

**ROLE OF COURTS IN ARBITRATION: A CRITICAL
ANALYSIS OF THE KENYAN ARBITRATION ACT NO. 4 OF
1995**

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DECLARATION

This is my original work and has not been presented for the award of any degree at any other University or educational institution.

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Signature  Date..... 29/11/2012

This thesis has been submitted for examination with my approval as the University Supervisor.

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DEDICATION

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ACRONYMS AND ABBREVIATIONS

AAA – American Arbitration Association

ADR - Alternative Dispute Resolution

CCP - Competence – competence Principle

CPC – *Nouveau Code de Procedure Civile*

EU – European Union

ICC – International Chamber of Commerce

NAFTA – North American Free Trade Agreement

UK – United Kingdom

UNCITRAL – United Nations Commission on International Trade Laws

US – United States of America

FAA- Federal Arbitration Act

ABSTRACT

The study seeks to critically analyze the role of the court in arbitration in Kenya as provided for under the Arbitration Act No. 4 of 1995. The aim is to determine how the role of the courts in arbitration in Kenya compares with best practices from the selected jurisdictions in the world. The study also seeks to find out whether the role of the courts in arbitration in Kenya is conducive or effective for domestic and international commercial arbitration. Further, it interrogates the question on whether or not; the law and practice on the role of the courts in arbitration in Kenya are to blame for limited utilization of Kenya as a seat for international commercial arbitration. The problem of the study is, thus, to critically analyze the status of the role of the court in arbitration in Kenya, how it ranks in comparison with best practices from the selected jurisdictions, and how the role of court in arbitration impacts on the process and development of arbitration in Kenya.

The study is divided into six chapters. Chapter One introduces the key concepts in the study by discussing the role of court in arbitration in general. Chapter Two reviews the role of the courts in arbitration in Kenya as outlined in the arbitration Act No. 4 of 1995. Chapter Three gives an overview of the best practices on the role of the courts in arbitration from three selected jurisdictions of the world. Chapter Four provides a Comparison on the legal gaps on the role of the courts in Arbitration in Kenya *vis -a- viz* the best practices on the role of the courts in the three selected jurisdictions discussed in chapter three. Chapter Five presents a data analysis and the current status of the role of courts in arbitration in Kenya. Finally, Chapter Six hosts a summary of the key findings of the study, conclusions and recommendations.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the problem

The courts are important in arbitration in realizing the objectives of engaging a arbitration and dispute resolution.¹ For instance, the courts are needed to enforce the arbitration agreement when one of the parties is unwilling to commit to arbitration or when the validity of the arbitration agreement is in question.² Parties may also need to obtain and enforce preserving orders before or after embarking on the process of arbitration.³ Additionally, the court's intervention may be called upon to help in the constitution and operationalization of the arbitral tribunal, for instance, in tackling procedural challenges and assisting in taking evidence.⁴ The courts also have a role in recognizing and enforcing arbitral awards and handling appeals on issues raised by parties against the award.⁵

Practitioners and scholars alike seem to be in agreement that the court has a vital role to play in arbitration. It has been argued by those in favour of court intervention that without the support of the court, arbitral proceedings may falter or be ineffective.⁶ In addition to their supportive function, courts may also intervene to guarantee that the minimum requirements of procedural fairness are fulfilled further exercise a supervisory function. The debate on the role of the court in arbitration therefore revolves around the question: to what extent is the court to be allowed to intervene in arbitral proceedings?

The House of Lords in **Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd**⁷ highlighted three clusters of instances where the courts must inevitably be involved in

¹ Kariuki Muigua, "The Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya" Available at: http://www.kmco.co.ke/attachments/080_role_of_court_in_arbitration_2010.pdf (accessed on 30/03/2010).

² For instance, Section 6 of the Arbitration Act 1995 provides for stay or proceedings to enforce arbitration agreement where one party prefers litigation.

³ Section 7 of the Act.

⁴ *Ibid.*, section 28.

⁵ *Ibid.*, section 36.

⁶ D.J Sutton, J. Kendall & J. Gill, *Russell on Arbitration*, (London: Sweet & Maxwell, 21st Edition, 1997) para. 7-001.

⁷ [1994] 2 All ER 465.

arbitration. Lord Mustill recognized the need for this balance in the English House of Lords case of *Coppee-Lavalin*⁸ case and stated thus:

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial.”

The law of arbitration the world over admits the notion that the role of the court in arbitration is inevitable and almost universally provides for it. Importantly, the law also appreciates the need to limit court intervention in arbitration to a basic minimum. Thus, provisions on court intervention are usually worded in the negative such that except where the law specifically provides for court intervention, the court has no recognized basis for intervening in the arbitration proceedings.⁹

In this regard, the UNCITRAL Model Law on international commercial arbitration in Article 5 thereof provides as follows on the role of the court in arbitration proceedings:

*“In matters governed by this Law, no court shall intervene except where so provided in this Law.”*¹⁰

In effect, the article limits the scope of the role of the court in arbitration only to situations Model that are expressly contemplated under the Model Law. Further, it seems the Law’s restriction on judicial intervention in arbitration as stipulated under Article 5 is only in relation to “matters governed by” the Model Law.¹¹

The Kenyan position on the role of the court in arbitration is stated in section 10 of the Arbitration Act. The section states thus:

⁸ See Lord Mustill’s dicta in *Coppee-Lavalin SA/NV* case (supra) page 469-470 on the ideal court’s approach in such intrusion.

⁹ Tomas Kenny-Grant, “The Role of the Court in Arbitration Proceedings”, A paper presented at the UNCITRAL-SIAC Conference “Celebrating Success”, held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005, p. 2.

¹⁰ Article 5, UNCITRAL Model Law on International Commercial Arbitration.

¹¹ New Zealand Law Commission, “Arbitration”, Report No 20, at Para. 293.

*'Except as provided in this Act, no court shall intervene in matters governed by this Act.'*¹²

In effect, the Arbitration Act, 1995 restricts the jurisdiction of the court in arbitration to matters provided for under the Act. At face value, section 10 above permits two possibilities for court intervention in arbitration. On the one hand, the courts are permitted to intervene in arbitration where the Act expressly provides for or permits the intervention of the court.¹³ For instance, the court intervention is permissible in matters touching on appointment of tribunal as provided for under section 12 of the Arbitration Act, 1995.

On the other hand, the courts and particularly the High Court have inherent jurisdiction to act in public interest. The Court is, therefore, entitled to intervene in arbitration proceedings even where that is not provided for expressly, provided such intervention is justified in public interest. For instance, courts in Kenya entertain Constitutional applications and judicial review proceedings against arbitrators and arbitral tribunal in public interest.

The Kenyan Courts have not been consistent with respect to the implication of section 10 with respect to their role in arbitration. For instance, in **Sadrudin Kurji & another v. Shalimar Limited & 2 Others**¹⁴ it was held that:

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

However, the Court of Appeal in **Anne Hinga v Victoria Gathara**¹⁵ appears to read the role of the courts in arbitration in broad terms by holding that public policy is not exhaustible. The Court stated as follows in the case:

¹² Section 10, Arbitration Act 1995 (Kenya).

¹³ *Supra*, note 1, p. 4.

¹⁴ [2006] eKLR.

¹⁵ Civil Appeal No. 8 of 2009.

....public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.¹⁶

Section 10 must, further, be construed as allowing the courts the leeway to intervene in arbitration in the public interest even where it is not expressly so provided in the Act. The Act cannot reasonably be interpreted as ousting the inherent power of the courts to do justice especially through judicial review and Constitutional remedies.¹⁷ In any case, if that was the intent of the Parliament, it would have made a clear provision in the Constitution limiting the role of the courts in arbitration even where public interest is at stake.

At least, that is the position that most parties and the representatives in arbitration in Kenya seem to have adopted if the numerous Constitutional applications challenging arbitration proceedings in courts are any indicator. For instance, in the case of **EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another**,¹⁸ the appellant had taken out an originating summons before the High Court (Constitutional Court) under, *inter alia*, sections 70 and 77 of the Constitution of Kenya; section 3 of the Judicature Act and section 3A of the Civil Procedure Act. The appellant's contention in the Constitutional application was that its Constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator. The main complaint of applicant was that it was unlikely to obtain fair adjudication and resolution of the dispute before the arbitral tribunal in view of the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who are crucial witnesses for a fair and complete resolution of the matters before the tribunal.¹⁹

The counsel for the Chartered Institute of Arbitrators-Kenya Branch, an interested party, submitted that while she did not refute the application under section 77 (9) of the Constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such application.²⁰ The majority of the Court

¹⁶ *Ibid.*, p. 25.

¹⁷ *Supra*, note 1, p. 4.

¹⁸ Civil Appeal No. 248 of 2005 (unreported)

¹⁹ *Ibid.*

²⁰ *Ibid.*

of Appeal admitted that the matter was not frivolous and ordered that the application of the appellant be heard by the High Court on merit.²¹

Justice Deverell contributing to the majority decision impressed on the importance of encouraging alternative dispute resolution to reduce the pressure on the court from the ever increasing number of litigants seeking redress in court. He further stated:

“If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make Constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts.”²²

The decision in EPCO case and the position outlined by Justice Deverell above points to the court’s reluctance in dismissing the need for Constitutional applications in arbitration. Only the dissenting judge, Justice Githinji, JA who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the Constitution, the appellant was seeking a public remedy for a dispute in private law.²³

There is general uncertainty as to the legitimate role of the court in arbitration and its limits under the Arbitration Act and the relevant jurisprudence in Kenya. Therefore, there is need to ascertain the role of the court in arbitration in Kenya and evaluate it in comparison with best practices in arbitration from the selected jurisdictions in the world.

1.2 Statement of the Problem

The intervention of the national courts in arbitration, whether domestic or international, is almost inevitable. However, in the Kenyan case, the role of the court has in most cases served only to inhibit the effectiveness of arbitration in resolution of disputes in Kenya. In particular, the intrusive role of courts in arbitration results in delay of the arbitration process, increased costs of dispute resolution in both the courts and the arbitral tribunal, increased loss of

²¹ *Ibid.*

²² EPCO case, *Ibid.*

²³ *Ibid.*

judicial times, exposure to adverse publicity of business, and uncertainty in the enforcement of legal obligations. There is, thus, need to find out ways to enhance the role of the court in arbitration to ensure that the court is able to perform its crucial role in arbitration while limiting incidences of abuse of the court process by unscrupulous parties to arbitration. In other words, need to maintain a balance between proper roles of the court in arbitration while taking measures to cull aspects of the role of the court in arbitration that are inimical to effective arbitration in Kenya.

1.3 Objectives of the Study

The following are the objectives of this study:-

1. To critically analyze the role of courts in arbitration in Kenya under the Arbitration Act of 1995.
2. To determine how diverse best practices on the role of the court in arbitration compare with the role of the courts in arbitration in Kenya on aspects of effectiveness.
3. To propose reforms in the light of the best practices towards a more effective role of the courts in arbitration in Kenya towards a conducive environment for domestic arbitration and international commercial arbitration in Kenya.

1.4 Research Questions

The research will seek to answer the following questions:-

- (i) What is the role of courts in arbitration in Kenya under the Arbitration Act of 1995?
- (ii) How do the diverse best practices on the role of the court in arbitration compare with the role of the courts in arbitration in Kenya on aspects of effectiveness?
- (iii) What reforms, in the light of the best practices above, are necessary in order to realize more effective role of the courts in arbitration in Kenya?

1.5 Hypothesis

The hypothesis of the study is that the role of the court in Kenya as provided for under Arbitration Act No. 4 of 1995, inhibits effective arbitration and is not conducive for

international commercial arbitration and that the application of best practices from the selected jurisdictions herein, can help in making the role of the court in arbitration in Kenya effective.

1.6 Justification of the Study

Any country that aspires to be an ideal seat of international commercial arbitration must strive to keep the role of the courts in arbitration to the minimum. This calls for a critical analysis of the role afforded the courts in arbitration in extant statutes to determine whether it measures up to best practices from around the world and ensure that it not an impediment to the development of arbitration, particularly international commercial arbitration. This study is an audit of the status of the role of the courts in arbitration in Kenya. As such, it will go a long way to supplement the efforts towards making Kenya an ideal international commercial arbitration destination. The proposals for reforms stimulated by the study will outline measures needed to streamline the role of the courts in arbitration in Kenya in line with international standards and best practices from leading jurisdictions around the world.

