the circumstances of the dispute\textsuperscript{14}. Section 29(5) of the Act also provides that in all cases, the arbitral tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction. This is all very well in so far as one is looking to the conformity of our law with international trends. However, it exposes the soft underbelly of Kenya as a developing country when one considers that in international trade, the rules are set by the developed world and may at times not be very appropriate for a developing state.

Thus while parties may have agreed to an arbitration under the International Chamber of Commerce (ICC) in Paris, the effect of such a provision to an established multinational from the United States may be negligible but for small start-up company in Kenya it may well mean the difference between bankruptcy and continued operations. Would such a provision be fair if it is

\textsuperscript{12} See the (English) Arbitration Act 1996.
\textsuperscript{14} Section 29 (1) and (3) of the Arbitration Act 1995.
found in a standard form contract entered into in Kenya at the instance of the US multinational? Supposing that the amount claimed is small, would arbitration in Paris under the ICC be logical considering the costs? What if the Kenyan company is a consumer of US products sold upon promotion in Kenya by the multinational? Supposing it is an employment contract in which the US multinational was sourcing middle level managers for its local operations? In these instances might there be sufficient local public interest to warrant interference with party autonomy? Would an international arbitral tribunal appreciate or even be sympathetic to such interests as to give them reasonable effect or are they better off taken care of by local statute or tribunal?

Further although the Model Law is clearly designated as applicable to International Commercial Arbitration, the 1995 Act makes no distinction between commercial and non-Commercial arbitration. Similarly it is based on the concepts of freedom of contract and equality of bargaining power, which are fundamental concepts in the laissez faire attitude employed in world commerce today.

1.2 Public Law Regulation of Private Transactions: The Role of Conflict of Law Rules

1.2.1 General Parameters of the Study

Kenya as a developing country may, however, not have the comfort of solely relying on the laissez faire attitude that is generally advocated in world trade. It is thus faced by two conflicting interests, which it has to address at the same time. First, we have had to ensure that our laws conform to global trends in harmonization, which we have largely accomplished by adopting the Model law. Secondly, and this is where the problem lies, we may have to take away some of that global conformity to cater for our own peculiar public interest which will not be served by a uniform globalized law.

15 O'Hara (Supra note 9) gives the example of Franchise contracts which often give the franchisors the right to terminate the contracts without cause and without notice which is meant to ensure performance by franchisees and prevent individual franchisees from riding off the value of the franchisors trademark. She also uses the example of products liability claims where because the manufacturer typically drafts the agreement, a clause might enable it to choose the governing law without actually moving its plant to the state with the preferred law.

16 See Section 3 of the Act, which is the interpretation section.
The concept of party autonomy in international arbitration implies an exclusive private law domain in which the parties have exclusive rights to determine their dispute as they may choose. However, this project paper seeks to interrogate the role of public law in regulating what may otherwise be deemed to be private law rights. In doing so, this thesis proceeds on the hypothesis that the distinction between public law and private law rights may be clear in principle but difficult to apply in practice; that questions of public and private law are often intermingled and cannot easily be separated. Thus in arbitration, there may be a need for public law to come in and regulate the exercise by private persons of contractual power where there is a public interest involved. In this context, the substantive public law principles developed by the courts over time to control contractual power—such as unreasonableness, relevance, purpose, and procedural fairness—may also be relevant in the regulation and control of party autonomy in arbitration.

Thus when we look at Kenya’s arbitration law regime as informed by the Arbitration Act 1995 and the applicable international law and specifically the conflict of law provisions applicable to international arbitration, the following issues appear to emerge:

a) That the Kenyan Act does not make much distinction between commercial and other disputes. This is important because whereas there may be a case for giving a free reign to commerce and thus allowing full party autonomy, the same can hardly be said of other transactions in which there are vested public interests such as consumer contracts and labour contracts.

b) That even in commercial contracts, there may be other public interests, from a developing country point of view, which it would be desirable to protect. The rationale for this is that the equality of bargaining powers that is assumed in the concept of party autonomy is in many instances not there especially when dealing

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18 Ibid p. 65. Although Lewis is addressing the question of judicial review of public bodies, the same general principles would apply.
19 This would include Conventions such as the 1958, Convention on the Recognition and Enforcement Of Foreign Arbitral Awards (New York Convention), customary international law, and general principles of international law.
with nascent industry players who would, when looking at International arbitration be dealing in all probability with established Multinational Enterprises.20

In view of the need to use public law to regulate the otherwise private law relations in arbitration, conflict of laws play a pivotal role because the public interests that are sought to be protected are from an individual state’s perspective yet commercial relations and the resultant arbitration are being conducted from an international perspective. The vehicle by which this public law regulation will be effected on the world stage becomes the conflict of laws provisions by which the dispute resolution will be conducted. This is especially so because in arbitration the parties have the free hand to choose the laws, the forum and the rules that will govern their dispute. It is therefore only by conflict of law provisions that certain decisions may be taken out of the parties hands or their decisions made subject to certain minimum requirements to ensure the public interest is catered for.

Thus if we are to draw a parallel from the mixed economy regimes21 that are practiced in the larger economy by many nations including the developed countries,22 there may be need to practice a similar concept in international arbitration so as to derogate from the laissez faire attitude of party autonomy and reserve some control through certain mandatory provisions in the Arbitration Act.23 The logic is that it is incongruous to support a significant role for government regulation in domestic economies, as most countries do to some extent, while leaving international trade and investment unregulated24. This situation is even more paradoxical given that globalization itself creates greater links between domestic and international economies, and

20 This is not informed by empirical data but rather by taking notice of the numerous multinational enterprises operating in Kenya today as well as the international nature of the contracts in issue.
21 This is where many countries despite having liberalized their economies still retain a fair extent of regulation of the markets out of the recognition that the assumed safe haven for economists- contractual freedom does not always work for the aggregate good.
23 Guzman, supra note 4 addresses also addresses the hard task of finding efficient solutions where the choice of law will benefit some individuals and states to the detriment of other individuals and states in search of Pareto efficiency.
therefore it becomes harder to maintain mixed economies domestically while leaving the global economy unregulated.

This would then affect the conflict rules applicable to international arbitration so that those disputes, or aspects of disputes that the state wishes to control are either reserved for the national courts irrespective of the agreement by the parties or have mandatory provisions applied to them irrespective of the applicable law. This we would have to do without appearing to derogate from the general picture of international conformity. This study therefore pre-supposes that there is a latent conflict between the concept of party autonomy as applied to international commercial arbitration on the one hand and the public interests of Kenya on the other. The problem thus lies in striking a balance that addresses both of the two conflicting interests which can only be achieved by a well thought out law and policy which are lacking in Kenya.

1.2.2 Specific Parameters of the Study

This project paper in addressing the issues raised above seeks to evaluate the conflict of law provisions that govern international arbitration from a Kenyan standpoint which evaluation provides grounding on the problem under enquiry and constitutes a departure point for the study. Similarly it analyses the opposing concepts of party autonomy and public interest in international arbitration and the place of conflict of law rules in regulating them. This involves the evaluation of such concepts as the foreign mandatory rules, public policy, arbitrability and the commercial qualification and their effect on party autonomy in international arbitration.

To inform Kenya’s position on these matters the study makes a comparative study of the English, South African and Kenyan positions and uses the English and South African reactions to the Model Law to offer insights on which way Kenya should move. The English position is useful in view of Kenya’s historical (colonial) ties with England as well as the fact that most of Kenya’s laws have borrowed heavily from English law both in structure and content. The English position is also important as an indicator of the trend in developed jurisdictions in reaction to the Model law. Most importantly however, England is an important commercial and arbitral center in world
commerce and its reaction to the model law offers useful lessons to other jurisdictions and especially developing countries irrespective of their different social, political and economic status.

As regards South Africa, a comparative study offers useful insights in view of the fact that both Kenya and South Africa are developing African economies competing with each other to be the dominant economic powerhouses in sub-Saharan Africa and the preferred venues for foreign investments in the region. South Africa also recently came out of economic isolation courtesy of apartheid and its measures in economic ‘engineering’ are bound to provide useful lessons for Kenya.

Finally this study draws upon the comparative study in identifying some of the issues on conflict of laws that require review from Kenya’s standpoint and on the basis of these issues some proposals for reform are made.

1.3 International Arbitration and the UNCITRAL Model Law: Why the Interest?

1.3.1 Why International Arbitration?

This study seeks to understand the interface between globalization, public law and international commerce. This is important because the modern law merchant “is a complex mix of public and private authority, which though designated as ‘private’ plays an important role in allocating risks, regulating market access and linking local and global domains.”25 From this standpoint, lex meatoria is a paradigm of the new global law in which “its main institutional locus is international commercial arbitration” and it “has been socially constructed and... contributes to the reorganization of hierarchies, modes of authority and structures of power.”26 In light of this

26 Ibid, p. 6
the study of conflict of laws in international arbitration brings out best the interplay of the above factors.

1.3.2 The Model Law: England, South Africa and Kenya: A Comparative Study

Viewpoint

There was no comprehensive policy paper informing the adoption by Kenya of the UNCITRAL Model Law via the enactment of the Arbitration Act 1995.²⁷ It is therefore important to consider the goals of the Model law which may be summarized as threefold thus:

a) Harmonization as an end in itself

Since harmonization of arbitration laws in international commerce was the avowed aim of UNCITRAL in drafting the Model law it must be considered as an end in itself. In so considering it takes a philosophical argument, which presupposes that uniformity of laws is to be preferred to diversity²⁸. This however begs the question as to whether it is not desirable to have jurisdictional competition among states so that international businesses might have more choices in deciding which state their arbitration and which law is to govern the same.

However the argument in favour of the Model Law is at a more practical level, the suggestion being that it is in the commercial interests of all states that other states should be encouraged to adopt the model law so that the importers and exporters from a particular state who are constrained to arbitrate in the other states, do so under a law that they are familiar with. This argument becomes even more compelling for developed states when encouraging less developed states to adopt the model law because for their business people contemplating arbitration in the less developed states, it is not a question of the Model Law being the best

²⁷ There is no formal record from which the existence of such a policy paper may be discovered and the search involves requests for information to the relevant government departments where such information is not out rightly available.

but rather in most cases it being a better law than those states may have before the adoption of the Model Law\textsuperscript{29}.

It is however again notable that the Model Law does not seek to achieve full harmonization of arbitral laws. As we shall later see there are many issues it leaves for regulation, determination or interpretation by national laws and its goals are actually rather modest which include giving effect to party autonomy and minimizing intervention by the courts. It leaves domestic arbitration untouched and even in international arbitration there are large and important tracts of arbitration law that it makes no reference to, and where there are large divergences between different states. These include issues of admissibility of evidence, discovery of documents, whether to follow inquisitorial or accusatorial patterns in presentation of evidence including whether to have oral testimony and to cross-examine witnesses.\textsuperscript{30}

b) Keeping in step with international trends in arbitration law

This may be considered as a separate ground, though similar to harmonization, which would influence the adoption of the Model Law. This arises out of political considerations based on the apprehension that quite apart from any virtue in the harmonization of arbitration laws, to be seen to repudiate a measure which commands the support of an international body like the UNCITRAL, and which a number of countries had looked upon with favour, would attract disfavour and may cause serious damage in some general way and may also act as a deterrent to the bringing of arbitrations to that particular state.\textsuperscript{31}

c) The intrinsic merits of the Model Law

This is the predominant consideration to be made by any country in deciding whether to adopt the Model Law; the question being whether the Model Law offers a better framework for the conduct of international arbitration from the context of a particular country. The states to whom the document is addressed differ widely in their social economic and political developments and the effect of the Model Law cannot be uniform in all of these states. It

\textsuperscript{29} Ibid.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid, p.16-17
therefore behoves each state to make a careful examination of the Model Law and decide the effect that each of the provisions of the model Law would have on its body politic and it is only where the intrinsic merits of the same justify the wholesome adoption or otherwise of the Model Law that such a course of action should be undertaken. Thus in the case of the United Kingdom (which we shall use for comparative analysis) there was the Departmental Advisory Committee (DAC) commonly known as the Mustill Committee after its chairman, Lord Mustill a well recognized authority on Arbitration in the UK and the world over. The Mustill Committee had been appointed in 1984 to advise the Secretary of State and Industry whether the Model Law should be enacted. The Mustill Committee was driven principally by the desire expressed in paragraph 109 of its report to make proposals, which would serve to keep London in the vanguard of the preferred venues for international commercial arbitration. It would thus contribute valuable invisible earnings and help to maintain London as one of the leading financial and mercantile centers of the world. The Mustill Report recommended that England should not enact the Model Law because the committee felt that to do so would be detrimental to English arbitration practice as it had developed over centuries by statutory enactment and decided cases. The committee thus recommended an intermediate solution in an Act that would, as much as possible, have the language and structure of the Model Law but also comprise a statement in statutory form of the more important principles of the English law of arbitration. We thus see in the English Arbitration Act 1996 which was the resultant enactment, a desire to conform as well as the desire to maintain those salient feature of English arbitration law that were felt to be crucial in safeguarding public interest.

32 This argument forms the superstructure of this paper and finds support from, among others, the Mustill Report (supra, note 28 p. 19) as well as the South African Report supra note 4 p 29
33 Supra, note 28 p 34
34 Ibid p. 9-11.
South Africa similarly commissioned a study of the Model law and its suitability for South Africa. This was through the South African Law Commission constituting a project committee of several experts, which issued its report in July 1998 making various recommendations on a proposed new International Arbitration Bill for debate in the South African Parliament. Although the Bill is yet to be tabled for debate and South Africa does not yet have a Model Law version Arbitration Act, the fact that the report was issued after extensive consultations, there are useful lessons for Kenya from the same. It is therefore notable that the South African report recommended adoption of the Model Law with several but subtle changes to suit South African needs and some of those recommendations inform this study.

If Kenya was to be informed by the English and South African ways of thinking then there is a need to interrogate the suitability to Kenya, of the Model law as adopted through the Kenyan Arbitration Act 1995 and specifically for this study to see how the conflict of law provisions (being a crucial aspect affecting party autonomy and public interest) are informed by the interplay of interests aforesaid. Secondly other than the lack of a policy document informing the enactment of the Kenyan statute there is also, as far as my literature review has established, no legal literature analyzing the wholesome adoption of the Model Law and how it affects Kenya’s public interest or indeed how our conflict rules affect the whole range of arbitration disputes from a Kenyan standpoint.

This paper thus looks at the interplay between party autonomy and public interest and how conflict of law related concepts such as the choice of law clauses, mandatory rules, public policy exceptions, commercial reservations and arbitrability affect international arbitration from a developing country standpoint. This project paper thus hopes to make some contribution in this area and hopefully invite more scholarly debate on the area with a view to an ultimate policy review on the subject.

35 See Chapter 3, post, on the history, work and analysis of the Commission’s Report.
1.3.3. The Model Law: Provisions Relevant to this Study\textsuperscript{38}

It is important at this juncture to consider the crucial provisions of the Model Law that relate to conflict of laws as well as those that affect the issue of public interest. These include the following:

a) Article 1 of the Model Law- Scope of Application

Article 1.1 of the Model Law provides that the law applies to international commercial arbitration. This therefore means that states would be otherwise free to regulate domestic arbitrations and a definition of international arbitration is provided, which basically applies where parties to the arbitration are from different states. Of more importance to this study however is the 'commercial' qualification in the scope of application of the Model Law. What the inclusion of the term commercial means is that the Model Law was only intended to apply to commercial matters and non-commercial matters were otherwise contemplated to either be unarbitrable or outside the scope of the international unification. The question of defining the term 'commercial' was the subject of debate during drafting of the Model Law and as compromise the same was inserted as a footnote, which reads:

"The term commercial should be given a wide interpretation as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road." \textsuperscript{39}

\textsuperscript{38} See generally the Mustill Report, \textit{supra}, note 28, p. 48 (Departmental Advisory Committee Commentary on the Articles of the Model Law)

\textsuperscript{39} Endnote 2 to the Model Law
Thus the way a particular state treats the ‘commercial’ qualification will have a significant affect on the Model law as applied therein.

Related to the ‘commercial qualification is Article 1.5 of the Model Law which provides that the Model Law shall not affect any other law of the adopting state by virtue of which certain disputes may not be arbitrable or may only be arbitrated upon according to provisions other than those of the Model law. This paragraph thus introduces the concept of (non-) arbitrability into the Model Law by allowing the adopting state to reserve some matters for national courts (non-arbitrable matters) or subjecting others to arbitration based on certain provisions, which ideally would be tailored to cater for some national/ public interests.

b) Article 5 of the Model Law- Extent of Court Intervention
This provision reads, “In matters governed by this law, no court shall intervene except where so provided in this law.” This as earlier noted is one of the main strands of the Model Law, which is intended to regulate the extent of court intervention in arbitration. This arose out of a general feeling in arbitration circles that national courts had meddled too much in arbitration matters either at the behest of recalcitrant parties or because of hostility towards arbitration as a rival system of adjudication. The general perception was that this interference had taken the effective edge out of arbitration and remedial measures were needed.

c) Article 7- Definition and Form of Arbitration Agreement
This article defines an arbitration agreement as an agreement for submission to arbitration in respect of a defined legal relationship whether contractual or not. More importantly the article requires that the agreement be in writing and defines an agreement in writing as one contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other telecommunication means which provide a record of the agreement or in an exchange of pleadings where the agreement is alleged by one party and is not denied by the other. As we

40 See Mustill Report, supra, note 28, p. 5 where the D.A.C. sought to dispel the perception that English courts had an interventionist history and attitude.
41 Art 7.1 of the Model law.
42 Art 7.2.
shall see later this affects conflict of laws and public interest in that, it affects individual states’ requirements as to material and formal validity of contracts and this may have serious ramifications for public interest say for instance in the case of bills of lading which as a matter of trade usage are issued unilaterally by a shipper and may not fit into the definition of an agreement in writing where they have an arbitration clause.

d) Article 28- Rule Applicable to the Substance of the Dispute
This is a major conflict of laws provision governing choice of law. The article firstly provides that the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties and any such choice shall unless provided expressly be construed to refer to a state’s substantive laws not its conflict provisions. This creates certainty by avoiding the doctrine of renvoi and gives effect to party autonomy as desired in international arbitration. The article also provides that failing any designation by the parties the arbitral tribunal shall decide the dispute in accordance with the conflict of laws rules it considers applicable. The article then requires that the tribunal shall only decide a dispute ex aequo et bono or as amiable compositeur [without strict adherence to rules of law and on the basis of fairness] only if the parties have expressly authorized it. Finally the article requires that the tribunal shall decide the dispute in accordance with the contract and shall take into account trade usages. Thus the effect of this article is to give effect to party autonomy by ensuring that the intentions of the parties are given full effect.

d) Article 34- Recourse Against Award
This article provides the only grounds upon which under the Model law, an aggrieved party may seek setting aside of the arbitral award. The grounds for setting aside under this article include where the applicant furnishes proof that one of the parties to the arbitration agreement was under some incapacity, or that the agreement is not valid under the governing law or failing that the law of the forum or; that the applicant was not given notice of the appointment of the arbitrator or;

43 Art. 28.1
44 Art. 28.2
45 Art. 28.3
46 Art. 28.4
that the award is beyond the mandate of the arbitral tribunal or; that the composition of the tribunal or its procedures were in conflict with the agreement of the parties.\textsuperscript{47}

The article also provides that setting aside may be allowed on proof that the subject matter of the dispute is unarbitrable under the laws of that state or that the award is in conflict with the public policy of that state.\textsuperscript{48} The provisions of this article again become relevant to this study because in the first instance the issue of validity of the arbitration agreement arises and this is being interpreted by different states according to their laws hence an incidence of conflict and secondly the second limb of the article deals with public policy which again is subject to different interpretations by different states.

e) Article 36- Grounds for Refusing Recognition and Enforcement

This article again applies the very grounds for setting aside of awards as grounds for refusal of recognition and enforcement of arbitral awards. The difference between the two articles is that whereas the setting aside is being done in the forum state only, recognition and enforcement may be sought in virtually any state where the loosing party is either resident or has assets. The only additional ground for refusal of recognition that is not found in Article 34 is that recognition and enforcement may be refused if the award has not yet become binding on the parties or has been set aside or suspended in the forum state.\textsuperscript{49}

We shall see later in chapter three how the provisions referred to herein affect the two issues of conflict of laws and their suitability or otherwise for Kenya.