Indeed, the efforts to enact the current Arbitration Act in Kenya were fueled by the need to limit court intervention in arbitration in Kenya. The now repealed Arbitration Act allowed the courts much leeway to meddle in the process of arbitration. The stakeholders in arbitration in Kenya were concerned that the courts were playing an enormous role which tended to eventually negate the advantages of arbitration over litigation such as speedy trials, limited costs and minimal reliance on procedural technicalities. However, since enactment of the Arbitration Act, 1995 no critical analysis of its provisions with respect to the role of the courts in arbitration has been undertaken to ascertain whether the objective sought to be achieved in enacting the Act had been achieved. This study seeks to achieve this by analyzing the role of the courts in arbitration as provided for in the Arbitration Act of 1995. The study will also evaluate the potential impact of the recent amendments to Arbitration Act 1995 and the proposed framework for court-mandated arbitration in streamlining the role of the court in arbitration in Kenya to make it conducive to international commercial arbitration.²⁴

There is also need to explore the role of courts in arbitration for the purpose of advancing knowledge in the area. As a matter of fact, there is scarce literature on the role of courts

²⁴ Wako, S.A, Memorandum of objects and Reasons of Arbitration Act, 2009.

arbitration in Africa as evidence by the literature review section. The study is, thus, justified on scholarly grounds in that it will not only advance understanding of the law on role of the court in arbitration but also enhance the knowledge of the best practices that may be adopted in order to enhance the efficacy of the role. This study is also justified in that it clarifies and reviews the law on the role of the court in arbitration. The study also aspires to expose the gaps in the literature on the role of the court in arbitration in Kenya.

1.7 Literature Review

The reviewed literature is drawn from textbooks, journal papers and other scholarly presented papers. The literature review is based on the specific themes under investigation, namely, the role of the court in arbitration, the rationale for arbitration, jurisdiction, role of the courts after arbitration including recognition and enforcement of awards. The literature relevant to these themes is analyzed below:

1.7.1 Role of the Court in Arbitration

There are diverse and numerous studies discussing the role of the courts in arbitration. The book *Resolving Disputes in the Asia-Pacific Region* is a presentation of research on how diverse cultures approach conflict in the context of the integration of global markets.²⁵ As a matter of fact, to date, most of the research on international arbitration has focused exclusively on Western models of arbitration as practiced in Europe and North America. While such studies have accurately reflected the geographic foci of international arbitration practice in the late twentieth century, the number of international arbitrations conducted in East Asia has recently been growing steadily and on par with growth in Western regions. Thus, the book presents empirical research about the attitudes and perceptions of over arbitrators, judges, lawyers and members of the rapidly expanding arbitration community in China, Hong Kong, Korea, Japan, Singapore, and Malaysia.²⁶

The analysis in the book covers both international commercial arbitration and "alternative" techniques such as mediation, providing an empirical analysis of how both types of dispute resolution are conducted in the East Asian context. The book examines the history and

²⁵ Shabla F. Ali, "Resolving Disputes in the Asia-Pacific Region: International Arbitration and Mediation in East Asia and the West", (London, Routledge, 2009).

²⁶ *Ibid.*

cultural context surrounding preferred methods of dispute resolution in the East Asian region and sheds light on the various approaches to international arbitration across these diverse regions.²⁷

In the context of the present study, the book discusses several issues in relation to the role of the court in arbitration including the impact of globalization of legal practice, cultural diversity and emergence of arbitral institutions in Asia. In addition, it offers ample background and legal framework of arbitration in Asia. In this respect, aspects touching on the role of the court in arbitration as provided for in diverse East Asian jurisdictions are discussed and elucidated. The author argues that the role the national courts play in arbitration is determined and allocated under the law. As such, the role the courts are allocated to play in practice is a crucial factor in determining the development of international arbitration as a mode of resolving commercial disputes especially in Asia. A survey of the opinion of arbitration and legal practitioners in Asia sample in the book reveals that while the role of the court in all arbitrations is indispensable, there is need to keep it at minimum if only to encourage international commercial arbitration.

The present study will benefit from the discussion in the above book and especially the empirical data on how the role of the court in arbitration affects international commercial arbitration. In particular, the surveys above are similar to the survey to be undertaken in present study with respect to the role of the court in arbitration as perceived by dispute resolution practitioners. The only difference is the parameters and the subjects of the present study in that it focuses on the role of court in arbitration in Kenya and only endevours to interview local arbitrators. The study therefore offers unique scholarly contribution in that it will expand the range of existing knowledge on the importance and effect of the role of court in arbitration around the world.

On its part, the book *International Commercial and Marine Arbitration* analyses and compares commercial-maritime arbitration in a number of different legal systems including the US, the UK, Greece and Belgium.²⁸ The book examines the role of the courts in arbitration in each of these countries, making reference to the latest case law, and also makes extensive reference to French, German, Italian, Austrian, Swiss and Netherlands law. Tracing the historical emergence of the modern system of commercial arbitration, the author then

²⁷ *Ibid.*

²⁸ Georgios I. Zekos, *International Commercial and Marine Arbitration* (London, Routledge-Cavendish, 2008).

goes on to present ways in which the current process of arbitration can be developed in order to make them more effective.²⁹

The book covers such issues as the place of National Courts in international commercial arbitration. Here, the role of national courts in arbitration is discussed in general terms with key focus being targeted at the necessity and the principles that underscore the role of national courts in international commercial arbitration in general. This section also discusses the negative aspects of the role of national courts in international arbitration especially where they are used to derail the arbitration process or not complicate an otherwise straight forward affair.³⁰ In particular, the intrusive role of the court which creates possibility of the delay in arbitration due to the need to comply with court process or orders such as injunctions is deemed to be negative. Further, the roles of the court with possibility of abuse by the parties such as dual areas with dual jurisdiction between the court and the arbitral tribunal are considered as negative as opposed to supportive roles such as assistance in collection of evidence and enforcement of arbitral awards where necessary.³¹

In addition, the book also includes sections dedicated to the role of courts in commercial and maritime arbitration in US law, the role of courts in commercial and maritime arbitration in English Law, the role of courts in commercial and maritime arbitration in Greek law and the role of courts in commercial and maritime arbitration in Belgian law. In addition, a comparative analysis of the role of courts in US, English, Belgian and Greek law is undertaken. The aim is to explore how arbitration can be a co-equal and full alternative to courts rather than being depended on the court for its operationalization.³² In essence, the book supports the role of the court in arbitration which tends towards enhancing the efficacy of the arbitration process as a whole rather than interfering with and complicating or delaying the process of arbitration especially in international commercial or maritime arbitrations.

The discussion in the book is especially important in that it provides useful case studies on the role of the court in leading jurisdiction around the work. These will be useful in the present study as comparison devices on which to rate the provisions of the Kenyan law on role of the court in arbitration with international standards and practice in leading arbitration

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

jurisdictions in Europe and North America. However, the book differs with the present study in that the discussion there in is more general and descriptive rather than critical and analytical as is the case in the present study. Therefore, this study offers an important academic contribution in that it is a scholarly critique of the extent and impact of the role of the court in arbitration in Kenya.

Julian Lew in "*Does National Court Involvement Undermine the International Arbitration Process?*", discusses the issue of how and why national courts become involved in international arbitration. It addresses questions such as: What is the nature of such involvement? Does it complement or impede the arbitration process? Is there a place for any court involvement at all in the system referred to as international arbitration? In this regard, the Article discusses the fundamental characteristics of international arbitration as it co-exists with national courts. Next, the Article surveys the different stages of national court involvement in the international arbitration process and the forms of court involvement. Further, the Article analyzes court awarded injunctions that act to support of the international arbitration process. Lastly, the Article concludes with an assessment of whether court involvement is helpful to the international arbitration process.

Lew argues that there are two crucial principles of international arbitration.³³ First, that court involvement is required as support for the arbitral process and for recognition and enforcement of arbitration agreements and awards. Accordingly, any other national court involvement in the international arbitration process is arguably illegitimate, including actions to protect nationals of a particular country, to intimidate arbitrators, to protect national commercial or jurisdictional interests, or simply because the court thinks that it is better suited than an arbitral tribunal to decide on an issue.

Second, he argues that the only courts that should become involved in the arbitration process are those at the seat of arbitration or the place of enforcement. According to Lew, any other intervention of the courts is likely to conflict with accepted international rules.

Lew argues that it is essential that the court should be aware and should recognize the binding nature of the awards issued under the provisions of the New York Convention of 1958. In addition, the court should also recognize and have a basic understanding of the international

³³ Julian D.M. Lew "Does National Court Involvement Undermine the International Arbitration Process?" in the *American University International Law Review*, based on Professor Lew's remarks in the Thelen Reid Lecture at American University, Washington College of Law (Oct. 15, 2007).

commitment and the international obligations of the member state as a contracting party to an international convention, in this respect, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁴

Lew identifies the court interaction with the arbitration process at four different levels³⁵: (1) prior to the establishment of a tribunal; (2) at the commencement of the arbitration; (3) during the arbitration process; and (4) during the enforcement stage. According to him:

“Prior to the establishment of the arbitral tribunal, courts become involved where a party initiates proceedings to challenge the validity of the arbitration agreement; where one party institutes court proceedings despite, and perhaps with the intention of avoiding, the agreement to arbitrate; and where one party needs urgent protection that cannot await the appointment of the tribunal...Court intervention at the commencement of an arbitration generally involves assisting with the appointment of and challenges to arbitrators...the court here uses its authority to give effect to the parties' agreement by establishing an appropriate tribunal to take over and deal with the dispute between the parties where the prescribed appointment mechanism does not work...Court involvement during the arbitration process... involves courts' making procedural orders that cannot be ordered or enforced by arbitrators, or orders for maintaining the status quo. These measures are generally helpful...Finally after an award has been rendered, the courts may become involved in two places: (1) at the place of arbitration, i.e., when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or (2) at the place of enforcement, where the successful party seeks the recognition and enforcement of the award...”

The article above is relevant to the present study in that it explores the basics of court intervention in international arbitration. It emerges that there is a general policy to keep such intervention to the minimum and to ensure that it is helpful to the overall arbitration framework. However, the study does not discuss the issue of court intervention in the case of domestic arbitration or in the context of a specific national jurisdiction. It thus differs with the

³⁴ Adolf H. (2009) Improving the Enforcement of International Arbitration Awards in ASEAN Countries, ASEAN Law Association, 10th General Assembly p 5

³⁵ Julian D.M. Lew *et al.*, (2003) Comparative International Commercial Arbitration 367 - 74

present study which focuses on the issue of court intervention in arbitration in Kenya in both domestic and national arbitration.

Dejan's paper "Delocalization in International Commercial Arbitration" analyzes the practical aspects of delocalization in arbitration and how it influences issues touching on role of the court in arbitration.³⁶ He identifies the basic elements of delocalization, namely, detachment from national procedural and substantive law of the place of arbitration, or any other national law, and underlines the principle of party autonomy as the guiding idea pertaining to the process of delocalization.³⁷

According to Dejan delocalized arbitration may be defined as "... a species of international arbitration not derived or based on a municipal legal order."³⁸ In particular, the main characteristics of delocalized arbitration are:

1. *It is detached from the procedural rules of the place of arbitration,*
2. *It is detached from the procedural rules of any specific national law,*
3. *It is detached from the substantive law of the place of arbitration,*
4. *It is detached from the national substantive law of any specific jurisdiction.*³⁹

Further, Dejan examines the problems related to the enforcement and powers of state courts to set aside arbitration awards deriving from delocalized arbitrations, as well as the application of mandatory provisions of *lex fori* and New York Convention with respect to such awards. He concludes that the only legitimate limitation to delocalization may be the public policy concerns, and that nothing should be in the way of parties' choice to waive some legal protection mechanisms of the legal system of the place of arbitration.⁴⁰

The study on delocalization of international commercial arbitration is very relevant to the present study on the role of the court in arbitration. In any case, the limitation of the role of the court in arbitration is one aspect of the concept of delocalization. This study also helps

³⁶ Janićijević Dejan, "Delocalization in International Commercial Arbitration", 3(1) *Law and Politics* pp. 63 – 71 (2005).

³⁷ *Ibid.*

³⁸ O. Olatawura, "Delocalized Arbitration under the English Arbitration Act 1996: an evolution or a revolution", 30 *Syracuse Journal of International Law and Commerce* p, 49 (2003).

³⁹ *Ibid.*, p. 64.

⁴⁰ *Ibid.*

point at the international emerging trends regarding the role of the court in arbitration. Indeed, it is by becoming more independent of national legal systems, arbitration is getting delocalized, meaning that it is floating on the surface of legal systems of different countries, not attaching itself to any, and serving primarily the interests of international trade.⁴¹

1.7.2 Rationale for Arbitration

Eugene Bucher in his paper, "Why Arbitration?" explores the reasons for concluding arbitration agreements in general. In particular, he discusses arbitration-clauses and the various reasons for their being included in contracts of small, medium as well as big size enterprises. The first rationale is that arbitration promises better justice and impartiality in international disputes. In any case, in international cases, the party seeing their case tried in a foreign country may presume that the tribunal will be inclined to decide in favour of the opposing party, their fellow-countryman. It is the privilege of arbitration that it allows to grant absolute symmetry in that respect by selecting the single arbitrator or the president of a group of three from a state other than those of the parties.⁴²

The other reason why arbitration is preferred over other modes of dispute resolution in international commercial disputes is that it affords flawless execution of decisions in most instances. In most countries the execution of judicial decisions is possible without difficulties and risks as far they are rendered at home, while the opposite may not be true, if the decision to execute has its origin abroad, having been rendered by arbitral or ordinary courts. However, in most jurisdictions there are difficulties in execution of "foreign" judgments or awards require an explicit legal basis comprising specifically the two countries concerned. The basis may be a bilateral agreement of the two states concerned, a multiparty convention or a generally applicable statute of the country requested to execute.⁴³

According to Bucher, arbitration is preferred because the widely ratified New York Convention of the United Nations on the Recognition and Enforcement of Foreign Arbitral Awards of June 10th 1958 ensure foreign arbitral awards can be enforced in most countries. This convention is vitally important in facilitating the execution of arbitral awards to the

⁴¹ Lord Mustill, "The New Lex Mercatoria: The First Twenty Five Years", 4 *Arbitration International* p. 86(1988).

⁴² Eugene Bucher, "Why Arbitration?", available at: http://www.eugenebucher.ch/pdf_files/Mercosur.pdf (accessed on 23/11/2012).

⁴³ *Ibid.*

maximum possible. Noteworthy, the New York Convention is actually effective in almost all developed countries with the consequence of furthering worldwide cooperation and exchange of goods and there from resulting prosperity.⁴⁴ Hence the need to limit the role of the court in international commercial arbitration because while courts may be bound to enforce foreign arbitral decisions, they will be inclined to deny them enforcement where it is clear that foreign courts exerted undue interference in reaching the decisions.

According to Schlaman and Trauman, mandatory arbitration procedures exist because parties are not able to reach a negotiated settlement in all cases. The expectation is that under mandatory arbitration, the parties will negotiate “with more intention to reach a principled and timely resolution of disputes, and thus, effectively eliminating double taxation in a more expeditious manner.”⁴⁵

Thus, even where a matter proceeds to arbitration following a failure to reach negotiated settlement, timely resolution of the case remains a significant issue. In any case, in international commercial arbitration, the matters at stake are commercial in nature and delayed resolution in most cases translates into financial losses. In agreements with mandatory arbitration, if parties cannot reach settlement on time, the case is subjected to mandatory arbitration.⁴⁶

Thus, in Schlaman and Trauman’s view, the only reason parties should be allowed to contract out of the established and proved mode of dispute resolution is if the same will render administration of justice more effective. In other words, their argument is that freedom to contract does not exist in vacuum. Thus, the courts have a role where the arbitration process is delaying justice to move to eject efficiency because that was the parties’ original objective.⁴⁷

On the other hand, David Kessler differs with Schlaman and Trauman and the host of scholars who answer the question of “why arbitrate?” by considering arbitration as a quest for efficiency in resolution of disputes. In his view, there is more to arbitration than speed of

⁴⁴ *Ibid.*
⁴⁵ Kris Schlaman and Brian Trauman, “Mandatory Arbitration Designed to Speed Agreement”, available at: <http://www.kpmg.com/Global/en/services/-nov2011.pdf> (accessed on 24/11/2012).

⁴⁶ *Ibid.*
⁴⁷ *Ibid.*

delivery of justice, namely, upholding the parties' freedom to contract. He argues that, in some instances, even when court litigation would avail justice speedily, arbitration is preferred because it offers other advantages such as confidentiality and the potential to harness the expertise and knowledge of the arbitrator in reaching an effective and quality decision.⁴⁸

Kessler discussing the jurisprudence behind the United States' Federal Arbitration Act ("FAA")⁴⁹ argues that the policy favoring arbitration is justified as serving two ends: it protects freedom of contract, and it creates an efficient alternative dispute resolution system. However, he discusses recent decisions of courts to show that in some instances those two goals come into conflict in which case the need to freedom of contract is allowed to prevail. He cites the case of *Hallstreet Associates, L.L.C. v. Mattel, Inc.*,⁵⁰ involving the Federal Arbitration Act in which the Court's decision preserved perceived efficiency at the expense of freedom of contract. The Court held that the parties could not contract to expand judicial review beyond the grounds provided in the Act because such contracting would undermine the speedy resolution of disputes in arbitration.⁵¹

In the *Hallstreet Associates* Case, the dissenting judge Justice Stevens argued that the Court's holding against contractual expansion of judicial review "conflicted with the primary purpose of the FAA,"⁵² which he identified as the specific enforcement of arbitration agreements.⁵³ Another dissenting judge Justice Breyer argued that, since all nine Justices agreed that the FAA did not *preclude* the parties from contracting for judicial review, the Court should simply have remanded the case with instructions to enforce the arbitrator's final (second) award.⁵⁴ In brief, the Court's decision in the case was a departure from prior decisions which expressed a belief that the main purpose of the Act was to promote freedom of contract and the enforcement of arbitration agreements like any other contracts. But the *Hallstreet*

⁴⁸ David K. Kessler, "Why Arbitrate? The Questionable Quest for Efficiency in *Hallstreet Street Associates, LLC v. Mattel, Inc.*, 550 U.S. ___ (2008)", Florida State Business Law Review, Vol. 8, 2009.

⁴⁹ 9 U.S.C. §§ 1-16 (2000).

⁵⁰ 550 U.S. ___ (2008).

⁵¹ Kessler, *ibid.*, p. 5.

⁵² *Hallstreet Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, slip op. at 1 (Stevens, J., dissenting). Justice Stevens was joined by Justice Kennedy.

⁵³ *See id.* at 2.

⁵⁴ *See Hallstreet Associates, L.L.C. v. Mattel, Inc.*, No. 06-989, slip op. at 1 (Breyer, J., dissenting).

decision embodies a choice to preserve the perceived efficiency of arbitration at the expense of the desire of the parties.⁵⁵

Kessler argues that the Court's decision will not actually produce efficient outcomes, at least for some parties, because it forces parties to accept an option for which they would not freely contract. As a result, the Court's decision will spur parties to seek other ways of hedging against the risk of an erroneous and damaging decision by an arbitrator. In other words, the rationale of arbitration is not efficiency for the sake of it. Rather, in Kessler's view, it is efficiently pursuing and enforcing parties' freedom to contract. This means that even where the role of the court would enhance efficiency of the arbitration process but goes against the agreement of the parties to the arbitration, the same is not justifiable or tenable.⁵⁶

1.7.3 Jurisdiction of the Arbitral Tribunal

The determination of the role of the court in international commercial arbitration vis-à-vis jurisdiction of the arbitral tribunal, there are questions that arise for resolution. The key questions are who decides whether the arbitral tribunal can determine its own jurisdiction and at what stage of the arbitral process should judicial intervention, if any, occur? The approach taken depends on one's persuasion with regard to the rationale of arbitration, namely, whether it exists to further parties' freedom to contract or efficiency of justice.

In simple terms, the general principle is that every judge is judge of his own jurisdiction. Indeed, jurisdiction to decide jurisdiction is one of the illustrations of this natural necessity. Thus, even in the absence of a text of law, it is generally recognized that every judge is judge of his jurisdiction. Nevertheless, there are diversities in jurisdictional approaches to providing priority to the arbitral tribunal to rule on its own jurisdiction.

Kennedy-Grant's paper "The Role of Courts in Arbitration Proceedings" focuses on considering the aspects of the role of courts in arbitration proceedings especially their role in handling challenges to the arbitrator and arbitral jurisdiction, interim measures of protection and recourse against and enforcement of awards.⁵⁷ The discussion of the role of courts in arbitration proceedings mainly centres the UNCITRAL Model Law on International

⁵⁵ Kessler, *ibid.*, p. 5.

⁵⁶ *Ibid.*, p. 8.

⁵⁷ Tomás Kennedy-Grant, "The Role of Courts in Arbitration Proceedings", A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005.

Commercial Arbitration (“MAL”) and particularly article 5 of the Model Law which provides that “in matters governed by this Law, no court shall intervene except where so provided in this Law.” Grant argues that the article has the effect of limiting the scope for judicial intervention to the situations expressly contemplated under later articles in relation to “matters governed by” the Model Law.

Kennedy-Grant categorizes the role of the court in arbitration with respect to jurisdiction under UNCITRAL Model Law into three distinct groups, namely, role of the court under Articles 8 and 11; the role of the court under Article 16(3); and the role of the court under Articles 14 and 27. He argues that Articles 8 and 11 both involve the intervention of the court in relation to matters of jurisdiction when the tribunal has not yet decided those matters. Article 16(3) involves the intervention of the courts in relation to matters of jurisdiction but after the tribunal has decided those matters. Articles 14 and 27 do not raise matters of jurisdiction but are, rather, cases of intervention in support of the arbitral process.⁵⁸

According to him, in the first group of interventions (those under articles 8 and 11), there is a tension between party autonomy and court intervention. The question that, therefore, usually arises in most jurisdictions is what approach should be adopted with respect to issues of jurisdiction in such circumstances. The contest is usually on whether to adopt the approach that the tribunal has the primary responsibility, so that the courts should only intervene in the clearest cases, or whether the courts should approach the matter without a predisposition one way or the other and decide on a case by case basis.⁵⁹

In the case of intervention under article 16(3) of the UNCITRAL Model Law, however, he argues that this tension does not exist. This is because the tribunal has already decided the issue of jurisdiction. The party against whom the decision has gone is dissatisfied and seeks a ruling from the court. The court clearly has to make a decision on a full consideration of the facts, because its decision will be final. Further, he concludes that interventions under articles 14 and 27 of the UNCITRAL Model Law do not raise any of these issues.

In essence, Kennedy-Grant in the article demonstrates that even the UNCITRAL Model Law admits of some limited role of the court in arbitration. Further, he shows that even under the

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Model Law, the issue of the role of the court in arbitration is not clear and, indeed, some of the roles raise contentious issues. The discussion in the paper is relevant to the current study in that it provides foundational material for its in-depth discussion of the role of the court in arbitration. In particular, the discussion helps reveal aspects that constitute best practice with respect to the role of the court in arbitration as outlined in the UNCITRAL Model Law.

According to Susler, the doctrine of separability and the principle of competence-competence are two of the most widely recognized concepts in international commercial arbitration. Both aim to prevent premature judicial intervention from obstructing the arbitration process. They also serve to eliminate loopholes for parties who intend to delay the arbitral process. In his view, although these principles tackle the issue differently, they both speak to the same question, 'Who decides the jurisdiction of the tribunal?'⁶⁰

The principle of competence-competence empowers the tribunal to determine its own jurisdiction, where it has been contested by one of the parties to the arbitration. This, however, does not negate the fact that there are divergent approaches taken by courts to the question of who decides the jurisdiction of the tribunal. There are also differences concerning the stage at which the jurisdiction question should be deferred to the courts and what standards, if any, should be employed by the courts to refer the parties to arbitration. There are also distinctions between national arbitration laws concerning the judiciary's role in determining the existence and validity of the arbitration agreement.⁶¹

Thus, in essence, it is advisable that the determination the jurisdiction of the arbitral tribunal in international commercial arbitration should as far as possible be kept out of the purview of the national courts because it may visit injustice on the party from the other jurisdiction. In any case, there are divergent positions with respect to the question of determination of competence of the arbitral tribunal to rule on its jurisdiction and therefore it is best that the matter is kept out of the regular court systems as possible.⁶²

Similarly, there is no universal international position on how to enforce the principle of separability which is important in determination of jurisdiction of arbitral tribunal. Courts in

⁶⁰ Ozlem Susler, "The Jurisdiction of the Arbitral Tribunal: A Transnational Analysis of the Negative Effect of Competence-Competence", *Macquarie Journal of Business Law*, Vol. 2009, pp. 119-145.