1.4 Theoretical Framework

This work is influenced partly by economic theories of law (law and economics) whose premise is that a study of almost every field of law from an economics perspective would yield very

\textsuperscript{47} Art 34.2. (a)  
\textsuperscript{48} Art 34.2. (b)  
\textsuperscript{49} Art. 36.1. (a) (v)
illuminating results. The works of such people as Ronald Coase, Richard Posner and Gary Becker among others has influenced this thinking. With these theories it is now prudent to look at law from an economic perspective where issues of utility, optimality and efficiency of the relevant conflict of law provisions with regard to international arbitration are addressed. It is for this reason that this study is premised on positive as well as normative reflection of Kenyan conflict of law provisions relating to international arbitration. The positive aspect of the study seeks to predict and explain the behaviour of the various players in the area of study while the normative aspect has the utility of being prescriptive and judgemental in trying to point out areas where our arbitration law and specifically the conflict of law provisions thereof have unintended or undesirable consequences for Kenya as a developing country and with it comes proposals for reform.

This study is also influenced by the sociology of law to the extent that it seeks to interrogate the suitability of the Kenyan Arbitration Act 1995 to the needs of Kenya as a developing nation. This is necessary because the Act is modeled on the UNICTRAL model law, which seeks to treat all adopting nations as economic peers while the reality is different. This inquiry is thus informed by the sociology of law in so far as it holds that law is not value neutral so that we cannot contemplate a value free Model law that caters for all nations irrespective of their economic and social circumstances. We must therefore see the model law in the light of global power relations so that the model law would reflect the social and economic needs of those who control global affairs.

52 See Freeman op. cit. p. 659.
53 Although the Model law as negotiated under the auspices of the United Nations Commission on International Trade Law (UNCITRAL) and was drawn up as a result of the initiative of the Asian-African Legal Consultative Committee and although the United Nations by its membership and structure allows more voice to the developing countries than say the World Trade Organization, it is submitted that the bargaining power and resources available to developed countries in any multilateral treaty negotiating forum always weighs heavily against developing countries creating a tilt in favour of developed countries in the resultant document.
There is therefore need to address the developmental needs of Kenya as a developing country in formulation of conflict of law rules in arbitration. This line of approach will seek to obtain as much conformity for Kenya with global trends in arbitration to ensure that Kenya remains relevant as a center of commerce. However of more importance to this study is the need to ensure that as a developing country we cater for those interests that are peculiar to a developing country in global power relations. This study will therefore of necessity take a Law and Development angle in addressing the balance of power between nations in a developmental perspective.

1.5 Limitations of the Study

This study while a comparative study between Kenya, South Africa and England, is limited in the sense that it makes various assumptions without empirical proof on issues that inform the Kenyan, South African and English policies on arbitration. These have been made by logical deduction based on their different economic status to demonstrate the need for Kenya as a developing nation to have conflict of law rules that are sensitive to its needs just like South Africa is anchoring to emerge from global isolation and become a relevant center in global trade while sufficiently protecting its developmental needs and England seeks to preserve its position on the global commercial and development ranking. This research also does not address in detail the economic forces that generate and sustain particular conflict of law rules but again proceeds by way of logical assumptions and expectations.

The study is thus restricted to an analysis of the conflict of law rules in international arbitration from a developing country point of view. The study being a desktop research (both internet and library), also did not obtain primary data to support various assumptions on the subject because to do so would require long-term research.
CHAPTER TWO: HARMONIZATION OF CONFLICT OF LAWS, PARTY AUTONOMY AND PUBLIC INTEREST

2.1 Conflict of Laws and its Harmonization

2.1.1 The Waning of Sovereignty and the Emergence of Transnational Law

Traditionally, the question of sovereignty of states – the traditional actors in the international arena - has been a sensitive one with each state seeking to jealously guard its sovereignty. However, with time and the concept of globalization, the world has seen a big increase in global commercial and other activities and these interactions between subjects of different states brought about the question of conflict of laws as one law had to yield to the other in regulating the interaction of the parties. The subject of conflict of laws was thus seen as a raging battlefield in which the belligerents were legal norms. This was compounded by Austinian jurisprudence which the late Friedrich Juenger, himself a leading conflicts scholar, called “a fixation on the idea that law must emanate from the power of a sovereign state”.

Francis Snyder notes that among the main shaping factors that have contributed to globalization are the tremendous growth of multinational companies and the international production networks, new technology, changes in the nature and form of work, and the rise of globalization have been defined by Francis Snyder in (2003) “Economic Globalization and the Law in the 21st Century” as “a process (or set of processes), which embodies a transformation in the spatial organization of social relations and transactions... generating transcontinental or interregional flows and networks of activity, interaction, and exercise of power.” This conceptualization of the term is important for the purposes of this paper in so far as it seeks to examine the effects of globalization on International arbitration and the consequent exercise of power and distribution of benefits.

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58 Supra, note 2, p. 2.
new actors in the international scene. This transformation Snyder notes, has come with numerous legal changes, both on a transnational scale and within countries. Some of these new legal forms and regimes differ substantially in nature, content, scale and operation from the largely state-based system of governance of the past several centuries. Snyder therefore notes that “a multiplicity of other sites of governance complement, supplement, or compete with the state, hence the term ‘governance’ instead of ‘government.’ However while eroded or even reconfigured, the state remains powerful, if not predominant, with the relative strength of different institutions, norms and dispute resolution processes depending frequently on the specific context. However, yet again, the erosion of the state as the focal point in international relations brought about by globalization has come with it a more powerful and assertive individual in the citizen. This as Franck Thomas observes is a rebellion against the orthodox international order where all persons are indirect participants in the international system through their governments. The old system has thus been attacked as one, which excludes participation of those most affected, and this has brought about a more visible international citizen who is the subject of international arbitration.

2.1.2 Transnational Law and the New International Citizen

Frank Thomas states that, “in the 19th and 20th Centuries, the model of the state as exclusive socio-political organizing principle was widely touted and adopted whether the state was a democratic republic, a liberal monarchy or one of the many prevalent forms of mobilizational authoritarianism”. The state was thus seen either as a building block in quasi federalist ideal structure of humanity or in the Hegelian conception as an ultimate ethnocentric end in itself.

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62 Supra, note 7, p. 77.
63 As seen by Kant Immanuel, “Perpetual Peace” in Kants Political Writings as quoted by Franck Thomas Franck, note 7 above.
This conception of state and community led to the prominence of the concept of sovereignty in which it was generally agreed that no state had the right to interfere with or regulate conduct in another state.

The disparate nationalisms, despite their bitter rivalry, succeeded in forging a new human identity in the place of the previous “basic social unit of the peasant village... large peer groups and extended families” in which there emerged a new person, the citizen. These citizens increasingly were emboldened to assert their membership in a new community of equals occupying and totally refurbishing the space of the dead feudal sovereign.

The emergence of the new citizen, coupled with developments in transport and communications and other technologies (globalization) led to increasing interactions between states so that in the late 20th Century and now the 21st Century for the first time in history, virtually all the nations of the world have come together in a world economy and an emerging world society. Despite violent political and religious conflicts, the world is held together partly by a common law of trade and investment and finance as well as by transnational legal concepts and rules of intellectual property, human rights, environmental protection and other branches of law.

Thus Berman observes that this is a new jus gentium, “law of nations” which includes not only jus inter gentes, “law between nations” for which Jeremy Bentham coined the name “international law” but also jus intra gentes, “law within nations” that is, common features of the world’s legal systems, which to Bentham did not constitute a transnational body of law but were only constituent parts of the municipal law of individual nation – states. Professor Juenger also observes, that transnational commercial contracts, for example, are usually governed by a supra-

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64 Supra note 7.
65 Ibid.
66 Kaufmann-Kohler Gabrielle, 2003, “Globalization of Arbitral Procedure” in 36 Vanderbilt Journal of Transnational Law, p. 1313 raises the rhetorical but important question whether globalization is the cause or the effect of the changes in legal regimes.
67 Supra, note 4, p. 43.
68 Ibid.
69 Ibid.
national customary law, the law merchant, and that the parties to such contracts usually agree to submit disputes to arbitrators chosen by the parties from diverse countries who are usually themselves experts in transnational customary commercial law. The application of this transnational customary commercial law avoids uncertainty in determining what national or local law should be applied, which uncertainty otherwise leads to forum shopping.

Transnational (universal) legal concepts and principles have thus greatly multiplied. Genocide, apartheid, torture, and certain other offences have been added to piracy and slavery as universal crimes that can be tried and punished in any jurisdiction where the offender is apprehended. Similarly, other than customary law developments such as the growth of the law merchant, international codifications such as the Vienna Convention on the International Sale of Goods (CISG) as well as the EC Convention on the Law Applicable to Contractual Obligations (Rome Convention) among others have helped to make uniform some branches of civil law.

Berman further looks at the relevance of conflict of laws in a world characterized by increasing harmonization of legal concepts principles and even basic (substantive) national laws and adopts a historical approach from which he makes two concluding remarks based on different theories of law. Firstly, he observes that from a strictly positivist stand-point there can be no such thing as world law and even the adoption of uniform laws by all the nation – states of the world would not constitute world law unless there were a world government to make and enforce the laws. In any event if the relevant laws of two states are literary identical then, for the positivist, there is no occasion for choice of one over the other since there is no conflict in substance.

71 Supra, note 4, p. 44.
72 This convention was adopted on 11th April 1980 at Vienna. It was set out as a convention that would create uniform rules to govern contracts for the international sale of goods and was thus intended to be the centerpiece of international harmonization of international trade law.
73 The Rome Convention is a European Union convention concluded by the members of the European Union to govern contractual relations within the Union. Though it is in that regard of limited application it remains an important instrument meant as stated in its preamble to continue the work of unification of law which has already been done within the Union. It is also important and taking into account the influence of Europe generally in global trends in the development of both national and international laws.
74 See generally, Supra, note 4
75 Ibid, p. 48.
Secondly, Berman also observes that natural law theory welcomes the fact that there are conflicts rules guiding the application by polity A of the laws of polity B and where justice so requires, there will be such rules of enforcement even if on the surface, particular laws are uniform throughout the world. The natural law proponent is thus concerned with the underlying conceptions of justice, which vary, substantially in different cultures of the world and conflict of laws is thus not eliminated merely because particular laws in the various jurisdictions are literally identical. Thus whereas the basic laws of the nation-states of the world may achieve more harmonization, the question of different interpretations of similar legal concepts or principles intended to serve different goals remains.

From the foregoing, the developments of the twentieth and twenty-first centuries may in this regard be summarized as two-fold thus:

a) There has been an increasing shift from a community based on civil society and the state to a community based on personal autonomy. In this regard Frank Thomas\(^76\) notes that while values of individualism may serve a society well at one stage of development—when personal freedoms generate cultural and economic growth, it may be an embarrassment at a different stage when the communitarian values of a caring society need greater emphasis. The need to emphasize communitarian values however stands in considerable tension to the liberal tradition and calls for a consensus on welfare provisions which requires that society is committed to a core of shared values and that we find a way to embody these in members’ daily conduct. This avoids what Frank Thomas\(^77\) calls ‘individualism ran amok’ that reflects among other things profound value differences and erosion of the sense of community by ‘unbridled individualism’\(^78\).

b) Despite the increase in transnational legal concepts and principles and the fact that national laws are increasingly harmonized there is still a lot of diversity both in content and interpretation such that the subject of conflict of laws is still of great relevance. Yet again,

\(^76\) Frank Thomas *op. cit.* p. 83
\(^77\) Ibid, p. 84
\(^78\) A term used by Amitai Etzioni as quoted by Thomas Frank, note 24 above.
sovereignty may not be as dead as we may want to postulate which leaves the question of conflict of laws wide open.

2.1.3 International Harmonization of Conflict of Law Rules

Within the context of economic interdependence that has been brought about by increased trade flows between nation-states, the extra-territorial impact of domestic authorities' internal public policies increases. Consequently, the legal and administrative system of every state becomes globally relevant. The members of each national community are increasingly subject to the effect of rules of law and decisions by authorities sanctioned by members of different national communities. This is the concept of the rising globalization of public law.

On the other hand international law limits and affects the legislative and administrative powers of states, in order to protect the interests located beyond their borders. Sometimes, the intervention of international law may be much more intrusive, by forcing domestic regulators to effect in the domestic system, rules set out beyond their borders. It is in such a mélange of laws and regulators that conflict of laws operates. There are therefore difficulties many a time in ascertaining what law is to be applied and with what restrictions. These difficulties are what have on many occasions prompted states to come together in efforts to harmonize conflict of laws provisions so that in case of dispute it would be easier to resolve the question of what rules of law apply. These efforts at harmonization have sometimes been within substantive law or as is the case with the Hague Conference on Private International Law they have been specifically directed at conflict of laws.

81 An example is the legal set up within the European Union where regulations of the European Union replace national rules and become effective in member states without any action on the part of national governments (Article 177 of the Maastricht Treaty). Similarly in settling disputes, the Treaty articles, secondary legislation, directives and decisions of the Union are enforceable against member states not only by other member states but also by business firms and individuals.
There have thus been many international attempts at harmonization of conflict of law rules on the international arena. As we observed earlier the rationale for the harmonization of conflict of law rules is the realization that there is need to manage globalization in view of the diversity of national laws.

Efforts at harmonization of conflict of laws include the following:

(a) Harmonization under the Hague Conference on Private International Law.

The Hague Conference on Private International Law (the Hague Conference)\(^82\) is a treaty organization that oversees conventions designed to achieve progressive unification of the rules of Private International Law\(^83\). Thirty-Seven\(^84\) conventions have been concluded under the auspices of the conference since the Seventh Session in 1951\(^85\). The Conference has concluded conventions on a wide range of legal matters including family law, civil procedure, sale of goods, personal law, torts, products liability, agency, international access to justice among others. However, the conference’s success is limited due to the fact that it has only 43 members\(^86\) most of which are European States together with the USA, a few Latin American States, Japan, China, Canada and Israel. Kenya is not a member and Egypt is the only African member.

The Hague Conference has in its conventions dealt with different fields of Private International Law including harmonization of conflict of laws for contracts, torts,

\(^{82}\)The Hague Conference was established in 1955 through the Statute of the Hague Conference on Private International Law International Law by 15 European states that were already working together for the harmonization of Private International Law. It entered into force on 15\(^{th}\) July 1995.

\(^{83}\)Article 1 of the (see also the Resolution of the Seventeenth Session of the Conference.)

\(^{84}\)See <http://www.en.wikipedia.org/wiki/list> for the list of Hague Conventions on Private International Law- last accessed on 6/7/2006

\(^{85}\)Six other conventions had been drawn up under the auspices of the Conference between 1902 and 1905.

\(^{86}\)Hague Conference on Private International Law general information/introductory material at <www.lexmecatoria.org> - last accessed on 6/7/06
maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts.  

b) The International Institute for the Unification of Private Law (UNIDROIT) is the other organization that has made a contribution in the harmonization of conflict of laws. It is an independent intergovernmental organization with its seat in Rome. Its purpose is to study needs and methods for modernizing, harmonizing and co-coordinating private and in particular, commercial law as between states and groups of states. It was set up in 1926 under the League of Nations and was re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT statute, after the demise of the league. The UNIDROIT has overseen the negotiation and conclusion of at least 10 conventions on diverse subjects such as International Sale of Goods, Travel Contracts, Financial Leasing and Factoring among others. The two most prominent UNIDROIT Conventions are the 1964 Hague Convention relating to a uniform law on the International Sale of Goods and the 1964 Hague Convention on the Formation of Contracts for the International Sale of Goods. The UNIDROIT has also come up with the UNIDROIT Principles of International Commercial Contracts, which is private restatement, which has helped in harmonization of conflict of laws.

However, the UNIDROIT is still limited in the extent of its membership, which currently stands at 60 members’ states, and the limited extent of its conventions in subject coverage.

c) International (multilateral) and bilateral conventions also contribute to the harmonization of conflict of law provisions, which are usually negotiated as part of treaty provisions.

87 Ibid.
88 <http://www.unidroit.org/english/presentation/main.htm> -last visited on 14/8/06
89 As at 2001
90 <www.unidroit.org/conventions/htm> -last visited 8/2/06
91 Ibid.
An example is the 1980 Vienna Convention for the International Sale of Goods, which has comprehensive conflict provisions and has been described as “the major instrument for the unification of private law in the last decades.”

The harmonization efforts so far have however face one global limitation in that they come piecemeal since they are in each case limited to the signatory parties and subject covered by the convention.

2.1.4 Role and Effect of Harmonization of Conflict of Laws

An interesting feature of the conflict of laws is that it is concerned with almost every branch of private law. “There is sweep and range in it which is almost lyric in its completeness. It is the fugal music of law”. It is “one of the most baffling subjects of legal science”, as stated by Cardozo J, who on another occasion remarked, “The average judge, when confronted by a problem in the conflict of laws, feels almost completely lost, and, like a drowning man, will grasp at a straw.” An American writer also commented that, “the realm of conflict of laws is a dismal swamp filled with quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” It can therefore only be true that arbitrators who will not usually be as learned in the law (being usually experts from different fields) will be much more confounded by the subject of conflict of laws and even when they may seek expert opinion of lawyers, they may not get as clear guidance as they may hope for.

95 Supra note 40.
96 Prosser, 1953, 51 Michigan Law Review, p. 971
Again historically different jurisdictions will use different approaches to conflict of laws and even a single jurisdiction may have such different approaches. This explains the difficulties that judges will experience in cases with foreign elements in resolving conflict of law issues. The problem is however aggravated by the arbitrator who is engaged in an international arbitration who has to resolve conflict of laws without much to go by from the arbitration agreement. Such an arbitrator will be confronted by different approaches and as much as the approaches may appear simple, the devil is always in the details, which may lead to completely opposite results.

Despite a large literature spanning centuries the conflict of laws field lacks a coherent theoretical foundation of set of rules to resolve problems. Put simply, as a body of rules, “conflict of laws is a source of constant embarrassment to lawyers, judges and scholars.” Although conflict of laws is highly controversial, the number of permutations and combinations arising out of a given set of facts in a case is always limited, as is the number of possible solutions. The choice of law thus depends ultimately on considerations of reason, convenience and utility. The question thus is more often than not, how the proposed choice will work, not only in the case at hand but also in other similar cases in future.

International harmonization of conflict of law rules is thus meant to introduce coherence to the subject by having uniform rules that will be applied to similar cases and producing similar results. This would introduce predictability and efficiency in the law. However three issues are encountered in any efforts to harmonize conflict of law rules.

a) Bargaining Power and Enforcement Difficulties.


99 Supra, note 40, p. 8.

Any effort to push states to agree on choice of law rules likely will be thwarted by the larger states. Larger states are systematically advantaged by using choice of law to enhance the welfare of their markets indicates that they can get away with pro-resident, biases in their choice of law decision-making.\textsuperscript{101} As observed by O'Hara, the larger states prefer not to be confined by rules at all.\textsuperscript{102} These states prefer to further their own commercial and social interests, case-by-case, and the sheer magnitude of their markets gives them the ability to resist interstate choice-of-law compacts. This is in international arbitration law evidenced by the clear preference for party autonomy, which the larger states know to be pro-resident in that their markets are likely to dictate applicable laws to be their own laws. For example if a small Kenyan enterprise is dealing with a large American multinational (as is likely to be) such multinational is likely to insist on arbitration in the US under American law as opposed to the reverse.

b) **Rules or Standards?**

Even assuming that countries are willing to conclude a choice-of-law agreement, will it take the form of rules or standards? To start with, rules, even if at times manipulable, increase certainty and predictability while decreasing judicial/arbitrator discretion.\textsuperscript{103} A mixture of rules and standards however is likely to be optimal.\textsuperscript{104} Unfortunately, the form of law chosen will usually reflect the balance of interest group influence in the treaty drafting body.\textsuperscript{105} Thus in our case herein one can expect that the conflict of law provisions in the Model Law reflect the balance of power in the UNCITRAL which is likely to favour the western world.

c) **Substantive or Procedural?**

The conflict of laws approach to international disagreement is attractive because it ideally enables each individual state to preserve its bundle of substantive laws. O'Hara identifies three reasons why the substantive laws between different states may differ.\textsuperscript{106} First, the balance of

\textsuperscript{102} Supra, note 43, p. 16
\textsuperscript{103} Supra, note 47, p. 17.
\textsuperscript{104} See generally the conclusions by Guzman & O'Hara op.cit.
\textsuperscript{105} O'Hara *op. cit.* p. 18.
\textsuperscript{106} O'Hara *op.cit.* p. 22
interest group pressures varies from state to state leading to differing legislative outcomes. However O'Hara observes that when the balance of influence weighs in favour of one interest in a given state, efforts to harmonize substantive laws in a way that harms that interest is likely to run into difficulties. This assumes however, that each state is only responding to pressure from interest groups within. However, for Kenya and other third world countries, the presence of external pressures is a clear reality and such pressures are likely to produce substantive laws that harm local interests.

Secondly, O'Hara rightly points out that state laws can differ because state environments differ. Thus the conflicts approach promises to help preserve legal diversity by allowing each state to have laws that fit into its social, cultural, economic and political environment.

Thirdly, state laws differ because individual states differ in their willingness to invest public resources into developing particular bodies of law. These bodies of law are valuable to individual states because they attract business to the states. This conflicts approach thus allows for differing laws as each state invests in those laws it deems most crucial to its interests. However this presupposes that the states acknowledge that the substantive laws of other countries deserve respect and that each state has a comprehensive policy vide which it has arrived at a particular law. However, this is not always the case and this leads to lack of comprehensive harmonization in conflict of laws.

The Harmonization of conflict of laws however allows closer interactions and integration between states while allowing them to retain diversity in their substantive laws. The harmonization is also meant to allow jurisdictional competition in that uniform conflict of law rules allow for the application of either of two competing jurisdictions' laws, whereupon each of these jurisdictions will seek to have the better law as an incentive to the parties to choose the same.

107 Ibid
108 O'Hara op.cit. p. 24
109 This is one of the crucial points of this project paper that Kenya must develop a clear policy on arbitration.
2.2 Private vs. Public Interests: The Role of Conflicts of Laws

2.2.1 Party Autonomy

a) Private Transactions: The Rationale for Party Autonomy

Party autonomy is the guiding principle in determining the law applicable to a dispute, the procedure to be followed and the powers of the arbitral tribunal. By this is meant the freedom of the parties to choose for themselves the law or rules of law that will govern their contract. The doctrine was first developed by writers and then adopted by national courts ultimately gaining acceptance in national laws. One commentator has thus stated thus, "...despite their differences, common law, civil law and socialist countries have equally been affected by the movement towards the rule allowing parties to choose the law to govern their contractual relations. This development has come about independently in every country and without any concerted efforts by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws". It is a principle that has been endorsed in national laws as well as by international arbitral institutions and organizations. Indeed the legislative history of the Model law shows that the principle was adopted without opposition. Similarly many arbitral institutions and organization’s rules recognize this principle as a central pillar in international arbitrations.

In understanding the rationale for party autonomy, it is important to realize that the transition from one legal system to another is less apparent in international trade today than the simple

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11 Redfern and Hunter op. cit. p. 278.
12 See for example, UN doc A/CN.9/207, para. 17: “probably the most important principle on which the Model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitrations according to their expectations.”
13 See for example, the Model Law Art. 19 (1), New York convention, Art.V.1 (d), London Court of International Arbitration (LCIA) Arbitration Rules, Art.14 (1) among others. Due to this universal acceptability of the concept of party autonomy and the rationale for the same, which this paper does not deny, we have not gone in an extensive analysis of the concept save for a brief restatement of the rationale to allow an in-depth evaluation of the need for the restriction of the concept which latter issue is the mainstay of this paper.
scenario of an individual who crosses a national frontier on foot or by car, passport in hand. In the latter case the individual realizes that he is moving from one country to another and thus from one legal system to the other. However with modern communication systems, national frontiers are crossed by electronic signals including email, telephone or fax and transactions involved may be complex which raises problems of identifying what law applies and in resolving any conflict between applicable laws.\textsuperscript{114}

The reason why party autonomy is given so much currency in international arbitration is the thesis that because of the international nature of the transactions the subject of such arbitration, national laws, even those well-developed and having modern commercial law codes are not necessarily best suited to the needs of international (as opposed to purely domestic) commerce.\textsuperscript{115} The law of a country will usually, both in its letter and spirit, reflect the social, economic and above all the political environment of that country. This makes national laws unsuitable to the needs of modern commerce, which will usually want to circumvent such national laws. Redfern and Hunter\textsuperscript{116} identify at least three reasons why such law may be unsuitable:

\begin{itemize}
  \item[i)] The law of a closed or planned economy may be too restrictive to the needs of international commerce. This is because such national laws are likely to have such restrictions as currency controls, restrictions on trade( for example permitting certain activities only through state corporations) among others.
  \item[ii)] Even in countries with relatively free market economies, national laws will often be tailored to protect certain national interests. Grain embargoes, import quotas, and trade boycotts among other measures may be imposed from time to time.
  \item[iii)] State contracts involve particular risks where a state party could legislate and change its law if it has been designated as the applicable law purely to alter its obligations under the contract.
\end{itemize}

\textsuperscript{114} Redfern & Hunter op. cit. p. 94
\textsuperscript{115} Redfern and Hunter op. cit. p. 100
\textsuperscript{116} Ibid.
However, the foregoing clearly point to the fact that even developed countries will seek to put certain restrictions on free trade which will at least govern the internal commerce and on other occasions these national laws will also govern international commerce depending first on the choice of law made by the parties and also on the conflict of law rules applicable. Facilitating party autonomy has also been advocated because by its very nature international trade is unlikely to fit within the confines of a single national law however good it is for domestic purposes. Party autonomy thus allows the parties the freedom of choice of the rules of law to govern their contract which may be the laws of a single state, a mélange of such laws or even the law merchant (lex mercatoria).


Article 28 of the Model Law which translated into section 29 of the Arbitration Act 1995, applies in governing the question of rules of law applicable to the dispute. It provides that the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties to the dispute. It also provides that unless otherwise expressed, the designation of a law or legal system of a given state shall be construed to refer to the substantive law of the given state and not to its conflict of laws rules. This latter provision avoids the application of the doctrine of Renvoi, which would lead to confusion, and the results may not reflect the parties’ intentions in choosing that particular law. The Model Law further provides that failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules it considers applicable to the dispute. This provision translates into Section 29 (2) of the Arbitration Act 1995 to read that the arbitral tribunal shall in the absence of choice of law by the parties apply such rules of law that the arbitral tribunal considers appropriate given all the circumstances of the dispute. The Arbitration Act 1995 does therefore move a step further from the Model Law in that the Model Law requires the arbitral tribunal to identify the conflict rules

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117 Act No. 4 of 1995
118 Model Law Art 28(1) and Section 29 91) of the Arbitration Act, 1995
119 On the doctrine of Renvoi, see Dicey and Morris op. cit.
120 Art 28 (2) of the Model Law
applicable and apply them to the dispute to come up with the substantive law applicable. However the Arbitration Act 1995 does actually identify the conflict rules where it applies the “closest connection” approach as the approach to be used by the arbitral tribunal in arriving at the substantive law. This approach is quite liberal and gives the tribunal a free hand in such determination.

Article 28(3) of the Model Law requires that the arbitral tribunal shall only decide the dispute “ex aequo et bono” or as “amiable compositeur” only if parties expressly authorize it to do so. A decision ex aequo et bono or by a tribunal sitting as “amiable compositeurs” would have not much regard for conflict rules because in the first place the tribunal decides the dispute on the basis of fairness without regard for technical rules of law. This provision is replicated in the Arbitration Act 1995.

Finally Article 28(4) of the Model Law provides that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. This provision is again directly imported into the Arbitration Act 1995 and its effect is to reinforce party autonomy by ensuring that the arbitral tribunal does not amend the contract for the parties and where the contract is not express then trade usages will apply.

2.2.2 The Role of Public Law in Regulation of Private Transactions

a) When may an arbitral tribunal derogate from party autonomy?

As observed by Redfern and Hunter, for lawyers who practice in the resolution of international trade disputes, and who have to wend their way through a maze of national laws, the existence of a general transnational rule of law supporting the autonomy of the parties seems almost too good

121 For an exposition of the “connecting factors” approach see generally Dicey and Morris op. cit.
122 A tribunal sitting ex aequo bono or as amiable compositeurs decides the dispute purely on the basis of fairness and without regard to technical rules of law. See Redfern and Hunter, op. cit. p. 43.
123 Section 29 (3) 1995 Act.
124 Redfern and Hunter op. cit. p. 97
to be true. There are thus instances when the rule on party autonomy will be restricted. These include (i) When the parties choice is not bona fide or (ii) is not legal and (iii) the choice or the result of from the choice offends public policy.\textsuperscript{125} As to bona fides, the mandatory rules of law of a country to which all the factual elements of a contract point cannot be avoided (for instance, for the purposes of tax evasion) by the choice of another law as the proper law of the contract.\textsuperscript{126} As to public policy, when a court is enforcing an arbitral award, and is applying a foreign law as the law chosen by the parties, it is not obliged to apply provisions of the law which are incompatible with its own mandatory rules or those of another country with which the contract has a close connection.\textsuperscript{127}

b) The Rationale for Public Law Regulation of Private Transactions

Guzman\textsuperscript{128} argues that in considering an appropriate choice of law approach, the first step is to identify the measure by which any particular choice of law rule will be measured. He argues that consistent with an economic approach, the objective of choice of law is to maximize global welfare. This he admits implies that only the welfare of individuals matter and that traditional choice of law concepts such as national interests or comity will be relevant only to the extent that they affect welfare. However, the liberal approach taken by Guzman and other party autonomy proponents assumes that parties to a transaction act in their own self-interest; that they have full information to enable them act as such and so they will not enter into a transaction unless that transaction increases their well-being.\textsuperscript{129} Guzman acknowledges that such a position may be criticized because it implicitly assumes that government has no role protecting individuals from making bad decisions\textsuperscript{130} and his article takes no view on whether government action to protect individuals in this way through laws such as the doctrine of unconscionability, mandatory securities laws, minimum wage laws, and so on – is desirable in any given situation.

\textsuperscript{125} Ibid.
\textsuperscript{126} See for example Art. 3, Para 3 Rome Convention on the Law Applicable to Contractual Obligations
\textsuperscript{127} See dictum of Lord Wright in Vita Food Products Inc. vs Unus Shipping co. Ltd (1939) Ac 277 at 290
\textsuperscript{128} Guzman, A., \textit{op.cit.} p. 13
\textsuperscript{129} Ibid. p. 15
\textsuperscript{130} Ibid.
Another angle to this issue is brought out by Professor Michael J. Sandel in Democracy’s Discontents who describes the general ascendance of liberal accommodation of individual rights in the American Society (and subsequently exported to the rest of the world). He deplores the excesses of individualism to the detriment of the common good, and the selfless civic virtues that advance it. The general understanding of this liberalism is that so long as a particular law or policy increases global welfare in general terms or net effect, it does not matter how such welfare is distributed or how much one individual had to lose for that global welfare which will only then be enjoyed by particular individuals.

He therefore notes in juxtaposition two theories competing within the American intellectual and political arenas: liberalism (which Thomas Frank notes, regards individuals as the building blocks of society and holders of basic rights) and civic liberalism to which the community is the basis of society and the repository of basic rights).

Whereas Prof. Sandel is describing the typical American Society, the downside of individualism, which he observes, is true even for the global community with reference to international arbitration. Indeed, it is truer for Kenya as a developing state where society and its institutions are not fully developed as to fully support the individualism brought by the concept of party autonomy.

Franck Thomas indeed observes that there is value in appreciating the peculiar difficulties some countries are likely to experience in negotiating certain transitions or sequences. He quotes an example from Professor Hirschman the case of France’s introduction of unprecedented universal male suffrage in 1793 and 1848 which may have been a principal cause for its (by Western European Standards) extraordinary delay—until 1944—in extending the franchise to women.

Prof. Sandel is quoted by Franck Thomas op. cit. at 84
Franck Thomas, op cit. p. 83
Hirschman, F, as quoted by Thomas Franck, note 79 above.
Franck Thomas op.cit., p. 84-5
The above observations lend support to the thesis of this project that there is a need to temper the application of the concept of party autonomy in international arbitration from Kenya's standpoint. This may be for two reasons; first, in recognition that the Kenyan society and institutions are not fully developed to support unbridled individualism and secondly, that from a developing country perspective there are certain public interest concerns which must be upheld for the common good.\textsuperscript{135}

Rising globalization has extended international trade law forcibly into areas, which previously were solely under national jurisdiction thus blurring the traditional distinction between the 'international' and the "domestic".\textsuperscript{136} As a consequence areas such as environment, public health, food safety and social welfare systems no longer fall within the province of a single nation-state alone and can no longer be dealt with adequately on this basis.\textsuperscript{137} Together with the rise of new international or transnational institutions and norms, this reconfiguration of the state means that norms "created elsewhere" affect daily life which was previously unconceivable.

As a result of the blurring of the public-private distinction, and the use in international arbitration of the private sector to carry out what was previously an important public function it is more difficult to discern a public interest, identify specific institutions which should represent it, and to decide how decisions about the production and allocation of public goods should be made.\textsuperscript{138} This question of distributive justice points to there being more losers than winners in the poor countries and raises the question of how to address their plight.

Thus while traditional economic choice of law analysts may have concerned themselves with achieving global welfare this paper proposes that allocative efficiency and equity are equally important and must not be ignored; that the optimum is achieved not in maximizing global

\textsuperscript{135} This position has received the implicit approval of Redfern and Hunter in a footnote where they observe that there is generally a feeling that developing countries need to exercise stricter controls on the concept of party autonomy.

\textsuperscript{136} Trebilcock M.J., & Howse R., 1999, \textit{The Regulation of International Trade}, (2\textsuperscript{nd} Edition) Routledge, New York, p. 9

\textsuperscript{137} \textit{Ibid}, p. 9

\textsuperscript{138} \textit{Ibid}. 

\textsuperscript{9} 38
welfare but in balancing the same with allocative efficiency and equity and this trade off is even more appropriate from a developing country perspective.\textsuperscript{139}

In international arbitration the maximization of global welfare is more than well served by the concept of party autonomy, which allows parties to choose the law governing their contract and any related dispute resolution procedures. This however, leaves the question of allocative efficiency and equity wide open and left unattended one may end up with a few big winners and many losers. Public law therefore comes in to fill this void and achieve a balance between the two competing interests.

### 2.2.3. The Role of Conflict of Laws in Public Law Regulation of Private Transactions

The question that arises is whether there is any connection between public law and conflict of laws. We have examined how Public law regulates private transactions with a view to the protection of public interest. The question therefore is why in seeking the enhancement of Kenya's public interest in the international arbitral process, we bothered about conflict of laws?

The regulation of internal commerce within a particular state is fairly uncomplicated because the state just applies public law concepts to impose restrictions on freedom of contract but as we shall see later this becomes problematic in international trade because the reach of a particular state's law making power is restricted ideally to its territorial limits and may only otherwise be felt through conflict of law provisions. Before addressing the limitations of public law regulation of international commerce it is useful to look at some of the public law concepts applied to regulate private commerce. These include the following:

#### a) Mandatory Rules

These are rules of law, which apply to contractual obligations irrespective of any contrary agreement.\textsuperscript{140} These include such rules as are mandatory irrespective of the governing law of the

\textsuperscript{139} See Redfern & Hunter \textit{op. cit.} at 148

\textsuperscript{140}
contract, which in English law are referred to as “overriding” and in France as “lois de police” or 
lois d’application immediate.” The effect of mandatory rules is that they are a public law 
amendment of a private transaction (contract), which is mandatory and cannot be derogated from 
even by agreement of the parties.

b) Material Essential Validity.
The expression “material or essential validity” covers situations where something in the nature of 
the contract makes it wholly or partially invalid. It includes such matters as formation 
(including the effect of silence), absence of consideration, fraud, duress, and mistake and also the 
legality of a contract. These relate to the existence of the contract and the reality of parties 
consent. Material or essential validity also includes in English law (which has been imported 
into many commonwealth countries) such contracts as contracts to commit a criminal offence, 
contracts in unreasonable restraint of trade, wagering contracts among others. In these instances 
public law is again interfering with purely private transactions and rendering them either wholly 
or partially invalid. The purpose is to either protect the weaker party or public policy.

c) Formal Validity
Public law will in certain instances impose formal requirements for the conclusion of contracts. 
An example of this is in relation to contracts for the sale of land, certain types of consumer 
contracts and guarantees. Such formal requirements may include, the requirement that the 
contract is in writing, or that it is attested in a particular way. This again is public law ensuring 
that a party goes to a particular extent in committing to a contract before the same is regarded as 
valid.

d) Capacity

Maxwell, London, p. 1243
141 Ibid, p. 1250.
142 Ibid, p. 1257
Public law imposes certain restrictions on who may enter into contracts. This involves age limitations for natural persons as well as type and steps of formation and status for artificial legal persons.

e) Public Policy
Public policy generally refers to "fundamental principles of justice, some prevalent conception of good morals or some deep-rooted tradition of the common weal,"\textsuperscript{143} which a nation holds so dear that it will not enforce a contract based on the same.

f) Arbitrability
This is a public law concept applied in arbitration which generally involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts.\textsuperscript{144} Redfern and Hunter\textsuperscript{145} explain the logic behind the concept by observing that in principle, any dispute should be just as capable of settlement by arbitration as by a national court. However, because arbitration is a private proceeding with public consequences some disputes are reserved for national courts, whose proceedings are generally in the public domain.

2.3. Conflict of Laws in the Public Law Regulation of International Arbitration

We now examine the regulation of international arbitration as a private interest and the role of conflict of laws. In this section public law moves from the domestic sphere to the international plane where difficulties are encountered because of the territorial limitations of each individual country's legislative powers. Similarly the fact that different countries have different interpretations of the public law concepts we looked at earlier means that different tribunals are likely to arrive at different decisions from the same set of circumstances. We therefore need to examine how each of the aforesaid public law concepts plays out in international arbitration and in the process appreciate the resultant conflict of laws.