⁶¹ *Ibid.* p. 119.

⁶² *Ibid.*, p.120.

some jurisdictions take the presumptive approach that the existence and validity of the arbitration agreement are for the courts to determine. In alternative, courts in other jurisdictions hold the view that the tribunal is provided the first opportunity to determine the existence and validity of the arbitration agreement. This means that leaving the matter open to determination by national courts may result in legal uncertainty which does not augur well for commercial entities.⁶³

Susler endorses the French Courts approach to this matter as the best practice. French legal position clearly takes a non-interventionist, prima facie approach to the jurisdiction of the tribunal. Article 1458 of the French Code of Civil Procedure enshrines the negative effect by providing inter alia that courts must delay any action if the merits are currently before a tribunal. The effect of Article 1458 unambiguously asserts that the arbitrators must be the first judges of their own jurisdiction, thereby enforcing the priority of the tribunal. He argues that this approach the optimum balance between providing priority to the parties' agreement to arbitrate and simultaneously ensuring there is access to courts if one of the parties presents a genuine challenge to the jurisdiction of the tribunal.⁶⁴

Alan Uzelac in his article entitled "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law" explores the various issues connected to the jurisdiction of the arbitral tribunal, as defined in the cases collected from various countries that have adopted UNCITRAL Model Law on International Commercial Arbitration (MAL). In particular, he focuses on the procedural issues of the determination of the jurisdiction (or lack of the jurisdiction) of the arbitral tribunal. He also explores, where necessary, the substantive issues, such as the existence or scope of the arbitral jurisdiction, where these are invoked as a ground substantiating jurisdictional pleas.⁶⁵

According to Uzelac, there is now a wide consensus that the arbitral tribunal has the power to rule on all aspects of its own jurisdiction. He cites reported decisions to show that the courts recognise the right of the arbitral tribunal to determine whether arbitration agreement exists between the parties, whether the matter in dispute comes within the scope of the arbitration

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p.131.

⁶⁵ Alan Uzelac "Jurisdiction of the Arbitral Tribunal Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and Problem Areas under the UNCITRAL Model Law", [2005] Int.A.L.R. pp. 154-164.

agreement, what is the proper interpretation of the arbitration agreement and whether the arbitration agreement is valid or was terminated.⁶⁶

However, he concludes that there are problems that have surfaced, directly or indirectly, from the collected case law to mar certainty as to the jurisdiction of the arbitral tribunal to rule on its jurisdiction. The key problems are dual jurisdiction between the courts and the tribunal regarding evaluation of validity of the arbitration agreement, dual jurisdiction regarding interim measures, availability of judicial remedies against negative arbitral decisions on jurisdiction and potential for limitation of the scope of arbitral authority, for instance, where there are allegations of fraud which fall outside the scope of submission to arbitration.⁶⁷

Thus, in Uzelac's view, the courts still have a major and important role to play in determination of the jurisdiction of the arbitral tribunal. However, he holds the view that the courts should exercise the role of football officials in that they should not interfere in the arbitral process by purporting to act as umpires. Thus, in his view, the role of the court should be as far as possible to confirm and uphold the jurisdiction of the arbitral tribunal where it establishes that to be the agreement of the parties.

1.7.4 Role of the Court after Arbitration

Hamid in the paper "Role of Courts in Arbitration in the Arab Countries" discusses how the national court participates in arbitration especially in Saudi Arabia. He shows that the law of arbitration of Saudi Arabia is unique because it requires the registration of an arbitration agreement by the tribunal that has the jurisdiction to settle the dispute. Upon registration, the tribunal is supposed to render the decision that makes the arbitration clause effective by recognizing the arbitration agreement as the source of the Court's of jurisdiction.⁶⁸ From then on, the courts serve only the role of supporting the decisions made by the tribunal, and the decision rests with the parties who may decide whether to set aside or enforce the arbitral award.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, p. 163.

⁶⁸ Hamid El Ahdab A. (2007) Role of Courts in Arbitration in the Arab Countries, http://www.adrmeda.org/tomeconference07/materials/Arbitration_Arab_Countries.pdf p 2 (Last Accessed 10 July 2010).

The paper establishes that in Arab countries, the Courts are not allowed to interfere with the arbitration until the process is concluded except where the agreement expressly provides for it. As a result, the arbitration is unstable especially when it comes to the actions to set aside the award given that the said actions are no more than a judicial control over the arbitrator's powers in respect of the essential elements of the arbitration case, such as the existence of an arbitration agreement, the conformity with due process, the restriction of arbitration to the arbitration agreement, the Constitution of the arbitral tribunal pursuant to the arbitration clause and the compliance with the public policy.⁶⁹

Kariuki Muigua's paper titled "Role of the Court under Arbitration Act 1995", examines critically the role of the court in arbitration in Kenya as stipulated by Arbitration Act.⁷⁰ In this regard, the aspects of court intervention before, pending and after arbitration in interlocutory and other matters in arbitral proceedings in Kenya are analyzed in detail. In addition, necessary reforms as far as court intervention is concerned are proposed.⁷¹

Further, the legal provisions in the Arbitration Act 1995, as amended by the Amending Act of 2009, giving the court power to intervene are highlighted and reviewed in the context of the Kenyan case law and legal practice. The paper aims at establishing whether court intervention is a facilitator of expeditious arbitration or a hindrance. In the final analysis, the Muigua reaches the conclusion that in many cases, the parties to arbitration agreements and their legal representatives have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending.⁷²

In addition, the paper concludes that recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. In a positive note, the paper finds that still something can be done to reverse this trend especially by limiting the ability of the parties to make extraneous application in arbitration as well as committing parties to achieving expedited arbitration hearings. Further, the paper proposes reforms to be undertaken to ensure that arbitration becomes an expeditious process. Given the finding of the study that court

⁶⁹ *Ibid.* p 8

⁷⁰ Kariuki Muigua, "Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya", available at: http://kmco.co.ke/attachments/080_role_of_court_in_arbitration_2010.pdf(accessed on 20/09/2010).

⁷¹ *Ibid.*

⁷² *Ibid.*

intervention in interlocutory proceedings and other matters leads to delay and can be used by parties to frustrate the arbitral process, the paper makes key proposals for streamlining the role of the court in arbitration in Kenya.⁷³

The paper is relevant to the present study in that review some of key provisions in the law regarding the role of the court in arbitration. Further, the proposals made in the paper with respect to streamlining the role of the court in arbitration go a long way in pointing the direction of the future role of courts in arbitration in Kenya. However, unlike the paper, the present study sets out to investigate and not to describe aspects of the court's role in arbitration as provided for under Arbitration Act of 1995 and how they impact the environment for international commercial arbitration.

Chopra's article "Supreme Court's Role vis-à-vis Indian Arbitration and Conciliation Act, 1996" examines some aspects of the growth of judicial law-making by the Supreme Court of India under the Indian Arbitration and Conciliation Act, 1996.⁷⁴ It also examines the negative role of the Supreme Court in taking the law backward thus preventing the growth of international trade and commerce. He argues that just as politicians and bureaucrats do not give up power, judges are no exception.⁷⁵

In essence, the question raised in the article is what should be the role of courts when dealing with international commercial agreements and finally determined awards in accordance with the arbitration clause therein. Chopra demonstrates that the role should be minimal as is set out in the UNCITRAL Model Law on which the Arbitration and Conciliation Act, 1996 is based. However, in his view, the Indian experience shows that the court's interference is not minimal but the courts are hyper active. For instance, he demonstrates that the Supreme Court has been time and again making the mistake of not relying upon the provisions of UNCITRAL Model Law especially by relying on the ambivalent principle of "public policy" which is one of the grounds on which the final award can be set aside under Rule 34 of the UNCITRAL Model Law and Section 34 of the Arbitration and Conciliation Act, 1996.⁷⁶

⁷³ *Ibid.*

⁷⁴ D.S.Chopra, "Supreme Court's Role vis-à-vis Indian Arbitration and Conciliation Act, 1996", Available at: http://works.bepress.com/dev_chopra/1 (accessed on 20/07/2010).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

Chopra demonstrates that the Supreme Court continue to fall in the trap of looking backwards (frequent references to the cases under the 1940 Act or continuing to follow the underlined unwritten principle in the 1940 Act) that judicial interference is desirable and necessary which has been totally given a go by under the new Act and in particular in international commercial arbitration awards. According to him, the continuous following of the old jurisprudence will certainly not give a boost to the Indian international trade and business which is the underlying principle and reasoning of the new Act. Another wrong approach is that of remanding the matter back to the trial court. He argues that the Supreme Court should follow the principle that it should not interfere with interim orders as outlined under Article 136 of the Indian Constitution. In his view, the Supreme Court seems to have forgotten that the 1996 Act was intended as an alternative dispute resolution method as it was both less time consuming and was effective and for promoting international trade and commerce and by continuously interfering in such matters these purposes are defeated.⁷⁷

The study is relevant in that it discusses the understanding of the courts in India of their role in arbitration. The Indian Arbitration and Conciliation Act, 1996 is similar in many respects to the Kenyan Arbitration Act including its approach to the role of the court. The study, therefore, helps in understanding how courts in Commonwealth understand and apply their role and how the same impacts on arbitration, especially international commercial arbitration.

1.8 Theoretical Framework

According to Ronald Dworkin, "*we live in and by the law. It makes us what we are: ... we are subjects of law's empire, liegemen to its methods and ideals bound in spirit while we debate what we must therefore do.*" If this is applied to the context of arbitration, the question becomes: since we are all "*subject's of law's empire*", to what extent is arbitration and arbitrators subject to the jurisdiction of the courts of law, "*the lords of the law's empire*"?⁷⁸

The issue of determination of the role of court in arbitration is an issue a complex issue especially in the case of international commercial arbitration where several systems of law

⁷⁷ *Ibid.*

⁷⁸ Ronald Dworkin, *Law's Empire*, (Harvard University Press, Cambridge: 1986), preface, p. (i).

are involved.⁷⁹ However, the conceptual theories of arbitration are relevant in determining what role of the court in arbitration is or at least, generally accepted to be.

1.8.1 The Jurisdictional theory

The jurisdictional theory is to the effect that the law of a state wholly circumscribes arbitration like litigation. This theory projects the concept of state sovereignty above the consensual agreement of the parties. In effect, it implies that the State as the sponsor of the methods and procedures for dispute resolution has unlimited jurisdiction to intervene through the national courts in overseeing the conduct of the arbitration and determining the status of arbitral awards.⁸⁰

The jurisdictional theory is the theory employed to support the claim that Constitutional applications and judicial review are applicable as against arbitration hearing and arbitrators respectively because the arbitration process and is part and parcel of the state mechanism for resolving disputes between individuals and the arbitrator enjoys the status of an administrative tribunal. The theory is criticized in that it fails to take into account the contractual nature of arbitration and the variety of arbitrations such as international commercial arbitration which do not strictly attach to the sovereignty of any particular state.

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The jurisdictional theory has been divided into two different schools of thought. On the one hand is the judgment theory which regards an arbitrator as being similar to a judge and the arbitral award 'an act of jurisdiction.' On the other hand, there is the delegation theory where the arbitrator is deemed to be performing a public function as a temporary judge.⁸² Both of these theories seem to support the quest for limited role of the courts in arbitration proceedings on account of the fact that either the arbitrator is a judge's equal

⁷⁹ Aniekan Iboro Ukpe, "Determining the *Lex Arbitri* in International Commercial Arbitration for Purposes of the Validity of an Arbitral Award", Available at: http://ciarbnigeria.org/Page_Builder_images/pages/Determining_Lex_Arbitri%5B1%5D.pdf (accessed on 20/07/2010).

⁸⁰ *Ibid.*

⁸¹ Julian D. M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, London: 2003), p. 80.