\textsuperscript{143} Cardozo J., in Loucks vs. Standard Oil Co., [224 NY 99, 111; 120 N.E. 198, 202 (1918)]
\textsuperscript{144} Redfern and Hunter \textit{op. cit.} at 148
\textsuperscript{145} \textit{Ibid.}
2.3.1 The Applicability of Foreign Mandatory Rules in International Arbitration

a) Rationale for the Application of Foreign Mandatory Rules

“We cannot have trade and commerce in world markets and international matters exclusively on our terms, governed by our own laws, and resolved in our own courts.”\textsuperscript{146} There will thus be instances when the chosen law is however overridden by a foreign mandatory rule of law. A foreign mandatory rule of law has been described as “an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship.”\textsuperscript{147} Such rule does not form part of the \textit{lex contractus} or law that is chosen by the parties to govern the contract.\textsuperscript{148}

The effect of foreign mandatory rule of a given country is to create an obligation to apply such a rule despite the fact that the parties have expressly subjected their contract to the law of another country. Proponents of party autonomy thus see the application of foreign mandatory rules as a fetter to party autonomy and raise the argument that such rules lead to uncertainty in that they interfere with the predictability brought about by the parties’ choice of law of a given country as the applicable law.\textsuperscript{149} However, in international arbitration such rules allow arbitrators to take into account rules belonging to another legal system other than that chosen by the parties to govern the dispute. Mandatory rules then will serve an important public law function modifying the parties’ contract to serve the public interest of the country originating the mandatory rule and avoid a strict application of the law chosen by the parties.

Others do not always hold the sanctity held by party autonomy proponents of the right of parties to choose their own law in such reverence.\textsuperscript{150} The significance of governing law to the contract

\textsuperscript{146} Redfern & Hunter \textit{op.cit} as quoted by Fenelon, R.L, “Foreign Mandatory Rules in International Arbitration” available at <www.rmck.com/downloads/rmck1> last accessed on 4/10/2006
\textsuperscript{148} Supra, note 93, p. 1.
\textsuperscript{149} Ibid.
\textsuperscript{150} Fenelon, \textit{op. cit.} p. 6.
or dispute is not absolute. There are several grounds advocated for the application of foreign mandatory rules:

b) Grounds for the Application of Foreign mandatory Rules

(i) Many mandatory rules are described as being a matter of “public Policy” which is so commanding that they must be applied even if the general body of law, which they belong to, is not competent by application of the relevant rules of conflicts of law. Thus although we shall consider the application of public policy separately, there is an overlap between the same and mandatory rules in that sense. In this sense however, one may conceptualize mandatory rules as consisting of public policy issues which have expressly been legislated upon and rules for their enforcement made.

(ii) Fenelon observes that there will be mandatory rules, which will not constitute matters of public policy.\textsuperscript{151} Thus public policy is deemed by some authors to be an incomplete answer.\textsuperscript{152} Mandatory rules may be the method more favoured when dealing with issues of anti-trust violations or anti-competitive issues. Fenelon\textsuperscript{153} in this regard observes that an arbitrator would hardly rely on universal standards to uphold foreign anti-trust laws, but is naturally more inclined to rely on the foreign mandatory rules method.

Fenelon\textsuperscript{154} thus poses the question, “why should one refuse to accept, as one of these limits on the lex contractus, the desire to promote the public interest as understood by a state within the sphere of its legitimate legislative jurisdiction?” He gets support from Yves Derains\textsuperscript{155} view that if mandatory rules of law other than those chosen by the parties are involved, arbitrators should not be satisfied with indicating that a mandatory rule is foreign to the lex contractus as a

\textsuperscript{151} Ibid, p. 5
\textsuperscript{153} Supra, note 98.
\textsuperscript{154} Ibid.
\textsuperscript{155} Derains Yves, 1986, “Public Policy and the Law Applicable to the Dispute in International Arbitration” in No. 3 ICCA Congress Series.
reason for not applying it, but must explain why there are no serious grounds for applying the mandatory rules in question.

(iii) Advocates of foreign mandatory rules give credence to the practical view that arbitrators should pay heed to the future of their award, and that a purely pragmatic approach should be encouraged among international arbitrators so they take into account mandatory rules foreign to the lex contractus emanating from states where the award could conceivably be enforced (this will invariably be those countries with a connection to the dispute and whose mandatory rules are likely to be in issue). This view is reflected in Article 26 of the ICC Rules of Arbitration. This view may however be objected to as contrary to the neutrality of the international arbitral process (which neutrality as we shall later see is not as evident as always assumed) as well as encourage state legal expansionism.

(iv) Fenelon also cites the idea that international arbitrators have a duty to uphold the laws of states who effectively allow the existence of international arbitration. The hypothetical rationale being that if national legal systems were to be ignorant or intolerant of arbitration a national judge would have to decide a dispute. To replace the judge with an arbitrator may thus be indefensible in the eyes of state, if it were to result in the sacrifice of public interest held by a state to be essential and which a national judge would have protected. This may similarly be criticized as advocating a return to sovereignty and protectionism, which are undesirable in international trade.

(v) There is another reason that does not appear to have been referred to by the various writers on the subject is the capacity of an international arbitrator to fully appreciate and protect peculiar position of the parties in the absence of such mandatory rules. A criticism usually leveled against judges in national courts is that they are steeped in their own legal traditions and may not be exposed international commerce and its trade usages amongst others. However international arbitrators are also ill-equipped to understand the public interest of a given country or the

156 Fenelon op. cit. p. 6
157 Ibid.
158 Supra, note 103.
peculiar position that one of the parties may be coming from and are unlikely to understand leave alone sympathize with such interests unless they be expressed in the form of mandatory foreign rules. For example an American arbitrator with a history as legal counsel for American multinationals is unlikely to appreciate leave alone sympathize with the possible lack of bargaining power by a third world employee or franchisee dealing with a multinational.

(vi) Another argument is that there is a growing tendency of arbitrators to consider that they are exercising judicial functions, which goes beyond the will of the parties and thus accepting more frequently the need to take into account other laws other than the lex contractus. Fenelon cautions however against merging the province of an arbitrator with that of the judge. An arbitrator derives his authority from the parties and is by and large exercising a private function while a judge is exercising a public function derived from law and state.

c) Arbitrator's jurisdiction to take into account foreign mandatory rules.

The initial reluctance of international arbitrators to have regard to, not to mention apply, foreign mandatory rules lay in the uncertainty surrounding their jurisdiction to do so\textsuperscript{159}. This is because of the concept of non-arbitrability by which areas of law usually touched on by mandatory rules such as anti-trust and competition law were deemed the preserve of national courts and hence non-arbitrable. However in 1985 the United States Supreme Court gave a resounding vote of confidence in international arbitrators' ability and willingness to apply foreign mandatory rules. This was in the famous case of Mitsubishi Motors Corp –vs. Soler Chrysler- Plymouth Inc.\textsuperscript{160}

The brief facts were that Mitsubishi, a Japanese car manufacturer granted exclusive distributing rights to Soler in Puerto Rico. Puerto Rico was under U.S sovereignty. The contract prohibited resale outside Puerto Rico, particularly to the U.S. Soler sought to disregard this prohibition. Swiss law governed the contract and arbitration ensued. Soler argued that the prohibition violated the Sherman "Anti-trust' Act. Soler sought a ruling in the US Federal Court on whether

\textsuperscript{159} Fenelon \textit{op. cit.}, p. 7.

\textsuperscript{160} 473, US 614; 105 S. Ct 3346; 87 L.Ed. 2d 444 (1985)
this was arbitrable arguing that only the US courts had sole competency to decide disputes involving anti-trust law.

The US Supreme Court overruled the court of appeal and held that the US Anti-trust legislation was arbitrable.

Fenelon observes that the arbitrability of European Union Completion legislation has also caused a swell of debate in which even the most conservative of authors believe it is arbitrable. Similarly several ICC cases have held the EU competition laws to be arbitrable. Indeed the 1980 Rome Convention Governing the Law of Contractual Obligations and which was enacted into the legislation of member states of the European Union provides in article 7.1 for the application of foreign mandatory rules of states whose law is not the lex contractus but has a close connection with the dispute.

2.3.2. Public Policy in International Arbitration

a) Rationale for the Application of Public Policy

The concept of public policy remains in arbitration that of "an unruly horse that once astride it, it takes the rider he knows not where. ...it is never argued at all but where other points fail." The esteemed Yves Derains describes public policy or 'ordre public' as consisting "of laws of immediate application whose observance is essential for safeguarding the political, social and economic organization of a country." Another view of public policy is "those mandatory norms that comprise a state's most basic notions of morality and justice". The most comprehensive description is however made by Professor Julian Lew who states that, "public policy reflects the fundamental economic, legal, moral, political, religious and social standards of

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161 Fenelon op. cit., p. 7
162 Ibid.
163 Per Burrough J. in Richardson vs. Mellish (1824) 2 Bing at 252
164 Quoted by Fenelon op. cit., p. 2
165 Fenelon op. cit., p. 2. (Quoting Buchanan - Public Policy and International Commercial Arbitration)
every state or extra-territorial community.... and covers principles and standards which are so sacrosanct as to require their maintenance at all costs and without exception."\textsuperscript{166}

The public policy of a state must be observed and respected in international arbitration. This is reflected in the New York convention of 1958\textsuperscript{167} whose provisions were imported into the UNCITRAL Model Law and subsequently into the Arbitration Act 1995.


The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 provides an international treaty framework for the recognition and enforcement of foreign arbitral awards.\textsuperscript{168} It has been described as the “single most important pillar on which the edifice of international arbitration rests.”\textsuperscript{169}

The New York Convention in providing for grounds for the refusal of recognition and enforcement under Article V provides that the competent authority in the country where recognition and enforcement is sought may refuse the same if the recognition or enforcement of the award would be contrary to the public policy of that country.\textsuperscript{170} The Convention however makes no effort to define public policy and this would be expected because different states view the concept differently and it would have been difficult if not near impossible for the drafters to agree on a definition of the concept.\textsuperscript{171} It is thus left for each state to define its public policy and since the concept is similarly unlikely to be exhaustively defined even in national statutes, it remains to be dealt with on a case-by-case basis. Thus in arbitration the question of public policy will arise at two levels. Firstly, the arbitral tribunal, with the future of its award in mind,

\textsuperscript{166} Fenelon \textit{op. cit.} p. 2. (Quoting Lew - Applicable Law in International Commercial Arbitration)

\textsuperscript{167} Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards 1958

\textsuperscript{168} Bowman P., 1999 “The Panama Convention and its Implementation under the Federal Arbitration Act”.


\textsuperscript{170} Article V.2 (b) of the New York Convention

\textsuperscript{171} Mbobu Kyalo, International Commercial Arbitration, University of Nairobi, LLM, Seminars 2005/6 (mimeo)
would have to consider whether certain aspects of the contract in question or its enforcement are contrary to public policy. Secondly, once the award has been rendered it may be subject to challenge on the ground that it is contrary to public policy.

The provision of the New York Convention on refusal of recognition and enforcement on grounds of public policy were incorporated into the Model Law in which public policy may be a ground either for setting aside an arbitral award or for refusal of recognition and enforcement. These two provisions have in turn been enacted into the Arbitration Act 1995.

There must be compelling reasons before enforcement of a New York Convention award can be refused on public policy grounds. This is not to say that the reasons must be "so extreme that the award falls to be cursed by bell, hook and candle, but the reasons must go beyond the minimum which would justify setting aside a domestic judgement or award." However, the difficulty of both arbitral tribunals and national courts in effecting the delicate balance between the public policy of sustaining international arbitration awards and the public policy for example of discouraging international commercial corruption has frequently been felt. For example, in Westacre Investments Inc. Vs Jugoimport – SPDR Holding Co. Ltd a senior Kuwaiti official was alleged to have obtained, through company A, a consultancy agreement for the payment of a 15% commission to procure government contracts for Yugoslav companies. The courts had to navigate the murky waters to avoid appearing to turn a blind eye to corruption in favour of enforcing arbitration agreements or arbitral awards. Colman J. in analyzing the issues relied on the fact that parties had participated in the arbitration without objection and that they has chosen Swiss Law (which did not deem the contract in issue illegal) to uphold the arbitration agreement and its enforcement.

172 Article 34, 2 (b) (ii) of the Model Law
173 Art 36 (b) (ii)
174 See sections 35 (2) (b) (ii) and 37 (1) 9b) (ii) of the Act
175 Hebei Import & Export Corp Vs Polytelc Engineering Co. Ltd (1999) 2 HICC Far 111 at 122 per Bolchary P J (Court of Final Appeal, Hong Kong)
176 (1998) 2 Lloyd’s Rep 111
This finding was criticized on the basis that the court may have relied on technicalities and an error by arbitrators may have led to the enforcement of an illegal contract.\footnote{177}

c) Proponents of International Public Policy

Some academics favour the concept of international public policy as a solution to the differences between national laws with regard to this concept.\footnote{178} Fenelon\footnote{179} cites Emmanuel Gaillard who argues strongly in favour of the concept of international public policy as opposed to applying foreign mandatory rules. Gaillard uses case law to demonstrate that there does not exist an example of an award in which arbitrators justified a solution by applying foreign mandatory rules. Fenelon supports this argument and relies for a good example on the case of Omnium de Traitement et de Valorization SA Vs. Hilmartin Limited\footnote{180} where a dispute over a commission arose between an English companies engaged by a French company OTV to coordinate administrative matters on the ground so as to procure a public works contract in Algiers. Swiss law governed the contract. The arbitrator decided that the English company’s goal was contrary to an Algerian mandatory rule, which prohibits the use of intermediaries.

However, this award was subsequently set aside by the court of Justice in the Canton of Geneva on the ground that it was “arbitrary.” The court held that unlike corruption, the use of intermediaries did not offend Swiss Law, which was applicable to the merits of the case. There is no doubt that the reason for the arbitrator’s decision was based on a belief that the English company was engaged in corruption. Fenelon thus argues that the arbitral tribunal would have fared better in examining the existence of corruption then reach his conclusion on the basis of transnational public policy. He concludes that latter approach would have been less controversial and more sustainable.

\footnote{178} Fenelon \textit{op. cit.} p. 4.
\footnote{179} Ibid.
\footnote{180} ICC Case No, 5622 (1988)
2.3.3 Arbitrability under the New York Convention 1958, the UNCITRAL Model Law and the Arbitration Act 1995

a) Rationale for Arbitrability

As seen earlier, arbitrability is the other vehicle through which public interest launches itself into the international arbitration arena. It is also closely connected and sometimes intertwined with the concepts of mandatory rules and public policy and especially with the latter. Arbitrability as noted earlier arises because arbitration is a private proceeding with public consequences for which reason different states reserve some categories of dispute for the exclusive resolution by national courts. Each state therefore applies its own public policy to decide which disputes are arbitrable and which are not. A particular state’s conceptualization of this concept may also change with time as the public policy of that state changes with time.181

The domain of arbitration is established by national laws and each state has a right to determine which matters may or may not be resolved by arbitration and this is done in accordance with each state's political, social and economic policy and in practice these can be quite extensive, and have traditionally included criminal matters and those that affect status of an individual or company (e.g. Bankruptcy and insolvency), anti-trust and competition laws, patents and trademarks, bribery and corruption and fraud. Others include securities transactions and contracts between foreign corporations and local agents.182

b) We examine the logic behind some of those restrictions:

i.) Anti-trust and competition laws

The US Supreme Court in the American Safety case stated that:183

“A claim under the antitrust laws is not merely a private matter... Anti-trust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic

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181 See Redfern and Hunter op. cit. p. 148
182 Ibid
183 American Safety Equipment Corp vs J.P Maguire & Co. 391, F 2d 821 (2d. Cir. 1968) at 826
damage. We do not believe Congress intended such claims to be resolved elsewhere than the courts."

However, in the celebrated Mitsubishi Case\footnote{Mitsubishi Motors Corp. Vs. Soler Chrysler-Plymouth Inc., 473 U.S.614; 105 S.Ct. 3346; 87 L.Ed. 2d 444 (1985)} the US Supreme Court ruled anti-trust issues to be arbitrable when arising out of international contracts. This was despite, the public importance of the anti-trust laws, the significance of claimants seeking treble damages as a disincentive to violation of those laws and the complexity of such cases.\footnote{Redfern and Hunter \textit{op. cit.} p. 151.}

ii.) Patents and Trademarks

Whether or not a patent should be granted is a matter that clearly lies in the domain of the state concerned these being monopoly rights that only a state can grant. Any dispute as to their grant or validity is thus outside the arbitration domain. Intellectual Property rights generally and their protection have generated a lot of global heat since the coming into being of the World Trade Organization (WTO)\footnote{A multilateral treaty at Marrakech, Morocco established the WTO in 1994 at the conclusion of the Uruguay Round of GATT talks.} and the conclusion of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) of 1994. Since then the importance of intellectual property in world trade and the balance of power arising therefrom has been felt more than before. The arbitrability of disputes on the grant of such rights or their abrogation by states\footnote{For example in compulsory licensing or parallel importation of crucial HIV - Aids drugs under Article 31 of the TRIPS Agreement.} will continue to generate heat and are unlikely to be considered arbitrable especially from a developing nation’s context. However matters touching on licensing and exploitation of patents as between private parties will usually be deemed arbitrable.\footnote{Redfern and Hunter \textit{op.cit.} p. 149}

iii.) Bribery, Corruption and Fraud

Since these are matters touching on the criminal even when dealt with as civil claims, they raise important questions of public policy which states have traditionally felt are
better dealt with by national courts. The lack of general agreement on interpretation of some concepts makes international agreement difficult and states will sometimes selfishly consider other aspects e.g. fiscal policies where they stand to benefit in allowing a dubious contact to pass than enforcing anti-corruption or anti fraud measures.\textsuperscript{189}

iv.) General Considerations on Arbitrability

The legislators in each country must balance the domestic importance of reserving matters of public interest to the courts against the more general public interest in promoting trade and commerce and the settlement of disputes. In the international sphere, as seen for example in the Mitsubishi case, the interests of promoting international trade as well as international comity have proved important factors in persuading courts to treat certain disputes as arbitrable.

However, the opposite is true in the context of less developed countries and it is proposed that these countries should impose stricter limits on arbitrability so as to retain control over foreign trade and investment, where more economically powerful traders may have unfair advantage.\textsuperscript{190} This includes instances where unscrupulous foreign companies may use influence (bribery and corruption) to obtain state contracts, which are then made subject to international arbitration in arbitral havens that have lax laws in regard to such affairs.

The New York Convention provides that recognition and enforcement may be refused upon proof that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country.\textsuperscript{191} This requirement was also imported into the Model Law, which provides that an arbitral award may be set aside or recognition and enforcement refused on the grounds that the dispute is not arbitrable. This is achieved, in the case of setting aside, under the laws of the seat of arbitration and in the case of refusal

\begin{footnotesize}
\begin{enumerate}
\item The Westacre Case, \textit{supra}, note 123, is a good example of this differential treatment by states.
\item Article V. (2) (a) of the New York Convention
\end{enumerate}
\end{footnotesize}
of recognition and enforcement, under the laws of the state where such recognition and enforcement are sought.192 These provisions have been replicated in the Arbitration Act 1995.

Thus just like it is with the concept of public policy, the arbitral tribunal would have to bear in mind the future of its award in arbitrating on a dispute in which the challenge as to arbitrability may subsequently be raised. However, seeing as it is that the concept of arbitrability just like public policy is to be understood within the context of a particular state, the issue arises as to whether an international tribunal will appreciate leave alone sympathize with the public policy underlying the non-arbitrability of a certain type of dispute from a particular country's standpoint?

2.3.4. The “Commercial” Reservation under the New York Convention.

The New York Convention193 provides that when rectifying the convention, a state may make a reservation declaring that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration. Kenya as a signatory to the convention has not made such a reservation but states such as the United States of America have.

The purpose of such a reservation is to exclude from arbitration or at least from recognition and enforcement, matters and arbitral awards which are non-commercial. The logic behind the “commercial” reservation is the argument that in matters commercial the prime interests concerned are the parties interests and therefore such disputes may comfortably be resolved in arbitration. On the other hand non-commercial matters as noted above in the discussion on arbitrability constitute a bigger stake for the state by way of public interest hence their non-arbitrability.

192 Article 34 (2) (b) (i) and 36 (1) (b) (i) of the Model Law respectively.
193 Article 1.3 of the New York Convention
The Model Law\(^{194}\) on the other hand provides that the same applies to international commercial arbitration. In an end note to this provision\(^{195}\) the Model Law provides that the term "Commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature whether contractual or not. It then sets out a whole range of transactions, which are to be deemed commercial. Notable from this listing is the fact that matters of intellectual property per se, anti-trust among others are omitted, which implies the intention to deem them non-arbitrable.