⁸² Anastasia Tsakatoura, "The Immunity of Arbitrators", Available at: http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn1 (accessed on 20/07/2010).

or that the judge's work has been delegated to him. However, this theory is not relevant to the present study except as means for contrasting it with the contractual theory. It seems to be the operative theory at present in Kenya where the role of the court in arbitration is given prominence while the present study advocates for adoption of the contractual theory as the guiding principle.

1.8.2 Contractual theory

The contractual theory was originally evolved from Merlin's perception on the subject of arbitration, as early as in the 19th century, where he supported that the arbitration agreement has the character of a contract.⁸³ Adam Samuel summarizes the classical contractual theory as follows: "*it is the agreement to arbitrate that alone gives the arbitrators the authority to make the award. They, in turn, in resolving the dispute, are acting as the agents or 'mandataires' of the parties.*"⁸⁴

In essence, the contractual theory suggests that the validity of an arbitral process is wholly dependent on the consensual agreement of the parties as to its conduct.⁸⁵ Thus, the role of other institutions and third parties including the state agencies such as courts should be limited as far as possible and only exercised upon the parties' agreement. In other words, the contractual theory is dependent on the assumption that an existing legal system confers such freedom to so agree on the parties.⁸⁶

According to the contractual theory, an arbitrator cannot be regarded as a judge since his function is not of a public character. The parties' will is of paramount importance and his powers does not emanate from the state's authority. This theory has been supported or criticized a lot in the subsequent years and many arguments were presented for and against it. The theory also leaves unaddressed many issues making it rather vague in many aspects. It has, therefore, been modified over the years so as to embrace some of the elements left out by the traditional theory.⁸⁷

⁸³ *Ibid.*

⁸⁴ Adam Samuel, "Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice", Available at:

<http://www.adamsamuel.com/pdfs/separabi.pdf> (accessed on 20/07/2010).

⁸⁵ *SEEE v World Bank, Yugoslavia and France* (1985) 82 ILR 59 at 69

⁸⁶ *Supra*, note 58.

⁸⁷ Edward M. Morgan, "Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question", 60 *Southern California Law Review* 1059 (1986-1987) p. 1064.

Overall, the proponents of this theory are agreed that arbitration agreement is still a contract but which is determined by special rules. In their view, the arbitrator's authority stems from the agreement of the parties although the arbitrator is not considered to be an agent of the parties, since the duty determine the mutual obligations of the parties cannot be fitted to that of the agent's duties. In this sense, the role of the court especially where the terms of the contract between the arbitrator and the parties is clear is limited and circumscribed. However, just like a normal contractual transaction, the court has a role to guarantee public interest and to ensure the arbitration adheres to the laws of the land.⁸⁸

1.8.3 The Theory of Party Autonomy

The party autonomy theory emphasizes the entrenchment of arbitration in different legal systems, as a self-standing mechanism of its own that should not be subsumed under an inappropriate legal category. In this sense, the theory projects the freedom of parties to the role the courts will play in the arbitration, while not disregarding the State as the precursor of that right.⁸⁹

The theory of party autonomy is manifested in real life by the allowance made in most arbitration statutes provisions for party agreement to override the provisions on the role of the court. The key weakness of the theory is its failure to take notice of the fact that in reality arbitration cannot stand alone and the place of public interest in arbitration.⁹⁰

1.8.4 The Autonomous Theory

Closely related to the party autonomy theory is the autonomous theory. This theory is a recent development and its main idea is mainly that arbitration should be detached from all the above theories and acquire an autonomous character. In other words, arbitration must be treated as being "*neither contractual, nor jurisdictional, nor hybrid but autonomous.*"⁹¹

⁸⁸ *Ibid.*

⁸⁹ *Supra*, note 58.

⁹⁰ *Ibid.*

⁹¹ Rubellin-Devinchi, "L'arbitrage: nature juridique" (1985) cited in *supra*, note 4, p. 80.

Nevertheless, this theory does not seem to have any practical application by any jurisdiction. Therefore, even if its content seems to be appealing, technically, there are many problems in its appliance, because it implies a partial surrender of legal sovereignty.⁹²

1.8.5 The mixed or hybrid theory

The mixed or hybrid theory encompasses a mixture of the jurisdictional and contractual theories. Those who support the theory are of the view that the reality lies somewhere in the middle of the contractual and jurisdictional theory, namely, neither the arbitrator performs a legal function nor that the award is a contract. "*The parties, by their agreement, created and fixed the limits of their private jurisdiction.*"⁹³

The arbitrator's duty is to judge but the power to do so is conferred to him by the agreement of the parties. Similarly, the position of the mixed/hybrid theorist regarding the role of the court in arbitration is that although the court has an important role to play in arbitration, the same should be capable of being limited by agreement of the parties except in cases where issues of fairness and integrity of the process are at stake. This is the philosophy which is adopted and advanced in this study.

1.9 Research Methodology

The research methodology used in this study is primary and secondary data method. Primary data sources will include statutes, journal, working papers, newspaper articles and treaties. Secondary sources will consist of the internet, policy documents and legal textbooks.

The study will also draw information on the role of the court in arbitration in Kenya, from interviews with leading lawyer-arbitrators, who are members of the chartered Institute of Arbitrators (Kenyan Branch), and who hold the rank of a full member, and above, coupled with more than five years arbitration experience. The research subjects will be identified through non-probability sampling of the members of the Institute. Target Respondent Interviews (TRI) will be used, in collecting the relevant information on the role of arbitrators in Kenya, as per the annexed questionnaire.⁹⁴ The TRI approach is chosen as data collection

⁹² Supra, note 5.

⁹³ *Ibid.*

⁹⁴ See Appendix II.

method, because it is the most ideal method, where respondents are deliberately selected, so as to collect relevant, trustworthy data and to retain focus in the study.

1.10 Chapter Breakdown

The study is divided into the following chapters:-

1.10.1 Chapter One: Background of the Study

Chapter One introduces the background to the Arbitration Act 1995 and the key concepts in the study discussing the role of court in arbitration in general. Further, the chapter will include a background of study, literature review and theoretical framework of the study as a way of laying the foundation for discussion in the other parts of the study.

1.10.2 Chapter Two: A Critical Analysis of the Role of the Court in Arbitration in Kenya

Chapter Two will critically analyze the role of the courts in arbitration as outlined in the Arbitration Act, 1995. The various aspects of the role of court before commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings will be appraised and their merit and demerits in enhancing effective arbitration in Kenya be determined.

1.10.3 Chapter Three: Overview of Best Practices on the Role of Court in Arbitration in the Select Jurisdictions, United Kingdom, Canada and France

This chapter will review the best practices on the role of the court in arbitration from three selected jurisdictions. The salient aspects of the role of the courts in arbitration in the selected common law and civil law jurisdictions will be distilled and discussed especially with regard to how they help enhance the effectiveness of arbitration as a mode of dispute resolution.

1.10.4 Chapter Four: A Comparison of the Legal Gaps on the role of Courts in Arbitration in Kenya vis-a- viz The Best Practices on the Role of the Courts in the Three Selected Jurisdictions Discussed in Chapter Three

Chapter Four will seek to establish whether and how the best practices discussed in Chapter three above are applicable in making the role of the courts in arbitration in Kenya effective. In particular, the Chapter will discuss the ways and means of domesticating and

institutionalizing the best practices on the role of court in arbitration from around the world towards effective role of the court in arbitration in Kenya. The Chapter will also discuss briefly how, given the findings of the field study as discussed in chapter three above, the role of the courts in arbitration in Kenya may be enhanced and rendered effective.

1.10.5 Data Analysis and the current status of the role of the courts in Arbitration in Kenya

Chapter five deals with data analysis and how the same findings confirms the loop holes or shortfalls in the role of the courts in Arbitration in Kenya before the commencement of the arbitration proceedings, during arbitration proceedings and after arbitration proceedings and the interpretation of the courts of their role in diverse decisions in arbitration in Kenya as discussed in chapter four.

1.10.6 Chapter Six: Summary, Conclusion and Recommendations

Chapter Six host a summary of the key findings in the study and a conclusion of the entire study. Additionally, the Chapter will also have highlights of the proposals for reforms in order to realize effective role of courts in arbitration in Kenya and to make the same conducive and robust for both domestic and international commercial arbitration in Kenya.

CHAPTER TWO

2.0. A Review of the Role of Courts in Arbitration in Kenya

2.1 Introduction

This chapter analyzes the role of the court in arbitration as outlined in the Arbitration Act, 1995 ("the Act").⁹⁵ The various aspects of the role of courts before the commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings and the interpretation of the courts of their role in diverse decisions are reviewed.

The discussion and analysis in the Chapter is organized around key thematic arguments based on an analysis of the statutory provisions and the case law examined. In particular, the following thematic issues are analyzed: the rationale of arbitration, minimum interference by the court, the jurisdiction, powers and autonomy of the arbitral tribunal, the need and conditions for court intervention and the duty of the court to intervene in public interest. The analysis will show the extent to which courts interfere in arbitration proceedings and whether the interference promotes or inhibits the process of arbitration.

2.2 The Law on the Role of the Court in Arbitration in Kenya

The law of arbitration the world over admits the notion that the role of the court in arbitration is inevitable and almost universally provides for it. Importantly, the law also appreciates the need to limit Court intervention in arbitration to a bare minimum. Thus, provisions on Court intervention are usually worded in the negative such that except where the law specifically provides for court intervention, the court has no recognized basis for intervening in the arbitration proceedings.⁹⁶

⁹⁵ Act No.4 of 1995.

⁹⁶ Tomas Kenny-Grant, "The Role of the Court in Arbitration Proceedings", A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005, p. 2.

The Kenyan position on the role of the court in arbitration is stated in section 10 of the Arbitration Act. The section states thus:

*'Except as provided in this Act, no court shall intervene in matters governed by this Act.'*⁹⁷

In effect, the Arbitration Act, 1995 restricts the jurisdiction of the court in arbitration to matters provided for under the Act. At face value, section 10 above permits two possibilities for court intervention in arbitration. On the one hand, the courts are permitted to intervene in arbitration where the Act expressly provides for or permits the intervention of the court.⁹⁸ For instance, the court intervention is permissible in matters touching on appointment of the tribunal as provided for under section 12 of the Arbitration Act, 1995.

On the other hand, the courts, particularly the High Court, have inherent jurisdiction to act in public interest. The Court is, therefore, entitled to intervene in arbitration proceedings even where that is not provided for expressly. Such intervention is justified in public interest. For instance, courts in Kenya entertain Constitutional applications and judicial review proceedings against arbitrators and arbitral tribunal in public interest.

The Kenyan Courts have not been consistent with respect to the implication of section 10 with respect to their role in arbitration. For instance, in **Sadrudin Kurji & another v. Shalimar Limited & 2 Others**⁹⁹ it was held that:

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

⁹⁷ Section 10, Arbitration Act 1995 (Kenya).

⁹⁸ *Supra*, note 1, p. 4.

⁹⁹ [2006] eKLR.

However, the Court of Appeal in **Anne Hinga v. Victoria Gathara**¹⁰⁰ appears to read the role of the courts in arbitration in broad terms by holding that public policy is not exhaustible. The Court stated as follows in the case:

*....public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised.*¹⁰¹

The Court in **Tononoka Steels Limited v. E. A. Trade and Development Bank (PTA Bank)**¹⁰² stated that even where the court intervenes in any arbitration proceedings or any matter that should be referred to arbitration; it would only be in respect of peripheral matters relating to the subject matter of dispute as opposed to dealing with the substantive matters. Needless to say, the courts have not been faithful in upholding this policy of minimum and peripheral interventions only.

In the above case, the Appellant wished to set up a plant in Kenya for manufacturing steel products and entered into a loan agreement with the PTA Bank, the Respondent. A dispute arose and the Appellant sued in the High Court of Kenya, seeking an injunction against the PTA Bank restraining it from recalling for the repayment of the facility or taking possession of the project. Special damages and general damages were also claimed by the Appellant. A question arose as to whether the jurisdiction of the High Court of Kenya was ousted. The arbitration clause and the Legal Notice were heavily relied on. Kwach JA (as he then was), in justifying jurisdiction, said that while the jurisdiction to deal with substantive disputes and differences was given to the International Chamber of Commerce in London, the Kenyan Courts retained residual jurisdiction to deal with peripheral matters.¹⁰³

In effect, this amounted to imposition by the learned Judge of the jurisdiction of the court into a matter that would otherwise fall for determination by international commercial arbitration.