The Arbitration Act 1995\(^{196}\) provides that the act shall apply to domestic arbitration and international arbitration. It then defines arbitration\(^{197}\) to mean "any arbitration whether or not administered by a permanent arbitral institution." Thus having no commercial reservation under the New York Convention, Kenya makes no distinction between commercial and other transactions for arbitration purposes and under the Act one may seek to arbitrate virtually any type of dispute barring objection on public policy grounds. This is likely to prejudice public interests because if an international arbitration were to be conducted on the basis of the Act, barring any commercial qualification, then the public policy or Kenya would also be liberally interpreted to allow arbitrability of as many disputes as possible.

\(^{194}\) Article 1 (1) of the Model Law
\(^{195}\) See endnote 2 to the Model Law
\(^{196}\) See Section 2 of the Arbitration Act 1995.
\(^{197}\) See Section 3 (1) of the Arbitration Act 1995.
CHAPTER THREE: A COMPARATIVE STUDY OF ENGLAND AND SOUTH AFRICA

3.1 The Mustill Report and the English Arbitration Act 1996

3.1.1 Introduction

Kenya does not have a policy document on Arbitration and Kenya’s adoption of the Model Law was not informed by a sustained approach based on comprehensive consultations with the various stakeholders in arbitration as would be logically expected. Indeed the adoption of the Model law was quite incidental arising as it were from generalized calls by local arbitrators and other stakeholders for the consideration of the Model Law. The Attorney–General then based on these calls published a bill basically adopting the Model Law, which was passed without much ado by Parliament.\(^{198}\) The other consideration is the fact that previously, the development of arbitration law and practice was if anything pretty uncoordinated. The law was to be found in the then Arbitration Act\(^{199}\) which had been enacted in 1968 and had undergone very few amendments since then up to the point of its repeal. Similarly the development of case law on arbitration up to the enactment of the 1995 Act, was in fits and starts, totally uncoordinated and at times going back in time and reversing the gains that had been made over time\(^{200}\). The experience with the courts had previously been one of apathy and indecision. There was therefore little to build on in the search for a new Arbitral law regime for Kenya which is why there was need for a comprehensive study to come up with policy guidelines that would shape the new law as contemplated as well as provide a road map for the future growth of the sector.

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\(^{198}\) Justice (Rtd) Togbor. University of Nairobi LL.M Seminar on International Arbitration, May 2006 (Mimeo)

\(^{199}\) Chapter 49 of the Laws of Kenya (Repealed by Act No. 4 of 1995).

\(^{200}\) A case in point is the case of *Tononoka Steels Limited v. The Eastern and Southern Africa Development Bank* [2002] 2 EA 536 where the Kenya Court of Appeal held that a choice of law clause that chose arbitration under English law did not completely oust the jurisdiction of the local courts to deal with peripheral matters and see to it that any disputes were dealt with or differences were dealt with in a manner agreed. Whereas this looks like a sound proposition of the role of the courts in supervising arbitration the judgment faced criticism because of the general implication it had that courts could meddle with the arbitral process without fitting itself within specific parameters of the Arbitration Act. The case is discussed in greater details later in this chapter.

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3.1.2 The Mustill Report

The development in English Law of Arbitration leading up to the enactment of the English Arbitration act 1996 is a case in contrast to Kenya's situation. The English Law of Arbitration has along history spanning many centuries. As has been observed by Lord Saville of Newdigate, "English law has the most developed law of arbitration of any country. Arbitration has been a popular form of dispute resolution for hundreds of years and the result is a system of rules and principles which has proved extremely popular throughout the world... England is, in fact, regarded as a leading world centre so far international arbitrations are concerned."

Indeed the English arbitration law is well developed. It has evolved over many years and provides a complete code available for those engaged in international trade and commerce that are minded to use arbitration for their dispute resolution.

Notwithstanding the foregoing, the English were not content to rest on their laurels. After the United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law, the Department Advisory Committee chaired by Lord Mustill conducted extensive consultations and issued a report in 1989 (the Mustill Report) which advised against simply adopting the Model Law in place of existing laws, though there were many things in the Model Law which England could usefully adopt. The Model Law was also not a complete code and would in any event have to be supplemented.

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201 Lord Saville was the Chairman of the Departmental Advisory Committee of the UK from late 1994. It was under his Chairmanship that a draft Arbitration Bill was published in 1995 and ultimately passed, with remarkably few amendments, as the 1996 Act.
203 A committee under the English Department of Industry and Trade. The DAC was appointed in 1984 to advise the Secretary of State or Trade and Industry whether the Model Law should be enacted.
205 Ibid, p. 25
The Mustill Report recommended that England should not enact the Model law because, so the Report argued, to do so would be detrimental to English arbitration practice as it had developed over centuries by statutory enactment and decided cases.\textsuperscript{206} Lord Saville\textsuperscript{207} observes that although the Mustill Report strongly expressed its criticisms of the Model Law, it was still regarded in many quarters as "conservative and timid." However, one must seek to understand the opposing interests that the Mustill Committee sought to accommodate which are the following:-

a) The need to have the new Act comprise a statement in statutory form of the important principles of the English law of arbitration as uniquely developed over the years through statute and case law. Mustill thus rejected both the Model Law and an American Style Restatement of Arbitration Law.\textsuperscript{208}

b) The Mustill Committee felt need to avoid the complexities then existing in English arbitration laws and to have a new statute with the structure and language of the Model Law. This would enhance its accessibility to those familiar with the Model Law and encourage foreign lawyers and business people to designate London as the preferred venue for the resolution of international commercial disputes.\textsuperscript{209}

Although these twin concepts are prima facie opposing concepts, they were both meant to serve one purpose expressed in the Mustill Report as "serving to keep London in the vanguard of the preferred venues for international commercial arbitration."\textsuperscript{210}

Similarly the Mustill Committee in England had occasion to consider the three goals of the Model law which it summarized thus:

\textsuperscript{206} Ibid, p. 9-11
\textsuperscript{207} Supra, note 5 p 22
\textsuperscript{208} Supra, note 7 p 34
\textsuperscript{209} Ibid.
\textsuperscript{210} Ibid.
f) Harmonization as an end in itself
Since harmonization of arbitration laws in international commerce was the avowed aim of UNCITRAL in drafting the Model law the Mustill Committee felt that it should be considered as an end in itself. In so considering it the Committee felt that this was a philosophical argument which presupposes that uniformity of laws is to be preferred to diversity. The Committee raised the question whether competition between jurisdictions would not be better since it would offer better choices. The committee therefore called for a critical evaluation of this goal and came up with the conclusion that, “...considerations in favour of harmonization as an end in itself, while they cannot be entirely disregarded, carry very much less weight than considerations relating to the intrinsic merits of the Model Law. Only if all other considerations were evenly balanced might harmonization in itself constitute a sufficient reason for enacting the Model Law.” 211

g) Keeping in step with international trends in arbitration law
The Mustill Committee also considered this as a separate ground, though similar to harmonization, which would influence the adoption of the Model Law. This the committee opined arose out of political considerations based on the apprehension that quite apart from any virtue in the harmonization of arbitration laws, to be seen to repudiate a measure which commands the support of an international body like the UNCITRAL, and which a number of countries had looked upon with favour, would attract disfavour and may cause serious damage in some general way and may also act as a deterrent to the bringing of arbitrations to that particular state.212 Thus although the Mustill Committee recommended the continuous monitoring of trends in the adoption of the Model law, it was not a factor that it particularly gave a lot of weight.

h) The intrinsic merits of the Model Law
The Mustill Committee concluded that this was the predominant consideration to be made by the UK, the question being whether the Model Law offered a better framework for the

211 Supra, note 7 p. 16
212 Ibid, p. 17
conduct of international arbitration. The committee further observed that this is a consideration to be made separately for each of the law districts of the UK namely England, Wales and Northern Ireland and Scotland.

The Mustill Committee analyzed the Model Law and classified the articles of the Model Law, which it found likely to have significant effect into three categories namely, those provisions that would be beneficial or neutral, provisions where the benefits were debatable and finally, provisions that would have detrimental effects. Among those it found detrimental included Article 7 on definition and form of arbitration agreement which the committee opined would introduce an unwelcome distinction between those arbitration agreements in international commerce which are recognized as binding although not signed by the parties (e.g. those in bills of lading, broker’s contract notes, etc) and those where agreement is in a formal signed document.

Similarly the Committee felt that the grounds for setting aside under article 34 of the Model Law were not wide enough to cover all cases of unfairness or serious irregularity. Finally, as regards the grounds for refusal of recognition and enforcement the Committee felt that the court’s power of summary enforcement of an award which existed in England and which the committee deemed invaluable where there existed no real grounds for defence appeared inconsistent with Article 36.

In rejecting the Model law the Mustill Committee stated thus:

“It seems to us that the weight of these arguments is really all one way... Judged on its intrinsic merits the Model Law has some features which could be of some benefit, principally as statutory statements of existing common law principles... A number of provisions of the Model Law would be detrimental, and others of doubtful benefit, to the law and practice of arbitration... The arguments in favour of enacting the Model Law in the interests of harmonization, or of thereby keeping in step with other nations,
are of little weight... We recommend that the Model Law should not be enacted for
the law districts of England and Wales and Northern Ireland\textsuperscript{214}."[Emphasis added]

In the circumstances the Mustill Committee made certain recommendations in which it
recommended a new statute bearing among others the following features.\textsuperscript{215}

a) "It should comprise a statement in statutory form of the more important principles
of the English law of arbitration, statutory and (to the extent practicable) common
law.

b) It should be limited to those principles whose existence and effect are
uncontroversial.

c) It should not be limited to the subject matter of the Model Law.

d) Consideration should be given to ensuring that any such new statute should, so far
as possible, have the same structure and language as the Model Law, so as to
enhance its accessibility to those who are familiar with the Model Law.

The Mustill Report, was however the beginning rather than the end of the search for a new
arbitration statute for England. The recommendations of paragraph 108 of the Mustill Report
were accepted by the then Secretary of State for Trade and Industry and various drafts both
official and private were prepared and were the subject of extensive consultation and debate.\textsuperscript{216}

It is then that the Departmental Advisory Committee then chaired by Lord Saville drafted a Bill
which was published in 1995. After months of further consultation and redrafting, a bill was
introduced in the House of Lords in December 1995, and with a few amendments passed in June
1996.

3.1.3 The (English) Arbitration Act 1996

Although the Mustill Report appeared to reject the Model Law, it is quite notable from the outset
that virtually every article of the Model Law is reflected in a section of the 1996 English

\textsuperscript{214} Ibid, p. 25

\textsuperscript{215} Ibid, p. 34

\textsuperscript{216} Bernstein, et al, supra note 5, p. 23.
Arbitration Act, in the same order and sometimes the same language, even if limited to key phrases. Bernstein\textsuperscript{217} observes that in practice, it proved easier to adopt the structure and express the spirit of the Model Law, than to adopt wholesale the specific language of specific provisions. The end result is that the Act ended up being far more than the "intermediate solution" contemplated by the Mustill Report\textsuperscript{218}

The (English) Arbitration Act 1996, unusually for a common law jurisdiction\textsuperscript{219}, is underpinned by general principles expressed as statutory duties, in a manner more usually found in codified law systems. Three principles are set out in the 1996 Act:

a) The object of arbitration is expressed to be to obtain "the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense."\textsuperscript{220}

b) Party autonomy (which is actually the most important principle in arbitration today) is provided for where "the parties should be free to agree how their disputes are resolved, subject to such safeguards as are necessary in the public interests".\textsuperscript{221}[Emphasis mine]

c) The role of the court is severely restricted ..."the court [shall] not intervene except as provided by this part"\textsuperscript{222}

These principles are the foundation of Part 1 of the Act (dealing with arbitration pursuant to an arbitration agreement) and are "the touchstone by which any proposed use of any of the provisions can be tested". The question is whether the proposed use tending towards or away

\textsuperscript{217} Ibid.
\textsuperscript{218} Paragraph 108 of the Mustill Report contemplated an Act that would as an intermediate solution pending a more comprehensive Act that would call for a lengthy period of planning and drafting, or prolonged parliamentary debate.
\textsuperscript{219} Bernstein, et al. op. cit., p. 23.
\textsuperscript{220} Section 1 (a) of the Act
\textsuperscript{221} Section 1 (b) of the Act
\textsuperscript{222} Section 1 (c) of the Act
from the object of arbitration. If for example, the proposed use appears derogate from party autonomy, then, the next question is whether the departure is necessary in the public interest.

(i) Rules Applicable to Substance of the Dispute under the (English) Arbitration Act 1996

The English Act has no different provisions on choice of law than the Model Law. Section 46 of the 1996 English Act which is the applicable section has substantially the same provisions as Article 28 of the Model Law and section 29 of Kenya’s Arbitration Act 1995. These basically provide that the dispute is to be decided in accordance with the law chosen by the parties and barring such choice, by the law that the arbitral tribunal considers applicable. Similarly the 1996 English Act avoids the application of the doctrine of Renvoi by providing that the choice of the laws of a country shall be understood to refer to its substantive laws and not its conflict of laws rules. The only difference is that unlike the Model Law and the Kenyan Arbitration Act 1995 which specifically provide that the arbitral tribunal may only decide the dispute ex aequo et bono or as amiable compositeurs if the parties have expressly authorized it to do so and in all cases according to the customs and usage of the trade, the 1996 English Act uses a broader approach by providing that the tribunal shall if the parties so agree, decide the dispute in accordance with such other considerations as are agreed or determined by the tribunal. Bernstein et. al. have commented that the existence of these clauses especially under English Law probably derive from a mistaken belief that the application of particular rules necessitates a strict adherence to the literal meaning of the words of the contract. This, they observe is not the case as pointed out by Lord Diplock in the case of Antaios Cia Naviera SA Vs. Salen Rederierna AB (The Antaios) where he stated.

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223 Bernstein, et al., op. cit., p. 24  
224 Section 46 (10 (a) and (3) of the 1996 Act  
225 Section 46 (2) of the 1996 Act  
226 Section 46 (1) (b) of the 1996 Act  
227 Bernstein, et al., op. cit., p. 37  
228 [1984] 3 All E. R. 229, 233
"I take this opportunity of restating that, it detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

(ii) Restrictions on Party Autonomy

There is little if any restriction on party autonomy in international arbitration in the 1996 English Act. Indeed most of the provisions that amount to serious fetters on party autonomy relate to domestic arbitration agreements provided for in Part II of the Act. These relate to the application of unfair terms regulations to consumer arbitration agreements, and the provision that an arbitration agreement will be considered unfair where a modest amount (as determined by the regulations aforesaid) is sought.

Similarly, the 1996 English Act excludes the application of Part I of the Act (under which party autonomy is reinforced) from small claims arbitrations in the county court. This means that such arbitration remains statutorily controlled.

(iii) General protection of Public Interest under the (English) Arbitration Act 1996

The (English) Arbitration Act has a few provisions, which are intended to secure generally public interest in the arbitral process, which go beyond the Model Law. The first of these is the extent of court intervention allowed under the 1996 English Act. This includes the following:

a) Challenge against an arbitral award under the 1996 Act is broader than allowed under the Model Law. The 1996 English Act in settling out the grounds for challenge provides that the same may be done on the basis of serious irregularity affecting the tribunal, the proceedings or the award. Although the grounds constituting serious irregularity include substantively (the terminology may

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229 Section 89 of the 1996 Act
230 Section 90 of the 1996 Act
231 Section 92 of the 1996 Act
232 By virtue of S. 64 of the County Courts Act 1984 of England
233 Section 68 of the Act
234 Section 68 (2) of the Act
differ) the grounds provided for by the Model Law, the 1996 English Act has additional grounds which may not be brought within the Model Law including:-

i. "failure by the tribunal to deal with all issues that were put to it;\textsuperscript{235}

ii. "uncertainty or ambiguity as to the effect of the award;\textsuperscript{236}

iii. "Failure to comply with the requirements as to the form of the award;\textsuperscript{237}

iv. "any irregularity in the proceedings or award which is admitted by the tribunal ...\textsuperscript{238}

Although the above four provisions may be brought within the Public Policy requirement in the Model Law, they are explicitly provided for in the 1996 English Act which makes their enforcement more straightforward.

b) Appeals against an arbitral award are not provided for in the Model Law\textsuperscript{239} which provides that recourse to a court against an arbitral award may only be made by an application for setting aside in accordance with Article 34. Further, if the court finds it appropriate it may suspend the setting aside of proceedings to allow the arbitral tribunal rectify the award and obviate the need for setting aside. On the other hand under Kenya’s Arbitration Act 1995, in addition to the Model Law provision above, appeals are only allowed for domestic arbitrations subject to the agreement of the parties.

However, the English Act goes beyond the provisions of the Model Law and allows appeals on points of law.\textsuperscript{240} An appeal under the Act may only be brought by agreement of the parties or with leave of the court.\textsuperscript{241} Thus if a party applies to appeal, if it satisfies the court of the need, it could obtain leave in which event the consent of the other party is obviated. The section also

\textsuperscript{235} Section 68 (2) (d) of the Act
\textsuperscript{236} Section 68 (2) (f) of the Act
\textsuperscript{237} Section 68 (2) (h) of the Act
\textsuperscript{238} Section 68 (2) (i) of the Act
\textsuperscript{239} Article 34 (1) of the Model Law.
\textsuperscript{240} Section 69 (1) of the 1996 Act
\textsuperscript{241} Section 69 (2) of the 1996 Act
provides for the basis on which the court may grant leave which cumulatively are when, the
rights of one or more of the parties are substantially affected;\footnote{Section 69 (3) (a) of the 1996 Act} when the question of law is one
the tribunal was asked to determine;\footnote{Section 69 (3) (b) of the 1996 Act} where on the basis of findings of fact in the award, the
decision of the tribunal on the issue is obviously wrong, or the question is of general pubic
importance and the decision of the tribunal is at least open to serious doubt;\footnote{Section 69 (3) (c) of the 1996 Act} and that despite
the arbitration agreement, it is just and proper in all the circumstances for the court to determine
the question.\footnote{Section 69 (3) (d) of the 1996 Act}

The other issue that arises with the allowance of appeals is what the court may do upon appeal. Section 69 (7) provides that the court may confirm the award, vary the award, remit the award to
the tribunal in whole or in part for reconsideration in light of the courts’ determination or set
aside the award in whole or in part. The fact that the court can vary the award in addition to
setting aside the same means that the finality of the arbitral award is compromised in favour of
the need to ensure that it is legally valid. Indeed the Act further provides that a further appeal
may be made with leave to the court of appeal which is not to be given unless the question in
issue is of general importance or for some other special reason.\footnote{Section 70 (1) of the Act}
c) Under the Act a saving is made for the application of matters governed by
other rules of law so long as they are consistent with the provisions of Part I of
the Act.\footnote{Section 81 (1) of the Act} Although the marginal note to the section indicates that the saving is
for matters governed by common law, an actual interpretation of section 81 (1)
would apply even mandatory rules of other statutes so long as the grounds for
their application under the section are met. These grounds include rules of law
relating to arbitrability,\footnote{Section 81 (1) (a) of the Act} the effect of an oral arbitration agreement;\footnote{Section 81 (1) (b) of the Act} or the
refusal of recognition and enforcement of an arbitral award on grounds of
Public Policy. Thus under this section, the 1996 Act with the use of careful camouflage seeks to retain the application of rules of law that serve public interest without rousing too much suspicion.