In any case, the parties to it had entered an international arbitration agreement. Given that one

¹⁰⁰ Civil Appeal No. 8 of 2009.

¹⁰¹ *Ibid.*, p. 25.

¹⁰² *Tononoka Steels Limited v. E. A. Trade and Development Bank (PTA Bank)* 2(2000)EA 536.

¹⁰³ *Ibid.*, at p. 549.

of the parties was in fact not Kenyan meant that he would likely be disadvantaged by the exercise of the jurisdiction of the court and the enforcement of resultant decision would likely be unduly expensive.

2.3 The Rationale for Arbitration

The main appeal of arbitration as a mode of dispute resolution is in the advantages it offers over and above litigation. The main factor behind the push for arbitration has been the continuous economic rationale of value for money offered by arbitration as well as the perceived 'failings' of the current judicial system and legal practice.¹⁰⁴ Therefore, the general approach is to avoid excessive judicial interference with regard to arbitration for the following reasons. First, arbitration is a method of dispute settlement which is based on the consent of parties to avoid litigation. Courts must not frustrate the parties' freedom of contract by interfering in the arbitration process and thus making the latter redundant.

Second, arbitration, unhampered by excessive court interference, is a desirable input for Kenya's attempt to actively participate in international trade and attract foreign investment. Third, courts themselves may benefit from abstaining from unnecessary intervention in commercial arbitration.¹⁰⁵ In any case, arbitrators are partners of judicial officers in the administration of justice. They have a role to play in making the judiciary efficient by enabling the latter to avoid the unnecessary diversion of the limited judicial resources and time away from matters that require particular judicial attention.¹⁰⁶

The growth of the popularity of arbitration, as alternative to litigation, reflects its ability to escape from the limitations and disadvantages of the court proceedings. On the other hand, the increasing use of arbitration in many countries reflects corresponding recognition of the quality of the arbitration. Arbitration offers advantages that litigation, from its nature, can never provide. These advantages vary from case to case.

¹⁰⁴ Colin Kaeser, "The emergence of arbitration in family law in Australia", 6(7) *ADR Bulletin*; available at: <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1261&context=adr> (accessed on 20/01/ 2011).

¹⁰⁵ Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia." 1(2) *Ethiopian Bar Review*, pp. 117-118(2007).

¹⁰⁶ *Ibid.*

However, there are the commonly recognized advantages of arbitration. The main advantage of arbitration is that it upholds the freedom of the parties to contract to resolve their disputes out of the court system. As such, the parties are free to decide in respect of the mode of proceedings. The principle of party autonomy allows the parties to agree upon written procedure, the periods of time, content of an award and upon many other questions of arbitration procedure. So the parties end up as the real “owners” of arbitration proceedings and theoretically may create their own “Code of arbitration proceedings”.¹⁰⁷

In **Rawal v. The Mombasa Hardware Ltd**,¹⁰⁸ the court held that the existence of an arbitration agreement in a contract is not an impediment to resolving disputes in court until a party to the contract objects. Further, it was stated that an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of plaint.¹⁰⁹

“In so holding, the court failed to appreciate its duty to give effect to arbitration agreement by staying proceedings to allow for arbitration. In other words, the court was stating that even where the parties have clearly agreed to arbitrate their dispute and one party is desirous that the agreement be upheld; the court may go ahead and allow litigation of the same matter to continue. The effect of this is to render uncertain enforcement of arbitration agreements in Kenya. This does not send the right signal, especially to international commercial arbitration fraternity in that it implies that the local courts may still exercise their compulsory jurisdiction over a matter which is a subject matter of international commercial arbitration in Kenya.”

2.4 The Role of the Courts before Arbitration Proceedings”

2.3.1 Stay of Proceedings

In the interest of enforcing the freedom of the parties to contract and the resultant agreement to arbitrate their disputes, the courts are given the powers to stay of legal proceedings pending arbitration. This is necessary given that the courts have no direct power, and of their own motion, to compel arbitration.¹¹⁰

¹⁰⁷ Eugene Bucher, “Why Arbitration?“, available: http://www.eugenbucher.ch/pdf_files/Mercosur.pdf (accessed on 20/01/2011).

¹⁰⁸ [1968] E.A 398.

¹⁰⁹ *Ibid.*

¹¹⁰ Kariuki Muigua, “Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.” A paper presented at the Chartered Institute of Arbitrators course on “Advocacy in

The Act gives the court discretion to intervene to grant stay of proceedings for arbitration. However, this power is limited in that the court can only act where specific conditions are met in granting a stay of proceedings. The attitude of the Kenyan courts has been inhibitive in that they strictly interpret and apply these conditions limiting their power to stay proceedings in favour of arbitration.

In the case of *Peter Muema Kahoro & Another-v-Benson Maina Githethuki*,¹¹¹ a Plaintiff had filed a suit seeking to enforce an agreement for sale of land by way of permanent injunction and in addition applied and was granted *ex-parte* temporary injunction pending *inter-partes* hearing of the application. The agreement contained an arbitration clause under which parties had undertaken to refer any dispute arising to a single arbitrator appointed by the Law Society of Kenya. The Defendant entered appearance, and in addition filed grounds of opposition against the application for injunction.

The Defendant then brought an application seeking to strike out the plaintiff's suit and the application thereof on the ground that the court was not seized of jurisdiction to try the matter. It was argued that the Plaintiff having failed to invoke the arbitration agreement clause, the court has no jurisdiction to entertain the suit and/or the application as the reliefs sought by the Plaintiff were best sought under section 7 of the Arbitration Act. The Plaintiff, in response, argued that an arbitration clause does not limit or oust the jurisdiction of the court.

The court interpreted section 6 of the Arbitration Act strictly finding that that striking out of the suit was beyond the ambit of the section. The court also refused to stay the proceedings on the basis that the Defendant failed to move the court in appropriate time under section 6 and refer the matter to arbitration. It stated that by taking steps in the proceedings, the defendant had waived his right to rely on, and invoke the arbitration agreement. In other words, the court held that parties can choose to ignore the arbitration agreement and file the proceedings in a court.

Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010) p.7 Available at <http://www.kmco.co.ke/attachments/080> <Accessed on 8 July 2010>.

¹¹¹ [2006] HCCC(Nairobi) No. 1295 of 2005.

In order to stay proceedings for arbitration, the dispute between the parties must be in regard to the matters agreed to be referred to arbitration by the parties. This means that the dispute must fall within the scope of the arbitration clause. In essence, it implies that the court can stay the proceedings unless, *inter alia*, it finds "...that there is not in fact any dispute between the parties with regard to the matters referred to arbitration."¹¹²

In **TM AM Construction Group (Africa) v. Attorney General**,¹¹³ an application for stay of proceedings was opposed on the ground that there was no dispute between the parties to be referred to arbitration. The court refused to stay the proceeding finding that there was failure by the AG to tender any evidence showing that there was in fact any dispute between the parties. The court stated that no basis had been established to show that a dispute in fact existed to justify staying the proceedings and referring the proceedings to arbitration. However, the court erred in that the burden ought to have been on the party alleging that there was no dispute to be referred to arbitration. In any case, it would be tedious for every party applying for stay of proceedings for arbitration to be required to tender evidence to show that there is a dispute between the parties.

Further, to succeed in staying proceedings, the application for stay must be done at the same time when the applicant acknowledges the claim against which it seeks a stay of proceedings.¹¹⁴ The rationale of this requirement is to ensure that stay of proceedings for reference to arbitration is not used as a delay tactic by the defence.¹¹⁵ Courts in Kenya have opted to interpret this provision strictly and will not stay proceedings unless the application was filed at the time of filing the memorandum of appearance. For instance, courts have concluded that the mere entering of appearance, filing of a defence and a notice of preliminary objection disentitles a defendant from invoking the provisions of section 6(1) of the Act to refer the matter to arbitration.¹¹⁶

¹¹² Section 6 (1) (b) of the Arbitration Act No. 4 of 1995.

¹¹³ HCCC No. 236 of 2001 (Milimani) (Unreported).

¹¹⁴ Section 6(1) of the Arbitration Act No. 4 of 1995. the Section before amendment made reference to when a party enters appearance or "files any pleadings or takes any other step in the proceedings".

¹¹⁵ *Supra*, note 16, p.12.

¹¹⁶ *Neliwa Builders and Civil Engineers Ltd V Jacob Mgaru Solomon & 3 Others* [2001] eKLR, <http://www.kenyalaw.org> <accessed on 9 July 2010>.

In *Peter Mwema Kahoro & another v. Benson Maina Gitethuki*,¹¹⁷ the Defendant entered appearance, filed grounds of opposition and took out a chamber summons application under O.VI r.13 of the Civil Procedure Rules seeking orders to strike out the suit on the ground that the court was not seized of jurisdiction to try the matter owing to the existence of an arbitration agreement between the parties. The Court, in dismissing the application, noted that striking out of the suit was beyond the ambit of section 6 of the Act and that besides that, the applicant (defendant) failed to move the court to refer the parties to arbitration pursuant to the arbitration agreement. Further, it held that by taking a step to acknowledge the claim against which stay was sought, the defendant impliedly affirmed the correctness of the (court's) proceedings and his willingness to go along with the determination by the courts instead of arbitration and thus the refusal of stay of proceedings.¹¹⁸

However, merely entering appearance and filing grounds of opposition to a pending application cannot suffice as evidence of acknowledgement of the claim. In any case, the applicant party was merely taking steps to protect his interests should the application for stay or striking out be refused by the court as was the case. It is also settled that courts should not punish the applicant for the mistake of his counsel by relying on a mere technicality when it upheld his overriding right to access justice as guaranteed under the Constitution.

Indeed, the above decision contradicted the decision of Justice Visram (as he then was) in *Kenya Seed Co. Limited v. Kenya Farmer's Association Limited*.¹¹⁹ In that case, the learned judge held that an action to resist interim injunction is not a step in the proceedings. Applications for interim applications are interlocutory proceedings whereas the steps proscribed have to be taken in substantive proceedings.¹²⁰

2.4 The Role of Courts during Arbitration

2.4.1 Appointment of Arbitrators

As per the Arbitration Act, parties to an arbitration agreement are free to appoint an arbitral tribunal and determine the number of arbitrators. This could be arbitration with one

¹¹⁷ [2006] eKLR, <http://www.kenyalaw.org> <accessed on 9 July 2010>.

¹¹⁸ *Eagle Star Insurance Company Limited V Yuval Insurance Company Limited* [1993] 1 Lloyd's Rep. 291, HL

¹¹⁹ HCCC No. 1218 of 2006 (Nairobi, unreported, Visram J).

¹²⁰ *Ibid.*

arbitrator,¹²¹ or two arbitrators, in which case each party shall appoint an arbitrator¹²² or three arbitrators, in which case each party shall appoint one arbitrator and the two arbitrators so appointed shall appoint the third arbitrator.¹²³

Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.¹²⁴ The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time.¹²⁵ The High Court, if it grants an application under subsection (5), may by consent of the parties or on the application of either party, appoint a sole arbitrator.¹²⁶ A decision of the High Court in respect of a matter under this section shall be final and not subject to appeal.¹²⁷

The Act acknowledges the autonomy of the parties to agree on who or how to appoint the arbitral tribunal.¹²⁸ Thus the appointment by court has provided for a default arrangement if efforts by the parties to appoint a tribunal encounter a stalemate.¹²⁹

The High Court in appointing the arbitrator should have due regard to any qualifications required of an arbitrator by the agreement of the parties. In addition, it must have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In the case of a sole or third arbitrator, the High Court has to take into account the advisability of appointing an arbitrator of a nationality other than those of the parties.¹³⁰ Other considerations of impartiality depend on the circumstances of the dispute such that where the arbitral tribunal is proposed by one party, the court may give audience to the other party either to raise objections against the proposed arbitrator(s) and /or to propose alternative ones.¹³¹

¹²¹ Section 12 (2) (c) provides that the parties shall agree on the arbitrator to be appointed.

¹²² Section 12 (2) (b) as amended by the 2009 Act.

¹²³ Section 12 (2) (a) Arbitration Act No. 4 of 1995.

¹²⁴ Section 14 (5) *supra*.

¹²⁵ Section 12 (6) *supra*.

¹²⁶ Section 12 (7) *supra*.

¹²⁷ Section 12 (8) *supra*.

¹²⁸ Section 12 (2) *supra*.