In summary the following is notable from the treatment of party autonomy and public interest under the 1996 Act:

a) There is no major attempt to deviate from the concept of party autonomy. This may not be a surprise since as earlier noted; a large economy like the United Kingdom may not be too keen on restriction by particular rules of law and may be better served by liberal attitude to business.

b) There is a little of public interest catered for in the 1996 Act but which is well camouflaged as not to seriously arouse the suspicion of foreign business interests. This may be achieved from several frontiers. First, the English economy being large enough will naturally attract business irrespective of the state of its law. Secondly the English are already well established in international arbitration and subtle rules in their favour are unlikely to arouse serious issues as would a newer entrant. For example, when it comes to provisions for appeals against arbitral awards, the argument would be that England is well developed with a sound court system that will soundly apply the law and efficiently at that and there is nothing to worry about. For a developing country suffice it to say the story would be different.

c) Thirdly even the English Arbitration Act 1996 itself is fairly complex (in comparison to the Model Law). This coupled with numerous references to other statutes makes the effect less well felt and this helps in camouflaging the public interest provisions. The English situation may thus not be of comparable status with Kenya's. However, it serves to bring out the contrast in looking for viable solutions as both Nairobi and London will be completing on the same world stage to be seen as sound business attractions and arbitration centres.

\[^{250}\text{Section 81 (1) (c) of the Act}\]
3.2 Lessons from Africa - The South African Case

3.2.1 A Historical Perspective of South Africa’s Response to the Model Law

South Africa perhaps presents a better case study for comparison with Kenya. Both are African countries facing similar challenges and though the South African economy is generally speaking, more developed than Kenya’s, both countries are in cut throat competition seeking to position themselves as investment centres of choice in sub-Saharan Africa and in their respective regions.

South Africa came out of economic isolation upon the end of the apartheid era in the early 1990s and the conduct of the free elections in 1994 through which the African National Congress under Nelson Mandela took power. This heralded the increase of regional and international trade and economic links between South Africa and other countries. It is with the above background that on 1st August 1994, the Executive Director of the Association of Arbitrators (Southern Africa) wrote to the South African Law Commission, submitting a draft bill intended for domestic arbitration together with an explanatory memorandum.251

On 29th August 1994 the Justice Minister approved the inclusion of an investigation entitled "Arbitration" in the Law Commission’s programme of law reform. The Commission then decided that a logical starting point was to investigate how South Africa should respond to the UNCITRAL Model Law. As a result working paper 59 “Arbitration”, was produced and circulated in September 1995.252 Comments were called for on the working paper 59 and on 1st January 1996 the Law Commission was reconstituted and a new Project Committee for the arbitration was established.253 After further consultations including discussion papers,254 and regional workshops, the Law Commission finally rendered its report in 1998255 which included a

252 Ibid.
253 Ibid p. 30
254 Most important was Discussion paper 69 containing the Project Committee’s initial draft bill
The draft bill is however yet to be tabled in the South African parliament and the soundness of its recommendations tested in practice. However the Law Commission’s report contains relevant lessons for Africa in general and Kenya in particular.

The Law Commission recommended that the Model Law should be adopted for international arbitrations only because domestic arbitrations were already being considered separately and the commission felt the matter was urgent enough in view of the adoption of the Model law by competing African jurisdictions such as Kenya and Zimbabwe.

The Law Commission was strongly of the view that the Model Law should be adopted with a minimum of alterations, for two main reasons. First, the goal of the Model Law is to promote harmonization and thus the uniformity of national laws pertaining to international arbitral procedures. Secondly, the absence of changes will make South African version more user-friendly and attractive to foreign parties and their lawyers which is one of the stated goals of the Model Law.

### 3.2.2. Public Interest Issues in South Africa’s Response to the Model Law

In seeking to achieve the above objectives the South African Law Commission had to grapple with a number of issues:

a) The Commission had to walk the tight – rope in seeking the delicate balance between giving enough judicial support to arbitration to enable it work effectively and firmly (especially when dealing with non-compliant parties) and

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256 Annexure F to the Law Commission report (ibid) – Draft International Arbitration Bill for South Africa (proposed Final Version).
258 The concept “international arbitration” is defined in article 1 (3) of the Model Law.
keeping the courts off from the arbitral arena to avoid excessive interference.\textsuperscript{262}

In reference to the (English) Arbitration Act 1996, the Commission noted that suspicion has existed, particularly among foreigners that English courts were only too ready to interfere with the arbitral process and to avoid similar pitfalls, the Commission recommended that “significant departures from the Model Law in this regard would adversely affect South Africa’s chances of developing into an important regional centre for international commercial arbitrations.”\textsuperscript{263}

b) The Commission observed that the Arbitration Act 1996 in England, “which is influenced rather than based on the Model Law,” contains some important innovations aimed at rectifying problems which are prevalent both in English and South African practice.\textsuperscript{264}

c) The Commission also had to find a way of dealing with interests peculiar to South Africa which it felt should incorporated which include the following which are relevant to this project paper:-

(i) Definition and Form of Arbitration Agreement

The Law Commission observed that the requirement for and definition of an agreement in writing under Article 7 of the Model Law may not be sufficient to cover the needs of a particular country prompting modifications as the English Act of 1996 has done.\textsuperscript{265} Thus the English Act additionally provides that, an agreement in writing under Section 5 includes, where the agreement is not signed by the parties\textsuperscript{266}, where the agreement is evidenced in writing\textsuperscript{267} and

\textsuperscript{262} The South African Law Commission report, Para 2.11
\textsuperscript{263} Ibid, paragraph 2.12
\textsuperscript{264} The commission referred to the Hong Kong Arbitration Ordinance (as amended in 1996) which appeared to the Commission to adapt rather than adopt the Model law for international arbitrations thereby undermining the goal of uniformity. The Commission argued that Hong Kong is apparently sufficiently established as an international arbitration centre to be able to do this. (See Para 2.7 of the Commission report)
\textsuperscript{265} S.5 of the English Arbitration Act 1996. An agreement in writing in Article 7(2) of the Model Law is defined to include a document signed by the parties or an exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement; or an exchange of pleadings in which the agreement is alleged by one party and not denied by the other; or is included by reference to a document containing an arbitration clause.
\textsuperscript{266} S.5 (2) (a) of the (English) Arbitration Act 1996.
\textsuperscript{267} Ibid, S.5 (2) (c) of the Act.
where the parties agree otherwise than in writing by reference to terms which are in writing and where the agreement made otherwise than in writing is recorded by one of the parties or by a third party with the authority of the parties to the agreement, all of which provisions are absent or not clearly stipulated) in the Model Law. The Commission also referred to the example of the (Singapore) International Arbitration Act 23 of 1994 S.2 (1) which expressly deals with the question of bills of lading which may contain arbitration clauses yet there is no signature by the consignor or writing from the side of the consignor to bring the arbitration clause within the definition in article 7 of the Model Law and since the bill of lading is not of itself a contract, the situation is not covered by the last sentence of Article 7 (2) of the Model Law.

(ii) Number of Arbitrators

The South African Law Commission departed from the Model Law in recommending that whereas parties are free to agree on the number of arbitrators (as is the case with the Model Law), if they fail to agree, the tribunal shall consist of a sole arbitrator. This is a modification that has been done by several countries including England and Kenya. The logic behind the proposition for one arbitrator is the reduction of expense which the commission found in line with South African practice. Other jurisdictions such as Zimbabwe and New Zealand have the approach of one arbitrator for domestic arbitrations and three for international ones. The concern of costs is not an especially trivial one from a developing country context as most local businesses are likely to feel the expense of putting in a deposit of fees for three arbitrators irrespective of whether such cost can or may be recovered upon the issuance of an award.

(iii) The “Commercial” Qualification.

\(268\) Ibid, S.5 (3) of the Act.
\(269\) Ibid, S.5 (4) of the act.
\(271\) Ibid, Para 2.159 & 2. 160
\(272\) S. 15 (3) of the (English) Arbitration Act, 1996
\(273\) S. 11 (2) of the (Kenyan) Arbitration Act, 1995
\(274\) (Zimbabwean) Arbitration Act of 1996 Sch. 1 Art 10.
As earlier pointed out Article 1(1) of the Model Law applies to international “commercial” arbitration, with a definition of “commercial” being provided in a footnote. The South African Law Commission referred to the Hong Kong statute, which removed the reference to “commercial” and deleted the footnote as well as the Australian version of the Model Law, which retained the definition in a footnote. It is also notable that the Kenyan Act also omitted the definition and footnote.

The South African Law Commission was however not in favour of omitting the word “commercial” in Article 1(1). The report notes that its inclusion emphasizes that the Model Law is intended to apply to commercial relationships, and not to non-commercial disputes. The Commission also considered whether or not to retain the definition of commercial and was of the view that if the same was to be retained it would be better off in a sub article rather than a footnote. However at the end of the day, the commission noted that the inclusion of the definition in a footnote was because the drafters could not formulate a generally acceptable definition. The commission was thus of the view that the definition may have certain gaps which could be utilized by evasive parties. This was despite the commission noting the broad and permissive language of the definition as well as the fact that it is clear from the “travaux preparatoires” of the Model Law that “commercial” is intended to be broadly interpreted. That the term is limited to contracts between merchants, but it is not intended to infringe on the doctrine of sovereign immunity and that while it is not restricted to the subject-matter of commercial codes it is not intended to cover labour disputes or consumer claims. Ultimately due to the doubts on the exhaustiveness of the definition, the Law Commission opted to leave it out.

(iv) Arbitrability/ Non- Arbitrability

275 See Chapter 2, supra, p. 14
278 The South African Law Commission Report, op. cit. Para 2.103
279 Ibid, paras 2.103 & 2.104 and accompanying footnotes 71
Article 1(5) of the Model Law makes it clear that the Model Law is not intended to affect other laws of the relevant state regarding arbitrability of disputes. In South Africa, there is the common law prohibition on arbitrations on criminal matters, restrictions under the Insurance Act 27 of 1943,\(^{280}\) as well as other restrictions on arbitrability contained in Section 2 of the Arbitration Act 42 of 1965. The Law Commission while observing the above also noted that other jurisdiction such as New Zealand and Zimbabwe have provisions in their statutes making it clear that the enactment of the Model Law does not affect arbitrability of disputes.\(^{281}\)

The Draft Bill in the Law Commission’s Discussion paper 69 had addressed the problem of arbitrability with a negative provision as follows:-

"**Matters not subject to arbitration**

6 (1) A reference to arbitration shall not be permissible in respect of any matter relating to status.

(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or under any other law; such a dispute is not capable of determined by arbitration.

(3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration.”\(^{282}\)

The Law Commission first dealt with the potential difficulty in the meaning of the term “status” and concluded that an attempt to define “status” would create more problems than it would solve\(^{283}\). The Law commissions Project Committee thus recommended that reference to “status”

\(^{280}\) S. 63 (1) of the Act.

\(^{281}\) The South African Law Commission Report, Para 2.40

\(^{282}\) The South African Law Commission Report, Para 2.41

\(^{283}\) *Ibid*, Para 2.42
be deleted and to circumscribe arbitrability in another way with reference to recently revised provisions on arbitrability in civil law jurisdictions.\(^{284}\) In this regard, the Commission’s report observes that the Swiss Private International Law Act 1987 Article 177(1) provides that “any dispute involving property can be the subject matter of arbitration.”\(^{285}\) The Swiss article provides the basis for the first part of article 1030 (1) of the New German Code of Arbitration, which reads, “Any claim involving an economic interest can be the subject of an arbitration agreement. The remainder of the German article 1030(1) provides “An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to come to a settlement on the issue of the dispute.”\(^{286}\). The Netherlands Arbitration Act of 1986 defines arbitrability negatively as follows: “The arbitration agreement shall not serve to determine the legal consequences of which the parties cannot freely dispose.”\(^{287}\)

After debating on appropriate wording and drafting,\(^{288}\) the Law Commission recommended a new provision in the draft bill which defined arbitrability positively as follows:

"Matters subject to arbitration

7. (1) For purposes of this chapter, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement is contrary to the public policy of South Africa or, under any other law of South Africa, such a dispute is not capable of determination by arbitration.

\(^{284}\) Ibid, Para 2.43

\(^{285}\) Ibid.

\(^{286}\) Ibid, Para 2.44. The English translation of the German text was published in (1998) 14 Arbitration International 3.


\(^{288}\) Ibid, Para 2.46 – 2.49.
The fact that an enactment confers jurisdiction on a court or other tribunal to determine by any matter shall not, on that ground alone, be construed as excluding determination of the matter by arbitration.”

(v) Rules Applicable to the Substance of the Dispute.

The South African Law Commission observed that the provisions of the Model Law Article 28 are more conservative than some systems of national law regarding the tribunal’s power to choose the substantive law in the absence of a choice by the parties. The commission therefore noted that it could not agree with the view of one respondent to the working paper No. 59 that Article 28(1) and (2) “deal cryptically and obscurely with difficult questions of conflict of laws.” The commission therefore recommended that the provisions of Article 28 be adopted unchanged.

(vi) Recourse against Award

The South African Law Commission also had occasion to revisit the grounds for setting aside an award as provided for in Article 34 of the Model Law. The article contains an exclusive list of grounds for recourse against an award under the Model Law. The Law Commission considered the question as to whether the setting aside of an award under article 34 in the country where it was made rendered the award unenforceable in all other countries or the setting aside will only usually render the award unenforceable in another country but enforcement may still be appropriate where the basis of setting aside was a ground which is not internationally recognized for that purpose.

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289 The Commission quotes Redfern & Hunter, supra note 90, at 124 where the authors have made reference to the position under French, Dutch and Swiss law.
291 Ibid, Para 2.225.
The Law Commission also considered the fact that the specific procedural irregularities cited under article 34 of the Model Law do not cover "misconduct" and "gross procedural irregularities" and although these would be covered under the public policy ground, the commission felt that there is need for a provision in the draft bill to make that clear.\textsuperscript{294}

The Commission therefore proposed a further addition to Article 34 2 (b) (ii) reading:

"For the avoidance of doubt, and without limiting the generality of paragraph (2) (b) (ii) of this article, it is declared that an award is also in conflict with the public policy of South Africa if;

vi) a breach of the tribunals duty to act fairly in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or

vii) the making of the award was induced or affected by fraud or corruption."\textsuperscript{295}

(vii) Recognition and Enforcement of Awards

The South African Law Commission observed that although some further improvements to the wording of the grounds for refusal of recognition and enforcement as provided in the New York Convention Article V could have been made in the Model law, the need for harmony between the two was considered more important.\textsuperscript{296}

However, as in the case of article 34 on setting aside, the public policy defense to an application for enforcement was to include situations where the arbitral award is tainted by a serious procedural irregularity. To avoid any doubt on this point the Law Commission recommended

\textsuperscript{294} Ibid, Para 2.261.
\textsuperscript{295} Ibid.
\textsuperscript{296} The South African Law Commission Report, Para 2.268.
the inclusion of a provision similar to article 34 (5) discussed above which had been done in other jurisdiction.\textsuperscript{297}

3.2.3. **Summary of the South African Case**

It is notable that the South Africans have contemplated various departures from the Model Law as discussed above. Indeed the Law Commission report contains more instances where the draft bill in South Africa contemplated more departures from the Model Law which departures may not be relevant to this paper. However, the important lesson for Kenya from the South African case is that whereas the need to conform to the Model Law and therefore remain relevant and attractive in International Commercial Arbitration is very real and compelling, the balancing act of taking care of essential national interests is equally important and cannot be under-estimated.

4.1 Kenya’s Public Interest: Myth or Reality

Kenya’s public interest with reference to international arbitration in various sectors would be discerned from various statutes and case law as developed by the courts. However, the same may not be so easily discernable because there is little expression of the same in statutes or even in case law. This therefore raises the question whether the same is a myth or a reality and if a reality, how then is it catered for or how it should be protected.

4.1.1 Statutory Expression of International Arbitration Related Public Interest in Kenya

There has not been a clear expression of public interest in statutory form in Kenya. We however examine the two statutes on arbitration in Kenya’s history for the same:

(a) The Arbitration Act (Cap 49 Laws of Kenya) (now repealed)

This was a simple statute enacted in 1968 at a time when Kenya had just come from colonization after independence in 1963. The economy had therefore not taken shape and international trade was nowhere near today’s levels. Indeed for many years after independence most international trade was conducted by state enterprises and a few multinationals and arbitration as a mode of dispute resolution was mostly relegated to domestic arbitration and even then not on a large scale. The repealed Act therefore made no distinction between domestic and international arbitration other than to provide for recognition of foreign arbitral awards. The Act similarly had no provisions on conflict of laws and the question of protection of Kenya’s public interest vis-à-vis international arbitration did not arise. The only attempt at this was in

298 The Arbitration Act (Chapter 49 Laws of Kenya) which was repealed and superceded by the Arbitration Act No. 4 of 1995) had commenced operation on 22nd November 1968.
provisions for recognition and enforcement of foreign awards under the Geneva Protocol of 1923 and the Geneva Convention of 1927. The 1927 Convention laid out grounds for refusal of recognition and enforcement which included limitations on arbitrability as well as the caveat that the award was not contrary to public policy or to the principles of the law of the country in which it was sought to be relied upon. These conventions having been superseded by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) are now of historic importance only

Another public interest control put in by the repealed Act, are provisions on the effect of bankruptcy on an arbitration agreement. The Act provided that a trustee in bankruptcy could adopt the contract in which event the arbitration clause would be enforceable by or against him. If the above position did not apply, then any other party to the arbitration agreement, or the trustee in bankruptcy (subject to consent of the committee of inspection) could apply to the court for leave to proceed to arbitration which leave the court could grant if it found it appropriate in all the circumstances of the case.

In making these bankruptcy provisions, the Act intended to protect the public interest involved in case of bankruptcy where protection of creditor’s interests and minimization of costs are important. However, one issue that would have arisen from these provisions is whether insolvency and liquidation of a company could be deemed as “bankruptcy” for the purposes of the Act (which did not define the term bankruptcy). It does appear that liquidation of a company was not included and no similar provisions were to be found in the Companies Act.

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299 The Geneva Protocol of 1923 allowed for enforcement of arbitral awards within the territory of the state where the award was made while the 1927 Convention broadened the scope to cover enforcement within contracting states. See Redfern & Hunter op. cit at 66. The 1923 Protocol and the 1927 Convention were both concluded under the auspices of the League of Nations.
300 Article 1(b) of the Geneva Convention of 1927.
301 Article 1(e) of the Geneva Convention of 1927
302 Article VII.2 of the New York Convention 1958
303 Section 5(1) of the Cap 49(repealed)
304 Section 5(2) of Cap 49(repealed)
305 Section 2 of Cap 49(repealed).
306 Chapter 486 Laws of Kenya. See also Marco Systems Case, post, p. 28.
(b) The Arbitration Act No. 4 of 1995

The public interest provisions contained in the above Act touch on areas already considered in the analysis of the Model Law under chapter 2 herein. This applies save for the provisions on bankruptcy\textsuperscript{307} which have replicated the provisions of the repealed Chapter 49 with an additional clause\textsuperscript{308} which is a conflict of laws provision providing that the bankruptcy provisions in section 38 of the 1995 Act shall apply in domestic arbitration or if the bankrupt person is a Kenyan or if the law of Kenya is applicable according to the rules of conflict of laws. Thus in an international arbitration involving a Kenyan national or where the law of Kenya is applicable, if one of the parties is a bankrupt, arbitration can only proceed with leave of the court or if the trustee in bankruptcy chooses to adopt the contract. Under this Act there is therefore need to have a provision relating to the liquidation of companies not just the bankruptcy of individual persons.