¹²⁹ *Supra*, note 4, p. 23.

¹³⁰ Section 12(9) of the Act as amended by the 2009 amending Act.

¹³¹ *Supra*, note 3, p. 24.

In the case of **Henry Muriithi Mvungu & Another v. Bruno Rosiello**,¹³² an application was made pursuant to section 12(3)(b) of the Act requesting the court to appoint an arbitrator to hear and determine a dispute arising from a joint venture agreement between the parties. The court declined to appoint an arbitrator, *inter alia*, because the applicants had not suggested the qualifications of the required arbitrator. The learned Ochieng J. was of the view that “it is definitely not helpful for any person to ask the court to appoint an arbitrator and leave it at that. I say so because I believe that it is not the function of the court to go about deciding for itself the persons who qualify for appointment as arbitrators in any given situation, without the benefit of some input from the parties themselves. I hold the considered view that it is always prudent for the parties who seek appointment of arbitrators, to put forward their suggestions of the person deemed qualified for the task. The suggestions should be inclusive of the names and qualifications of the persons so named.” Although this was supposedly in the best interest of the arbitration process, it delayed the process even further because the learned judge could have asked the parties to submit names of qualified parties to him for selection. .

2.4.2 Appeals from Jurisdiction of Arbitrator

Section 17 of the Act declares that the Arbitral Tribunal has the competence to rule on its own jurisdiction. Where the tribunal makes a ruling on the issue, section 17(6) of the Act directs a party aggrieved by such a ruling to apply within 30 days to the High Court to decide on the matter.

Ringera J (as he then was) in **Nova Chemicals Limited v. Alcon International Limited**¹³³ properly considered whether the Arbitration Act conferred upon the High Court appellate jurisdiction. He was of the opinion (correctly so) that “it is in two instances that the Act conferred appellate jurisdiction to the High Court. The first instance is under section 17(6) of the Act whereby it is provided that where the arbitral tribunal rules as a preliminary question that it has jurisdiction to entertain the reference, an aggrieved party may appeal to the High Court. The decision of the High Court on the issue of jurisdiction is declared under subsection (7) of the same section to be final and not appealable.”

¹³² [2006] eKLR <http://www.kenyalaw.org> <accessed on 12 July 2010>.

¹³³ Milimani HCCC Number 1124 of 2002.

The case of **Kenya Airports Parking Services Ltd & another v. Municipal Council of Mombasa**¹³⁴ the Court considered Section 17(1) of the Arbitration Act. The Court stated that the arbitral tribunal has powers to render a decision in regard to its own jurisdiction. It further stated that the defendant was not prohibited by law from raising the issue regarding the validity or otherwise of the agreement before the arbitral tribunal.

In the above case, the Court considered the Court of Appeals decision in the case of **Anne Mumbi Hinga v. Victoria Njoki Gathara** and held that it could not intervene and consider matters to do with the merit of the dispute between the plaintiffs and the defendant. That was stated to be an issue that was squarely within the province of the arbitrator. The Court therefore declined to consider the issues regarding the validity of the agreement between the plaintiffs and the defendant, and referred the matter back to the arbitrator for determination.

2.4.3 Judicial Intervention in Public Interest

The Courts have interpreted section 10 of the Arbitration Act as allowing the courts the leeway to intervene in arbitration in the public interest even where it is not expressly so provided in the Act. The key argument has been that the Act cannot reasonably be interpreted as ousting the inherent power of the courts to do justice especially through judicial review and Constitutional remedies.¹³⁵

In the case of **Epco Builders Limited v. Adam S. Marjan-Arbitrator & Another**,¹³⁶ the appellant had taken out an originating summons before the High Court (Constitutional Court) under, *inter alia*, sections 70 and 77 of the old Constitution of Kenya; section 3 of the Judicature Act and section 3A of the Civil Procedure Act. The appellant's contention in the Constitutional application was that its Constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator. The main complaint of applicant was that it was unlikely to obtain fair adjudication and resolution of the dispute before the arbitral tribunal in view of the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who are crucial witnesses for a fair and complete resolution of the matters before the tribunal.¹³⁷

¹³⁴ [2010] eKLR, <http://www.kenyalaw.org> <accessed on 13 July, 2010>.

¹³⁵ *Supra*, note 16, p. 4.

¹³⁶ Civil Appeal No. 248 of 2005 (unreported).

¹³⁷ *Ibid*.

The counsel for the Chartered Institute of Arbitrators-Kenya Branch, an interested party, submitted that while she did not refute the application under section 77 (9) of the old Constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such application.¹³⁸ The majority of the Court of Appeal admitted that the matter was not frivolous and ordered that the application of the appellant be heard by the High Court on merit.¹³⁹

Justice Deverell contributing to the majority decision impressed on the importance of encouraging alternative dispute resolution to reduce the pressure on the court from the ever increasing number of litigants seeking redress in court. He further stated:

*"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make Constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a Constitutional court during arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a Constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."*¹⁴⁰

The decision in the EPCO case, and the position outlined by Justice Deverell above, points to the court's reluctance in dismissing the need for Constitutional applications in arbitration. Only the dissenting judge, Justice Githinji, JA who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ EPCO case, *Ibid.*

by invoking section 84(1) of the old Constitution, the appellant was seeking a public remedy for a dispute in private law.¹⁴¹

2.5 The Role of the Courts after Arbitration Proceedings

2.5.1 Setting Aside of Arbitration Award

The High Court (on its own motion) will set aside an arbitral award if it finds that¹⁴² the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with public policy in Kenya.

Courts have had an occasion to rule on the question as to when an Arbitral Award can be considered to be in conflict with the public policy in Kenya. In the case of **Glencore Grain Ltd v. TSS Grain Millers Ltd**,¹⁴³ Onyanja J stated as follows:

“A contract or arbitral award will be against public policy, in my view, if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word “illegal” here would hold a wider meaning than just “against the law”. It would include contracts or acts that are void. “Against public policy” would also include contracts or contractual acts or awards which would offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive”

This decision seems to contradict another decision on the issue of conflict with public policy, namely, **Christ for All Nations v. Apollo Insurance Company Limited**¹⁴⁴ in which the following statement was made:

“In my judgment, this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of statute or contract on the part of an arbitrator

¹⁴¹ Ibid.

¹⁴² Section 35 (2) (b) of the Act.

¹⁴³ [2002] 1 KLR 606 at p. 626.

¹⁴⁴ [2002] 2 EA 366.

cannot by any stretch of the imagination be said to be inconsistent with the public policy of Kenya. On the contrary, the public policy of Kenya leans towards the finality of arbitral awards and parties to arbitration must learn to accept awards, warts and all, subject only to challenge within the narrow confines of Section 35 of the Arbitration Act”

The above decision embodies the correct position on the matter of public policy that the court should work for finality of arbitral awards. Although the decision was a persuasive precedent available to the court in **Glencore Grain Ltd** case, it was ignored with the Court unduly expanding the concept of public policy as applies to arbitration.

2.6 Recognition and Enforcement of Arbitral Awards

A domestic award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced.¹⁴⁵ An international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.¹⁴⁶

The law requires the party relying on the award or applying for its enforcement to furnish it with the original arbitral award or a certified copy of it and the original arbitration agreement or a duly certified copy of it.¹⁴⁷ However the High Court may order otherwise where a party seeks indulgence on compliance with these requirements to supply those documents.¹⁴⁸

The High Court has inconsistently used its discretion to allow recognition of awards where the procedural requirements for recognition and enforcement are not strictly adhered to. For instance, in **Kundan Singh Construction Ltd v. Kenya Ports Authority**¹⁴⁹ an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Act. The Judge found that there was no duly authenticated original arbitral award or a duly certified copy of it. Rather, he found that what was on court record were photocopies of the arbitral award and arbitration agreement contrary to the requirements

¹⁴⁵ Section 36 (1) *supra*.

¹⁴⁶ Section 36 (2) *supra*.

¹⁴⁷ Section 36 (3) *supra*.

¹⁴⁸ Section 36 (4) *supra*.

¹⁴⁹ H.C.C.C No. 794 of 2003 (Milimani, unreported).

of section 36(2) of the Act which could only be waived upon application which had not been made.

"However, in Structural Construction Co. Ltd v. International Islamic Relief Organization¹⁵⁰ the lack of an original or certified copy of the arbitration agreement was held not to be fatal and a copy annexed to the supporting affidavit held to be acceptable for the purposes of the application for enforcement. It was also decided in this case that the non- representation of a party at the arbitration proceedings due to their neglect to appoint their advocate of choice did not entitle them to challenge the recognition and enforcement of an award."

2.8 Conclusion

The prevailing policy with regard to court intervention at the international level is to minimise it. The key approaches in court intervention in arbitration around the world seems to follow two key patterns, namely, minimal intervention of the court except in public interest and supporting arbitration in order to realize its rationale and enhance the role of the arbitrator in exercise of his jurisdiction and powers.

From the foregoing discussion, it emerges that there are various instances where the Kenyan Arbitration Act empowers the Court to intervene in the arbitration process. However, even where there is no express statutory provision giving the Court such power, the court may read in public interest as a justification to entertain or hear a dispute arising within the arbitration proceedings. This is despite the fact that the Act is clear that except where it is otherwise provided, the court has no role in arbitration proceedings. The Act also restricts recourse to the High Court or Court of Appeal by declaring most references to the High Court as final and non-appealable. This is designed to restrict recourse to Courts by parties who are unwilling to take part in the arbitration process or who are keen on avoiding payment of the award rendered against them.

The mainstream court practice in Kenya paints a different picture. The court comes across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases, it seems the court considers its role in matters that are subject to arbitration agreement as being

¹⁵⁰ [2006] eKLR <http://www.kenyalaw.org> <accessed on 12 July, 2010>.

parallel to that of the arbitrator. Thus, where one party goes to court in breach of an arbitration agreement, the courts are reluctant to stay the proceedings in favour of arbitration relying on strict interpretation of the conditions for stay under section 6 of the Arbitration Act. The Courts have, in most instances, also contradicted themselves in their decisions even where the law is clear. This has ended up creating uncertainty on the position of the arbitration law and an opportunity for unscrupulous litigants to exploit to delay arbitration proceedings in Kenya.

CHAPTER THREE

3.0 Overview of the Best Practices on the Role of Courts in Arbitration in Three Selected Jurisdictions

3.1 Introduction

In Chapter Two, I analyzed the role of the courts in arbitration as outlined in the Arbitration Act, 1995. The various aspects of the role of courts before the commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings and the interpretation of the Courts, of their role in diverse decisions were reviewed.

Chapter Three reviews best practices on the role of the Courts in arbitration in United Kingdom (UK), Canada and France. The salient features of the role of the Courts in arbitration in the two common law jurisdictions (United Kingdom and Canada) and the Civil Law Jurisdiction (France) are discussed with special focus on how Courts enhance the effectiveness of arbitration as a mode of dispute resolution. The discussion focuses on the role of the Courts in the following three areas: (1) Stay of proceedings (2) assistance; and (3) appeals.

The aim of the Chapter is to show how the laws in England, Canada and France have ensured a balance in maintaining the role of the Courts to intervene in arbitration, and upholding arbitration as an Alternative to the Court process.

Canada has domesticated the UNCITRAL Model Laws. In 1986, Canada, with consent of its provinces, adopted the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law").¹ It was the first country in the world to do so and led the way for other countries to follow suit. The Model Law was implemented by legislative enactment at both the provincial and federal levels in Canada in 1986.² The Federal Commercial Arbitration Act applies to domestic and international commercial arbitrations. The provincial international

¹ The Model Law was adopted by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985 by the General Assembly Resolution A/40/17, 40 G.A.O.R. Supp. No. 53, A/40/53. The Parliament of Canada adopted the Model Law on June 17, 1986; it came into force on August 10, 1986: The Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.).