(c) Public Interest Provisions in Other Statutes

It is clearly apparent from the English and South African cases that a big departure from the Model Law (even for a developed economy, leave alone for a small economy like Kenya) is undesirable because it will discourage the choice of Kenya as a place to do international business or dispute resolution. However, the need to take care of national interests especially for a developing country is equally compelling as already noted earlier\textsuperscript{309} and cannot be wished away. This is because a \textit{laissez-faire} attitude to international trade can only be allowed so far. A developing country must retain certain controls in the public interests which will affect private transactions. Due to the need to keep deviations from the Model Law to a minimum, and even for practical expediency, most of these controls will be found in national laws (usually by way of statute) from where they will be transposed into arbitration by way of the conflict provisions relating to arbitrability, mandatory rules, governing law provisions, as well as public policy.

\textsuperscript{307} Section 38 of the Arbitration Act No. 4 of 1995.
\textsuperscript{308} Section 38(3) of the Arbitration Act No. 4 of 1995.
\textsuperscript{309} See infra, Chapter 2, p.36 section 2.2.2.
The following are some of the areas or statutes to consider-

(i) Capacity/Status of Parties

This will not be affected by such statutes as the Law of Contract Act,\textsuperscript{310} Bills of Exchange Act \textsuperscript{311} the Companies Act\textsuperscript{312} for companies and the Bankruptcy Act,\textsuperscript{313} among others. These should be reviewed to ensure that the national interest that may be served in regulating the provisions as to the party’s capacity or disability is maximized. Where there is need to frame these in mandatory terms then the same would ensure that they are not unduly disregarded in international contracts. An example here is the question of subjecting arbitrations involving bankrupts and companies in liquidation to court control. This is because once an award is made against them and enforcement is sought outside the jurisdiction, then the local courts would not be able to exercise any control and the same may prejudice the rights creditors.

(ii) Weaker Party Protection

Such interests include consumer protection, employee protection, and protection of franchises or local agents of foreign companies, amongst others. It is however notable that in Kenya there is no specific statute on the protection of consumers. The public interest that would be covered under such a statute would include issues of product liability, regulation of “mandatory arbitration clauses”\textsuperscript{314} in consumer contracts, which may be entered unilaterally by manufacturers or suppliers to name but just a few. The protection of such interests is of great importance to a country such as Kenya which is by far a net importer of manufactured products. Similarly, franchisees of multinationals and other local agents may be subjected to mandatory arbitration clauses and due to the prevailing lack of bargaining power, there would be need to regulation such contracts.\textsuperscript{315}

\textsuperscript{310} Chapter 23 Laws of Kenya
\textsuperscript{311} Chapter 27 Laws of Kenya
\textsuperscript{312} Chapter 486 Laws of Kenya
\textsuperscript{313} Chapter 53 Laws of Kenya
\textsuperscript{314} See “Consumer and Media Alert: The small print That’s Devastating Major Consumer rights”, a National Consumer Law Center Inc. bulletin, available at www.consumerlaw.org/initiatives/model/arbitration.shtml
Another example is the Contracts in Restraint of Trade Act\textsuperscript{316} which vests jurisdiction in the High Court to declare a contract void where the court is satisfied that having regard to the nature of the profession, trade, business or occupation concerned, and the time period and area of its operation, the provision is not reasonable in the interests of the parties, or it is in the interests of the public, inasmuch as the provision is injurious to the public interest. The court is also to consider whether the contract is to the benefit of a minor if he is a party to it and where it is against an employee then the contract is automatically void if employer terminates the contract in breach of the agreement. This is a good example of statutory protection of the public interest but the question that arises in international arbitration is whether such clause will have effect if the law of Kenya is not the chosen law. What if it was worded in mandatory terms? What if a conflict provision was inserted stating that it is to apply whenever one of the parties is a Kenyan national or when the party to whose benefit it is intended is Kenyan or if the contract is concluded in Kenya or even where performance is to be effected in Kenya? These are some of the issue that these statutes must consider.

(iii) Other Areas of General Public Interest

These include environmental protection, regulation of monopolies and competition laws,\textsuperscript{317} intellectual property matters,\textsuperscript{318} statutory arbitrations,\textsuperscript{319} fiscal measures,\textsuperscript{320} insurance matters,\textsuperscript{321} to name but a few. All these are areas of public interest which will usually involve mandatory provisions which should not be abrogated by contract and there is need to look at the same with international arbitration in mind.

Whereas it is not possible to carry out an in-depth analysis of these statutes and discuss the public interests involved in the context of this paper, a comprehensive review of international arbitration may necessitate a revisiting of these statutes to reflect on national interests covered and how best they are retained in the international arbitration arena.

\textsuperscript{316} Chapter 24 Laws of Kenya
\textsuperscript{318} See the Industrial Property Act No. 3 of 2001.
\textsuperscript{319} For example under the Kenya Airports Authority Act, Chapter 395 Laws of Kenya
\textsuperscript{320} E.g. under the Banking Act, Chapter 488 Laws of Kenya.
\textsuperscript{321} See the Insurance Act, Cap 487.
(d) Public Interest Provisions in Case Law

As earlier indicated at the beginning of chapter 3 herein, the treatment of arbitration by Kenyan courts has been in fits and starts, retrogressive at the times and generally speaking of apathy and indecision. We have thus herein attempted to trace a trend in case law on arbitration but the same is limited for the following reasons-

(i) This country has since the early 1980s experienced a severe lack of law reporting and it is only recently that some attempts have been made to restart the same. The reporting that being done even now is not exhaustive only picking choice judgments for reporting and the bulk of judgments thus remain unreported. The type of research involved cannot in the circumstances be exhaustive.

(ii) Our High Court and the Court of Appeal are not so well known for exhaustive, well-researched judgments which situation is made worse by backlog of cases and their approach to arbitration is only to be gleaned from the judgments.

(iii) The volume of cases on arbitration is not as high as to constitute a comprehensive coverage of the issues and most relate to domestic arbitrations and will only deal with the issue of whether or not matters should proceed to arbitration or not or on an arbitral procedure to be followed and there is very little on substantive issues of public interest such as arbitrability or application of mandatory rules.

We nonetheless look at a few cases to decipher the general attitude of Kenyan courts to arbitration-

\[322\] See infra. Chapter 3, p.56 section 3.1.1

\[323\] Efforts to update law reporting in Kenya are being undertaken officially by the National Council for Law Reporting while there are also efforts by Law Africa who publish the East African Law reports.
This remains one of the major pronouncements in Kenya on arbitration in recent years especially since it went up to the highest appellate court in Kenya (the Court of Appeal). Tononoka who were the plaintiffs in the High Court as well as the appellants in the Court of Appeal, had entered into a commercial facility agreement with the PTA Bank, a body corporate established under a multilateral treaty. Tononoka subsequently filed suit against the bank claiming breach of contract and seeking damages, injunction and costs. Tononoka simultaneously made an application for interlocutory relief. The Bank appeared and filed a defence claiming immunity from civil process and contending that the applicable law by virtue of an arbitration clause was the law of England. At the hearing of the application for interlocutory relief the Bank raised the aforesaid preliminary objections and the court concurred, striking out the application and the suit.

Tononoka now appealed and the court considered the effect of the arbitration agreement as well as the immunity granted to the Bank under the Privileges and Immunities Act. Article 43 of the PTA Charter granted the bank immunity from every form of legal process except insofar as in any particular case it had through its president expressly waived its immunity. This immunity had further been fortified when the Minister for Foreign Affairs had promulgated an order under the Act that applied various immunities, including immunity from legal suit and legal process, to the bank.

The Court of Appeal unanimously reversed the ruling of the High Court and held that Parliament did not intend to extend absolute immunity from suits and legal process to the bank and that such an extension would be against public policy and in breach of international law. The court further held that notwithstanding the arbitration agreement and the choice of English law, the jurisdiction of Kenyan courts could not be completely ousted as they still retained a residual jurisdiction to deal with peripheral matters. Tunoi JA. opined that in purporting to give blanket immunity to the bank, the minister was in effect amending section 60 of the constitution which gives the High Court unlimited original jurisdiction in civil matters. The judge was categorical

324 [2002] 2 E.A. 536
325 Chapter 179 Laws of Kenya.
326 See page 536 paragraph (i)
that this was dispute which belonged to the courts of Kenya and it was for adjudication by them. The question that arises is what then became of the arbitration agreement? Tunoi JA, relied on the dictum of Lord Denning in *The Fehmarn* where the learned Lord stated:

"I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which courts of this country will pay much regard and to which they will normally give effect, but it is subject to overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them."

There are however criticisms that may be leveled against the judgment of the court of appeal as follows:

a) The court having refused immunity to the Bank on the basis that this was a commercial matter should then have given effect to the arbitration agreement and refer the matter to arbitration instead of ordering a trial at the High Court as it did.

b) The Court seems to have disregarded the Arbitration Act in determining the extent of Court interference which appears unsupportive of arbitration. Whereas it was important for the court to cater for the public policy as it did, by defining the extent of court interference so widely, it rendered a decision that is subject to challenge which does not do much even for public policy protection yet the court in refusing immunity had actually achieved what it needed to achieve in the name of public interest.

- *Indigo EPZ Limited vs. Eastern and Southern Africa Development Bank*[^329]

While such criticisms may be leveled against Tononoka it was rightly interpreted by the High Court in *Indigo EPZ Limited v Eastern and Southern Development Bank* where Mbaluto J[^327]

[^329]: [2002] 1 KLR 810
rightly opined following the dictum of Kwach JA in Tononoka that in agreements where parties have agreed to refer disputes to arbitration, the position is that the jurisdiction to deal with substantive issues is given to the arbitrator while the Kenyan courts retain a residual jurisdiction to deal with peripheral matters. In regard to the public interest in retaining this residual jurisdiction Kwach JA had stated that it would be absurd to suggest that a borrower whose security is being sold in Nairobi illegally cannot approach a court in Nairobi for protection pending final arbitration in the chosen seat of arbitration.

• *Macco Systems India PVT Ltd vs. Kenya Finance Bank*, 330

In *Macco* the defendant company went into liquidation after the arbitral agreement had been entered into. The issue before the court was whether the arbitration proceedings could be commenced since actions against a company in liquidation are governed by the provisions of the Companies Act, Chapter 486 of the Laws of Kenya. Section 228 of the Act requires leave of court before proceedings can either be commenced or continued once a company is placed in liquidation. Onyango Otieno J. (as he then was) held that arbitration could proceed without leave of court. The judge stated that arbitration merely established the rights of the parties to the dispute so as to enable the respondent to use section 228 of the Companies Act to proceed against the company once its rights are established. However, the judge did not reckon with the fact that this is the same function served by a law suit in court up to the point of judgment (establishment of parties' rights) and therefore distinguish between the differential treatment of law suits and arbitration. Similarly, the court did not address the interpretation of section 38 of the Arbitration Act 1995331 and its applicability in liquidation.

Finally the judge found that section 35(b)(i) and (ii) require the applicant to show that the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya and “not that the award contains errors of law on the substantive law of this country”. 332 One would have hoped that the judge would elucidate on this point in analyzing the sources of authority on arbitrarily in Kenya in the absence of specific provisions in the Arbitration Act 1995. Is it to be

330 HCCC No. 173 of 1999 (Milimani Commercial Courts) (unreported)
331 See *infra* p.79, section. 4.1.1. (b)
332 At page 9 of the typed ruling.
found in other statutes or case law or in the absence of the above, is it to be deduced by logic from all the circumstances of the case?

- *Christ for All Nations vs. Appollo Insurance Co. Ltd*\(^{333}\)

In Appollo although it was a domestic arbitration, the court had occasion to interpret what amounts to the “public policy of Kenya” as would be applied under s. 35(2)(b)(ii) of the 1995 Act. Although this was a domestic arbitration the same interpretation would apply to international arbitration and the ruling is therefore relevant. In this case, Appollo had extended the applicants comprehensive insurance policy with an endorsement to cover COMESA countries. The applicant’s vehicle had an accident in Zambia and on arbitration of the applicant’s claim; the arbitrator found for the applicant that the endorsement on the policy did not merely extend third party coverage but comprehensive cover as well.

It is the above award that was challenged by Appollo on the grounds of public policy. Ringera J. (as he then was) had occasion to analyze the meaning of public policy and in reliance of Indian authorities\(^{334}\) (the judge concluded that the same principles of law which apply under section 37(1)(b)(ii) to non-recognition and non-enforcement of a foreign award would apply to the setting aside of a local award under section 35(2)(b)(ii). The judge was persuaded by the logic of the Supreme Court of India and took the view that although public policy is a most broad concept incapable of precise definition an award would be deemed to be contrary to the public policy of Kenya if it was shown to be either: (a) inconsistent with the Constitution or other laws of Kenya whether written or unwritten; (b) inimical to the national interest of Kenya; (c) contrary to justice and morality.\(^{335}\)

The judge found the first category to be self explanatory. I would say that the same would cover the application of mandatory rules and the concept of arbitrability among others. On the second category, the judge “without claiming to be exhaustive”, included interests of national defense

\(^{333}\) [2002] EA 367

\(^{334}\) Especially *Renusagar Power Co. v General Electric Co.* [AIR 1994 S.C. 860; (1994) CLA Sup 1 (SC)] (an Indian Supreme Court decision)

\(^{335}\) *Supra*, note 36, p. 370
and security, good diplomatic relations with friendly nations and the economic prosperity of Kenya as areas where issues could arise that are inimical to the national interests of Kenya. In the third category, the judge included issues of corruption, fraud and violation of public morals.

In conclusion, the judge took the view that the arbitral award was not contrary to the public policy of Kenya as it did not fit in any of the three categories. Indeed, the judge went on to say that even if the arbitrator was wrong in law and fact or on the construction of a statute or contract on the part of an arbitrator cannot by any stretch of imagination be said to be inconsistent with the public policy of Kenya. He found that “on the contrary, the public policy of Kenya, leans towards finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to the right challenge within the narrow confines of section 35 of the Arbitration Act.”

For myself, I would say that whereas I have no quarrel with the judge’s substantive finding, the courts conclusion as to the public policy of Kenya leaves one in doubt as to whether the court was not negating the three tests of public policy that the court so willingly accepted from the Indian Supreme Court. I would therefore re-state his conclusion to read that “the public policy of Kenya leans towards finality of arbitral awards and that even an error of law and fact or construction of a statute of contract on the part of the arbitrator will usually not allow court interference unless it is inconsistent with the constitution or other laws of Kenya or is inimical to the national interests of Kenya or contrary to justice or morality in a fundamental way as to amount to a breach of the flip side of the public policy of Kenya”.

- African Airlines International Ltd vs. The Eastern & Southern African Trade & Development (PTA) Bank

In this case the applicant contended on the authority of the Tononoka Case that the ouster of Kenyan law in a submission to foreign arbitration as was relied on by the defendant bank was

336 ibid.
337 Nairobi HCCC No. 1361 of 1999 (Milimani Commercial Courts) (unreported)
against the public policy. In its ruling the court did not directly deal with this issue but went on to disallow the application for stay of proceedings and referral to arbitration on the grounds that the defendant/applicant had taken further steps in the suit than was allowed by section 6(1) of the Arbitration Act 1995 and were guilty of laches having failed to prosecute the application for five years.

- **Tropical Food Products International vs. The Eastern & Southern African Trade & Development (PTA) Bank**, In this case there was an arbitration agreement which provided that disputes between the parties would be referred to arbitration in accordance with the laws of England under the ICC Rules of Conciliation and Arbitration. The plaintiff filed suit after a dispute arose and the parties then proceeded to record a consent agreeing to domestic arbitration in Nairobi. The defendant bank then applied to set aside the consent to arbitrate locally in favour of the ICC arbitration on the ground that the consent was recorded under a mistake of fact as to the existence of the agreement to arbitrate under the ICC.

Mwera J. in his ruling set aside the consent order and referred the parties to arbitration under the ICC as per the arbitration agreement. This was despite the plaintiff’s protestation that arbitration at the ICC would be expensive and costly. The judge considered that enforcing party autonomy overrode the cost implication which the court appeared to sympathize with by putting a rider to his ruling that the parties could however maintain the status quo (local arbitration) if they deem it fit.

- **Glencore Grain Ltd vs. TSS Grain Millers Ltd**

In Glencore an application was filed by Glencore to enforce an international arbitral award at the High Court in Mombasa and TSS filed a counter-application seeking the setting aside of the

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338 Page 7 of the ruling of the court.
339 Page 12 of the ruling of the court.
340 Nairobi HCCC 1534 of 2001 (Milimani Commercial Courts) (unreported)
341 Page 11 of the ruling of the court.
342 Page 13 of the ruling of the court.
343 [2002] 1 KLR 606
arbitral award on the basis that it offended public policy. In a consolidated ruling the Court considered the opposing arguments and held as follows:

i) The courts could not be used to enforce the arbitral award the subject of the suit because the same was illegal or void or immoral therefore against the public policy of Kenya.

ii) Although it is Kenya’s public policy to enforce international arbitral treaties and agreements, the court must balance the competing rights; the public policy in protection of matters in favour of international arbitral awards, contracts or judgments and the public policy in protection of matters more favourable to the welfare of the Kenyan people.[emphasis mine]

iii) The contract or award herein whose effect would be to release to the public maize unfit for human consumption would in itself be tortious as well as illegal and accordingly against public policy.

4.1.2. Lessons for Kenya on Public Interest in International Arbitration

As appears from the analysis of the few cases cited above, there lacks in Kenya coherent judicial authorities to guide public policy and in the absence of statutory guidelines it is clear that enforcement of public interest then becomes problematic.

The following observations may then be made-

a) The Model Law in its provisions that affect conflict of laws contemplates a well developed law where-

i) The concept of arbitrability is clearly defined as to then be applied to international arbitration.

ii) The national law is well developed as to protect national/public interest through either the application of mandatory rules or the concept of public policy.
iii) The concept of public policy is itself fairly defined (it being a concept which may defy a clear definition) as to allow coherent application in international arbitration.

b) Public policy may be the better vehicle for the application of public interest because mandatory rules create a picture of too much interference in arbitration but the concept of public policy must also be sensitively handled by the courts as it could very easily become the proverbial unruly horse unless reined in firmly.

c) The Model Law was not meant for a cut-and-paste application and various states have modified or adapted it to take care of their peculiar interests which would not have been covered by the Model Law.

d) The modification or adaptation of the Model Law to Kenya calls for comprehensive consultations and consideration of all factors affecting it as was the case in England and South Africa and the absence of such an exercise in Kenya has clearly been to Kenya’s detriment.
CHAPTER FIVE: PROPOSALS FOR REFORM AND CONCLUSION

5.1 Proposal for Policy Paper on Arbitration for Kenya

It is clear from the evaluation of the subject of conflict of laws in international arbitration and the related issues of protection of Kenya's public interest in the arbitral process that the issues involved are complex. Any effort by Kenya to balance the opposing public policy issues of lending full support to international commercial arbitration and thus becoming or remaining relevant and attractive as an international arbitration center on the one hand, while ensuring that we do not unduly compromise the public policy "in protection of matters more favourable to the welfare of the Kenyan people"\textsuperscript{344}, cannot be anything but a delicate balancing act. There is therefore need for a comprehensive study of the entire subject involving a reflection on the Model Law and the Arbitration Act, 1995 that would evaluate their effect both on the international arbitration arena as well as on the local scene. In developing such a policy document the study would of necessity look into the following:

(a) Undertake a comprehensive study of the Model Law and the various provisions as well as relate back to the "travaux preparatoires" used in drafting the Model law as well as the explanatory notes by the UNCITRAL Secretariat. This study will help understand the rationale for each of the provisions of the Model Law, and the consideration made by the drafters in coming up with the same.

(b) Look into areas of concern to Kenya in coming up with an arbitration law. These would include firstly, those aspects that have to do with marketing Kenya as an attractive center for commerce and the resolution of commercial disputes and generally being globally co-operative and secondly, those aspects peculiar to Kenya, which require a departure, form the general global

\textsuperscript{344} Per Onyancha J. in \textit{Glencore Grain Ltd –vs.– TSS Millers Ltd}, Nairobi HCCC 1534 of 2001 (Unreported). For an exposition of the case see Chapter 3 above, p.88.
perspective. This will involve looking for a balance between aspects of global conformity and relevance on one hand and those of protecting Kenya’s Public interests on the other.

(c) Undertake comparative studies between Kenya and several other jurisdictions with a view to learning how such other jurisdictions have dealt with issues arising out of the Model Law. This will also involve research into the opinions of publicists and other prominent commentators on the issues involved so as to obtain insights into how the matters arising may be dealt with.

(d) The team charged with the task of reviewing these issues could then organize public fora to debate these issues and then invite local and international experts on the subject to discuss a draft report from which a final report and recommendations on amendments to various statutes that affect international arbitration may be made. Such fora would bring in practical insights from arbitration practitioner and give the whole study a practical perspective.

(e) The report of the team would be adopted, as a policy document on international arbitration while the amendments would be taken to parliament for debate and further action.

5.2 Proposals on Protection of Kenya’s Public Interest in International Arbitration

As noted in Chapter 2 of this paper\textsuperscript{345} there are several vehicles for the transposition of public interest in international arbitration and these include the use of mandatory rules of law,\textsuperscript{346} the application of the doctrine of public policy\textsuperscript{347}, the application of the commercial reservation\textsuperscript{348} and the application of the doctrine of arbitrability as a limitation on the concept of party autonomy.\textsuperscript{349}

While all these concepts actually overlap\textsuperscript{350} and indeed public policy may be said to be all encompassing and at the center of each of the other concepts, they are sometimes regarded as

\textsuperscript{345} See chapter 2 above, section 2.2.3. p. 39
\textsuperscript{346} See chapter 2 above, section 2.3.1. p. 42
\textsuperscript{347} See chapter 2 above, section 2.3.2. p. 47
\textsuperscript{348} See chapter 2 above, section 2.3.4. p. 54
\textsuperscript{349} See chapter 2 above, section 2.3.3. p. 50
\textsuperscript{350} For example one of the rationales for the application of foreign mandatory rules in international arbitration is on the basis of public policy as is the case of arbitrability and commercial reservation.
different concepts each with limitations on its applicability in different situations. We thus examine briefly how each of these concepts applies in effecting Kenya's public interest in arbitration.

(a) **Effectiveness of Kenya's mandatory rules in international arbitration.**

As noted earlier for the rule of law of one to be effective in international arbitration it must be imperative as to demand application in international arbitration irrespective of the choice of law by the parties. As further noted in chapter 3 herein, such matters as the status of parties (capacity, bankruptcy etc), may be the subject of mandatory rules, which will demand application irrespective of the choice of law by the parties. The problem with many provisions in Kenyan statutes that essentially cover Kenya's public interest regulation of such questions as validity of contracts and capacity of parties among other issues that would be more appropriately governed by mandatory rules, is that such provisions lack the necessary conflict of laws clauses that would actually convert or reinforce them as mandatory rules applicable in international contracts and the dispute resolution thereof. There is therefore need to revise our statutes to cover such aspects as the effect of liquidation or receivership of a company that is party to an arbitration agreement, the applicability of the contracts in Restraints of Trade Act or the applicability of provisions of the Bills of Exchange Act to name but just a few.

However, one thing that is clear is that the public interest in diverse areas of our economy and public life that can be protected by use of mandatory rules cannot be accommodated within the Arbitration Act 1995 because it will end up being clumsy and crowded. Similarly it will deny the Act the uniformity sought to be achieved by the Model Law making it unattractive to foreign

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351 Supra note 3
352 See chapter 2 above, section 4.1.1. p. 79
353 See Section 228 of the Companies Act, chapter 486 Laws of Kenya which, provides for the leave of court before proceeding with suit against a company in liquidation. See also chapter 3 above, section 4.1.1. (b) p. 79 on the rationale for regulation of any arbitration where one of the parties is a company in liquidation.
354 Chapter 24 Laws of Kenya. See chapter 3 above, section 4.1.1. (c) p.80 on the effect of section 2 of the Act in nullifying such contracts in the public interest. The Act however does not contemplate international contracts and lacks conflict of laws provisions that would apply it in certain instances in international arbitration.
355 Chapter 27 Laws of Kenya. Section 23 of the Act for example provides that no person is liable as drawer, endorser or acceptor of a bill who has not signed it as such. How do we reconcile this provision with the wide provisions of Section 4 of the Arbitration Act 1995 on arbitration agreements if the bill of exchange has an arbitration clause? Shouldn't the former Act have appropriate conflicts provisions?
investors who consider dispute resolution mechanisms in their investment decisions. However, to protect such public interests, there is need to have conflict of law provisions in many of our statutes to cover such interests by ensuring that such provisions are in the nature of mandatory rules that are applied irrespective of the choice of law by the parties. In addition to areas mentioned above, such provisions would cover areas such as consumer protection, labour (or service) relations where such are subject arbitration, protection of local agents of multinational corporations among others. In seeking to protect such interests the following considerations come into issue:

(i) Such interests are diverse and would have to be considered sector by sector and an exhaustive discussion of the same is not possible within the confines of this project paper.

(ii) Such interests would have to be, as narrowly defined as possible to avoid a bigger erosion of our international conformity, which can be counterproductive.\textsuperscript{356}

(iii) Such interests would have to apply only in certain instances when Kenya’s Public interest is crucial.\textsuperscript{357}

(b) The public policy doctrine as a tool for the protection of Kenya’s public interest.

As observed in chapter 3\textsuperscript{358} public policy will usually be deduced by an international arbitral tribunal either from a country’s laws or as forming part of international public policy. Indeed only recently the International Centre for Settlement of Investment Disputes (ICSID)\textsuperscript{359} which settles investment disputes between foreign investors and host states had occasion to deal with the question of public policy in relation to Kenya when it dismissed a six year old claim against Kenya for Kshs 40 billion brought to the tribunal by Nassir Ibrahim Ali at Dubai- based

\textsuperscript{356} For example in the case of consumer protection such rules would cover issues such as product liability for very defective products or for limitation of liability in standard form contracts such as when contained in standard conditions of sale as opposed to every consumer issue that arises.

\textsuperscript{357} For example the consumer protection measures may apply only where a foreign manufacturer has exported the goods into Kenya and either advertised them or made representations to the consumer as to certain conditions as opposed to where say the consumer has imported the goods without any representations by manufacturers.

\textsuperscript{358} See chapter 2 above, section 2.3.2. p. 47 on the applicability of the doctrine of public policy.

\textsuperscript{359} The ICSID is a World Bank brainchild based in Washington DC in the United States of America and was set up under by the international convention for the Settlement of Investment Disputes between states and Nationals of other States (the ICSID Convention or the Washington Convention) of 1965.
businessman claiming breach of contract that had allowed him to operate duty free shops at Kenya’s two international airports in Nairobi and Mombasa. In dismissing the claim, the ICSID found that the contract had been procured by corruption and bribery (of former President Daniel Moi by Mr. Ali to the tune of US $2 million (Kshs 144 million) which corruption and bribery the tribunal found to be contrary to international public policy.\(^{360}\)

When it comes to the public policy of Kenya, the same is to be discerned either from statutes which would either prohibit or criminalize certain acts or otherwise regulate them in certain way as to make clear that the public policy of Kenya requires parties to conduct themselves in a particular manner. The other way that public policy will be discerned by deduction from case law where an arbitral tribunal could be persuaded that going by the way local courts have over time treated a particular issue it is clear that Kenya’s public policy takes a particular position on the matter. From the foregoing, the use of public policy as a tool for protecting public interest of Kenya is likely to suffer the following limitations:

(i) Due to the limitations in statutory expression of mandatory rules of law\(^{361}\), the expression of public policy in our statutes will be equally limited. This is because public policy is applied (either to set aside an award or to refuse recognition and enforcement) as an exception rather than the rule and an international tribunal will infer a public policy exception from statute only where the intention of the statute to regulate certain conduct, including in an international transaction, is expressed in the clearest of ways, usually as a mandatory rule of law.\(^{362}\) This “pro-enforcement” bias is clear in most jurisdictions and will therefore mean that public policy is very restricted.\(^{363}\)

\(^{360}\) Daily Nation, October, 8, 2006, at 1

\(^{361}\) See chapter 4 above, section 4.1.1. p.77

\(^{362}\) Redfern and Hunter op. cit. p. 430 and p. 471

\(^{363}\) Ibid, p. 472. See also: Kerr, 1997, “Concord and Conflict in International Arbitration” Vol. 13 No. 2, *Arbitration International*, p. 140. In *Parsons vs. Whitemore Overseas Co. Inc. v. Societe’ Generale de l’industrie du Papier (RAKTA)* 508 F 2d 969 (2d Gr. 1974), the New York District court refused an argument that recognition and enforcement of an arbitral award should be refused on the grounds that diplomatic relations between Egypt (the defendant’s state) and the United Stated had been severed. The court referred to the “pro-enforcement bias” of the New York Convention and held that the “public-policy” defense should be narrowly construed and that enforcement
(ii) The lack of comprehensive law-reporting and a vibrant judiciary that is keen on clear interpretation and development of the law among other limitations mean that no clear trend can be discerned from case law as would assist in bringing out the public policy of Kenya for enforcement by international arbitral tribunals and foreign courts. This coupled by the "pro-enforcement bias" in international arbitration will mean that such public policy as may be discerned from Kenyan case law is unlikely to see the light of day.

(iii) There is a movement away from national public policy to international Public Policy.\(^{364}\) The concept of international public policy or "ordre public international" has been developed by French jurists and is embodied in the New French code of Civil Procedure.\(^{365}\) The rationale for it is that every state has its own concept of what is required by its "public policy" and different interpretations are bound to arise from different states' perspectives. The movement towards international public policy is meant to avoid such conflicts of interpretation but more importantly to avoid enforcement of a particular state's parochial and narrow interests or purely domestic considerations but rather limit Public Policy to broader public interest of honesty and fair dealing as understood by the international community.\(^{366}\)

While many developed jurisdictions advocate the narrower international public policy conception\(^{367}\) there is as the general theme of this paper runs, a need for developing countries to prop up at least part of the so-called parochial interests of their states to facilitate growth and development. However, practical differences will arise because these purely domestic considerations will be sought to be enforced in international arbitral tribunals and foreign courts which with their internationalist approaches will be less sympathetic to such considerations.

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364 Redfern & Hunter, op. cit. p. 431
365 French Decree Law No. 81 – 500 of May 12 1987 Art. 1502.5
366 Redfern & Hunter, op. cit. p. 432
The effect of the Commercial reservation and concept of arbitrability on Kenya's public interest.

As observed in Chapter 3, Kenya ratified the New York Convention without making any of the two reservations provided. Thus, having failed to make a commercial reservation, Kenya failed to take advantage of a provision that would have assisted in defining the concept of arbitrability and thus reserving disputes in non-arbitrable areas of law for adjudication by the courts. This is a position that Kenya cannot reverse because the relevant article does not provide for a future reservation as the same could only be made at the point of ratification of the convention and denunciation is only possible for the entire convention. As already noted, the United States of America which by virtue of its development status is justified in adopting a liberal approach to commerce, and also by virtue of its latter ratification of the convention would have been expected not to make a commercial reservation, but nevertheless did. The question therefore arises as to whether it was wise for Kenya, all factors considered not to make such reservation. This is an issue that calls for further investigations.

However, it is submitted that it is still possible to apply the "commercial" qualification by statute if the same is actually provided for and this is a qualification that Kenya should provide for. The way to go would be to provide in specific statutes, for example the Employment Act or in a Consumer Protection statute that certain matters are reserved for the courts and the jurisdiction of the courts is not to taken away either at all or unless certain pre-conditions are met. This would define the concept of arbitrability within those statutes after which the Arbitration Act would be simultaneously amended to include both the commercial qualification as well as a definition of matters arbitrable. The effect of these amendments is that public interests would be

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368 See chapter 2 above. Section 2.3.4. p.41
369 These reservations are the "reciprocity" reservation and the commercial reservation. See Art. 3 of the New York Convention
370 Article XIII of the New York Convention
371 Chapter 226 Laws of Kenya
372 No Consumer Protection Act currently exists in Kenya purely for consumer protection purposes other than for perhaps a few scattered provisions in other statutes.
safeguarded in keeping away from arbitral tribunals matters non-commercial or those others deemed to be non-arbitrable.

However, this would be subject to challenge on the basis that Kenya having failed to make a commercial reservation under the New York Convention undertook to recognize and enforce all arbitral awards irrespective of their being non-commercial. This could however be countered on the basis that even the fact of failing to make a commercial reservation under the New York Convention cannot mean that all matters are arbitrable and the concept of arbitrability must still be given its space and application in Kenya.

5.3 Proposals for Amendment of the Arbitration Act 1995 (Conflict of Laws Provisions)

It is submitted that on account of the previous findings in this paper, most conflict of law provisions to cater for public interest would be well reserved for other statutes for the reasons stated. However a few considerations should be made as follows:

(a) The commercial qualification should be included in Act as follows:

(i) Section 2 of the Act which reads “Except as otherwise provided in a particular case, the provisions of this Act shall apply to domestic arbitration and international arbitration” should be amended to read:

“Except as otherwise provided in a particular case, the provisions of this Act shall apply to commercial arbitration whether domestic or international.”

(ii) The footnote definition of the term “commercial” as found in the Model Law should be transposed as section 2 (2) to read:

“For the purposes of this Act, relationships of a commercial nature include, but are not limited to, the following transactions, any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture
and other forms of industrial or business co-operation; carriage of goods or passengers by air; sea, rail or road [and other similar transactions save those expressly excluded by Kenyan law whether written or not].” The last phrase would be added to the definition first to allow a wider interpretation and proposed by the Model Law by allowing the use of the “ejusdem generis” rule of legal interpretation and secondly by restricting the definition to exclude those matters deemed non-commercial and therefore un-arbitrable by other laws of Kenya hence protecting public interest therein.

iii) Section 3 (1) on interpretation defines an “arbitration agreement” to mean “an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.” This clause should be amended to include after the words ‘legal relationship’ the words “of a commercial nature” and after the word “not “, “and subject to such limitations on arbitrability as are required by this Act”.

(b) **Form of arbitration agreement**

Section 4 of the Act should be amended to include a subsection (5) reading as follows:

“(5) Where either the arbitration agreement or the underlying agreement are governed by the Laws of Kenya, this section shall be deemed amended to include such requirements as to form of agreement as any be required by the laws of Kenya whether written or otherwise.”

(c) **Arbitrability**

On arbitrability it is proposed that Kenya should borrow the South African Law Commission recommendation by having an amendment inserting a Section 3B whose marginal note would read “matters subject to arbitration”. The section would read:

“3B (1) For purposes of this Act, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a
matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless the arbitration agreement is contrary to the public policy of Kenya or, under any other law of Kenya, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as excluding determination of the matter by arbitration.”

(d) Choice of Law

In choice of law is proposed to amend section 29 to have a subsection (6) to read:

“(6) In all cases, the tribunal shall have due regard to such rules of law of either the state where the contract was made or a state that has a real connection with the dispute where such rule or rules are so imperative as to require application irrespective of the law that governs that relationship”.

(e) Public Policy

A section 37B is proposed to beef up the public provisions of the Model Law. The same would read as follows:

“37B. For the avoidance of doubt, and without limiting the generality of sections 35 (2) (b) (ii) and 37 (1) (b) (ii) above, it is declared that an award is also in conflict with the public policy of Kenya if:

a) It is in breach of mandatory rules of law of Kenya whether written or not that are so imperative as to require application irrespective of the law that governs the legal relationship in issue; or

b) A breach of the arbitral tribunals duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or
c) The making of the award was induced or affected by fraud or corruption as conceptualized by the law of Kenya”.

5.4 The Way Forward

The choice is plain: to act or not to act? The answer is important, since the consequences of a wrong decision may be serious. However, the considerations to be made are many and opposing and the understanding of the same not as easy. Conflict of laws remains that “dismissal swamp filled with quagmires”\(^{373}\) and when considered within the context of international arbitration where “party autonomy” reigns supreme, the subject truly becomes “one of the most baffling subjects of legal science.”\(^{374}\)

The complexities of the subject notwithstanding, it is clear that the subject requires more than passing attention and the enactment of the Arbitration Act 1995 without consideration of conflict of law issues, amongst others is regrettable. This project paper therefore calls for a comprehensive study on the subject of international arbitration from a Kenyan viewpoint which study will interalia look into the subject of party autonomy vis-à-vis Kenya’s public interest and the role of conflict of laws in international arbitration. Such a study by a team of experts would then create fora for debate of issues arising which would lead first to a policy paper on international arbitration, leading ultimately to necessary amendments to the Arbitration Act 1995. After more than 10 years of use of the Act, it is submitted that there must be ample practical experiences by arbitration practitioners that would shape a proper review of the Act.

The following courses of action are proposed-

(a) International arbitration is at the end of the day a private sector undertaking. Government involvement is only in regulation of the same mostly through judicial control. In the circumstances therefore, other than when judges have difficulties in doing

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\(^{373}\) Prosser as quoted in chapter 2 above, p. 28 note 43  
\(^{374}\) Chapter 2 above, p. 28 note 41
justice to the parties that come before them in arbitration matters, government *per se* hardly ever comes into contact with international arbitration. This is unless the government is itself a party to arbitration when different considerations apply.

It is therefore the private sector operators who know the problems that they experience and are best suited to initiate a reform process. It is therefore proposed that the Chartered Institute of Arbitrators (Kenya Chapter) should take up the leadership mantle possibly in conjunction with the Law Society of Kenya and to begin with organize a conference where arbitration practitioners can come together to discuss the successes and failures of the Kenyan Arbitration Act, 1995 and evaluate its performance over the ten-year period it has been in force.

From the views collected at the conference, the Chartered Institute can progress the reform programme by drafting a comprehensive discussion paper with proposals for reform of the Arbitration Act, 1995 preferably with a draft bill annexed. This would then be referred to various stakeholder organizations and arbitration practitioners to solicit their comments and further input. The Chartered Institute and the Law Society would then on receipt of the comments refine the draft bill further before sending it to the Attorney General for publication and tabling in Parliament.

(b) Another way forward would be for the Chartered Institute and the Law Society in Kenya to join efforts and lobby the Attorney General to appoint a Task Force to look into the review of the Arbitration Act, 1995. The Task Force would then develop a programme of work for the collection of views and wide consultations and subsequently prepare its report with a draft bill for debate in Parliament.

The only problem with this course of action is that most of the statutes in Kenya have not been reviewed in a long time and when it comes to priorities the Arbitration Act, 1995 is unlikely to gain priority for two reasons. First is that by comparison with most other statutes, the Act would be considered fairly recent. Secondly, as mentioned earlier, the
government is not directly affected by the operations of the Act and this coupled with limited government resources means that the Attorney General is unlikely to prioritize the review of the Arbitration Act.

(c) As regards the protection of public interest, it is notable, as discussed earlier that the same is best achieved by incorporation into various statutes that deal with specific areas of law. These statutes would then, when applied together with the Arbitration Act, 1995 in regulating arbitration matters have the net effect of protecting public interest. Since a one-time review of all these Acts may not be possible, it then means that there has to be a policy to address these matters as and when each of the relevant statutes is considered for review in the hope ultimately public interest will be protected on the whole. Such a policy would also include enactment of statutes in areas that are lacking such as consumer protection.

5.5 Conclusion

This project paper was prepared within the limitations set out in Chapter One. It does not lay claim to being an exhaustive study of the subject and remains a one-man view of the same. In the circumstances, this paper seeks to play a limited role of inviting learned forays into the “dismal swamp” and spur learned debate on the subject. If it will have interested more scholarly debate into this very difficult and very old problem of conflict analysis; if it will only make all of us think harder about the issues raised, then the modest effort herein will not have been in vain and a fair level of success will be proclaimed.
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