² Available at <http://adrchambersinternational.com/publications.html#6> accessed on 30th May 2012.

arbitration legislation in force in the province in which the arbitration is brought, applies to international commercial arbitrations between private parties where one of the parties is 'foreign' and where the Federal Commercial Arbitration Act does not apply.³

In addition, in 1986, Canada, with the consent of its provinces, acceded to and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").⁴ By adopting the Model Law and acceding to the New York Convention, Canada and its provinces, significantly improved the old Canadian arbitration regime. These improvements include the establishment of the following principles: limited scope of court intervention, consistent recognition and enforcement of foreign arbitral awards, party autonomy and freedom of contract. Such improvements provide parties involved in international arbitrations in Canada with the advantages of certainty, predictability, consistency and expediency in dealing with international commercial disputes. UK is the mother of Common Law. The U.K. Act of 1996 was influenced by the provisions of UNCITRAL's *Model Law*⁵ of 1985, which favoured the principle of party autonomy, while minimizing court control in order to maintain the effectiveness of arbitration as a much sought-after and much desired commercial dispute resolution mechanism.

France has always been a popular venue for international arbitration. ICC statistics—generally thought to be representative of international arbitration as a whole—demonstrates that, France as a place for international arbitration has lost none of its appeal.⁶

The transnational character of international arbitration in France results from the convergence of several important factors. The foremost of these is the strong pro-arbitration bias of French law on arbitration. France's 1981 Decree on international arbitration was one of the first modern arbitration laws, and even today remains more progressive than subsequent arbitration legislation in most other countries.⁷ The French courts have also played an important role in encouraging international arbitration in France by establishing a solid tradition of judicial non-interference in the arbitral process. Provided there is a *prima facie*

³ *ibid*

⁴ *ibid*

⁵ *Model Law on International Commercial Arbitration*, GA Res. 40/72, UNCITRAL, 1985.

⁶ Arbitration in France 'The Premium Forum for International Arbitration Paris, January 1, 2002' available at <http://www.ainaris.com/pages_html.asp?Id=venue> accessed on 30th May 2012.

⁷ *Ibid*.

arbitration agreement, French courts will insist, if need be, in the establishment of the arbitral tribunal and leave it to the arbitrators to determine the existence and extent of their jurisdiction. No court interference whatsoever will occur in the course of an arbitral process. At the action to set aside or enforcement stage, the award will be scrutinized only by reference to five limited grounds, all of which are narrowly construed.⁸

Lastly, the existence of a longstanding and very active international legal community, as well as the location of the headquarters of ICC in Paris since 1923, significantly contributed to the development of a strong international arbitration practice in France.⁹

3.2 Case Study 1-United Kingdom

Role of Courts in Arbitration in the United Kingdom

The legal basis of the role of the Courts in arbitration in the United Kingdom can best be captured in the words of the House of Lords in the case of **Bremer Vulkan v. South India Shipping Corp.**¹⁰

The House of Lords in this case upheld the decision of the Court of Appeal that an arbitrator did not have powers similar to those of a court to dismiss a claim for want of prosecution. While this aspect of the decision was not controversial, their Lordships went on to hold by a majority of 3:2 that the court had no power to intervene to restrain a dilatory claimant from proceeding with arbitration, even where the delay was such that a fair hearing was no longer possible. The decision was important, as it revealed that the U.K. courts at that time favoured non-intervention, even when it was possible that an injustice might result. Lord Diplock explained the decision on the basis that there was a real difference between litigation and arbitration, in that, litigation was adversarial while, arbitration was consensual. Where both parties were at fault for the delay, the courts would not intervene at the request of the party who sought to extricate itself from a difficult situation to which it had contributed. Lord Diplock continued (at p. 985): “... *the parties make the arbitrator the master of the procedure to be followed in the arbitration. Apart from a few statutory requirements under*

⁸ Ibid.

⁹ Ibid.

¹⁰ [1981] 1 All E.R. 289 at 295-96, aff’d [1981] A.C. 909.

the Arbitration Act 1950... he has a complete discretion to determine how the arbitration is to be conducted from the time of his appointment to the time of his Award, so long as the procedure he adopts does not offend the rules of natural justice."

The Court added;

"The supervisory jurisdiction that the High Court exercises over the way in which inferior Courts and tribunals conduct their proceedings on which Lord Denning MR and Cumming-Bruce LJ relied, as one source of its jurisdiction to prohibit further proceedings in an arbitration, is not inherent in its character as court of justice; it is statutory."¹¹

The opening words of Section 1(a) of the 1996 Act states that, "*the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*".

Section 1(b) provides that "*the parties should be free to agree how the disputes are resolved, subject only, to such safeguards as are necessary in the public interest.*" To complete this user friendly approach, Section 1(c) concludes that "*in matters governed by this Part, the court should not intervene except as provided by this Part*".

The 1996 Act, by its opening words, immediately identifies twin objects that appear throughout the Act, namely, the autonomy of the parties and their right to determine the procedure to be followed. In addition, the role of the court is to support the arbitration process rather than to interfere with it. Court's intervention is restricted as far as it may result in unnecessary delay and expense in the arbitration process. Further, the object of intervention of the court should be to guarantee fair and impartial resolution of disputes. Importantly, it is inferable that parties' autonomy is not to be restricted unnecessarily by courts except, in public interest.

The English Arbitration Act of 1996 (The 1996 Act), seeks to minimize judicial intervention in arbitration process. The 1996 Act includes, a clause which states that, the courts should not intervene in the arbitration, except as provided by the Act. Indeed, the principle of limited

¹¹ *ibid.*

court intervention in the 1996 Act, is clear recognition of the underlying policy of party autonomy, the desire to limit and define the courts' role in arbitration in order to give effect to that policy.¹²

The power of the court to assist in arbitration is also provided in the 1996 Act. As regards other aspects of court's intervention in arbitration, the key principle in the Act with respect to court assistance is to maintain a balance between competing interests. In this regard, the 1996 Act, strikes a balance between court intervention, and effectiveness of the arbitral process. The 1996 Act permits a degree of judicial intervention at each stage which is designed to make the UK an attractive venue for international commercial arbitration.

Further, the 1996 Act, underscores the overriding importance of party autonomy in arbitration in the UK, by providing at Section 1 that, "*the parties should be free to agree on how their disputes are to be resolved, subject only, to such safeguards as are necessary in the public interest.*" Literally, this principle implies that, court's intervention in the UK, is restricted to guaranteeing fair and impartial resolution of disputes, and may be limited only where it results in unnecessary delay and expense, in the arbitration.¹³

In *Coppee-Lavalin SA/NV Case*¹⁴ the House of Lords highlighted three instances where the courts must inevitably be involved in arbitration. Firstly, measures that involves purely procedural steps and, which the arbitral tribunal cannot order or enforce. For instance, issuing witness summons to a third party, or stay of legal proceedings, commenced in breach of the arbitration agreement. Secondly, procedures meant to maintain the *status quo*, for instance, granting of interim orders of injunction and for preservation of the subject matter of arbitration. Lastly, such measures meant to give effect to the award, by providing means for enforcement or challenging the same.¹⁵

¹² David St. John Sutton & Judith Gill, *Russell on Arbitration* (London: Sweet & Maxwell Limited, 2003), p. 293.

¹³ Kariuki Muigua, "Role of Courts in Arbitration in Kenya", available at <http://www.kmco.co.ke> (accessed on 10/09/2011), p. 1.

¹⁴ [1994] 2 All ER 465

¹⁵ See Lord Mustill's dicta in *Coppee-Lavalin SA/NV case* (supra) page 469-470 on the ideal court's approach in such intrusion.

Lord Mustill recognized the need for this balance in the English House of Lords case of *Coppee-Lavalin*¹⁶ case when he declared:

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that, at least in some instances, the intervention of the court may not only be permissible, but highly beneficial.”

Role of Courts in Stay of proceedings

The Courts in UK have interpreted their jurisdiction to stay, to mean that legal proceedings should be stayed in favour of arbitration, unless, the arbitration agreement is invalid. In other words, the Courts consider the arbitration law as imposing an imperative duty upon the Court to refer the parties to arbitration, unless, the arbitration agreement was null and void. Accordingly, it can be said that, the English practice on the jurisdiction of the Courts to stay legal proceedings for arbitration is that, the courts must grant a stay of the Court action *“unless the court is satisfied that the arbitration agreement is ‘null and void, inoperative, or incapable of being performed.’”*¹⁷

Stay of proceedings under the 1996 Act, is provided for in Sections 9, 10 and 11. These sections apply regardless of the applicable substantive law, or underlying agreement. The effect is that, the English courts are given extraterritorial jurisdiction to grant stay of proceedings even where the arbitral proceedings are not to be held under the English law, or even in the UK. Questions of jurisdiction were raised in **AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC**¹⁸ in the context of anti-suit injunctions. The Court of Appeal demonstrated the willingness to protect the rights of parties under arbitration agreements, by granting an anti-suit injunction restraining litigation in the Republic of Kazakhstan in circumstances where arbitration had not yet commenced, and both parties had no intention to arbitrate.

The above case examined the enforceability of an English arbitration clause in a concession agreement governed by Kazakhstan law between the owner and operator of hydroelectric

¹⁶ *Ibid.*

¹⁷ *Supra* note 1 at 298.

¹⁸ 2011] EWCA Civ 647.

facilities in the Republic of Kazakhstan. As relationships between the parties worsened, a number of proceedings were commenced in the Kazakhstan courts. Following a decision by the Kazakhstan courts that the arbitration agreement was invalid, legal proceedings were commenced in England. Among other things, an anti-suit injunction was sought, under either section 44 of the 1996 Act, or Section 37 of the Senior Courts Act 1981, to prevent the owner from raising disputes falling within the arbitration clause in Court proceedings in Kazakhstan. The application was opposed, on the ground that, a party cannot seek a declaration or an injunction in the English Courts without first commencing arbitration proceedings, or having the intention to commence arbitration proceedings.

The Court of Appeal affirmed that English courts have jurisdiction to grant declarations and issue anti-suit injunctions, preventing proceedings outside the EU, regardless of whether or not, there were actual or intended arbitration proceedings, where an arbitration clause stated that disputes between the parties were to be governed by, and construed in accordance with, English law.

The court declared that it was now common ground that Section 44 of the 1996 Act could not be used as a basis for a claim unless, current or prospective arbitral proceedings existed. However, Section 37 of the Senior Courts Act 1981 supplemented the courts' jurisdiction to grant anti-suit injunctions in order to uphold the effectiveness of arbitration agreements. As a result, an anti-suit injunction was made possible on the facts of the case. It was deemed unnecessary for parties wishing to raise an issue of the effectiveness of an arbitration clause, to first commence arbitration proceedings.

The court, however, was careful to point out that any court asked to grant an anti-suit injunction must tread carefully between providing adequate support to the parties' agreement, and avoiding the usurpation of the role of arbitrators.

A positive declaration on the binding nature of an arbitration agreement may sometimes be seen to overstep the court's jurisdiction in answering a question which should be left for an arbitral tribunal in the future.

3.2.1. Determination of Question of Law

An example of the role of courts in balancing the competing interests of the parties is the provision in the 1996 Act, on the power of the court to determine a question of law. In United Kingdom, the court has power only to determine questions of law arising in the arbitration, if, both parties, or a party to, and the arbitral tribunal, so agree. The advantage of this provision is that, it saves time and costs to have the point authoritatively determined by the court at an early stage and for the award to reflect that decision especially where it is apparent that the case will turn on the issue of law in question, and that, whichever way it is decided by the tribunal, either of the parties will then seek leave to appeal against the award. In other words, the allowance for determination of question of law by the court reduces incidences of appeal after award.¹⁹

The parties and/or the arbitral tribunal must agree to the court's intervention, otherwise, the question will be decided by the arbitral tribunal. This ensures that the court does not become too intrusive, thereby undermining the purpose of arbitration. However, as provided for in the English domestic arbitration legislation, court intervention in this area may enhance the arbitral process. Thus, a balance must be maintained between Court intervention, and efficiency.²⁰

Rule on Jurisdiction

The 1996 Act²¹, encourages arbitral tribunals to determine their own jurisdiction. Under section 30 (1) of the 1996 Act, the arbitral tribunal has the right to rule on its own substantive jurisdiction, on whether there is a valid arbitration agreement or not,²² whether the tribunal is properly constituted,²³ and what matters have been submitted to arbitration in accordance with the arbitration agreement.²⁴ If the arbitration agreement, although valid, is inoperative or

¹⁹ David St. John Sutton & Judith Gill, *Russell on Arbitration* (London: Sweet & Maxwell Limited, 2003) at 293.

²⁰ *Ibid.*

²¹ Section 30(1) of the 1996 Act.

²² Section 30(1)(a).

²³ Section 30(1)(b).

²⁴ Section 30(1)(c).

incapable of being performed, no tribunal formed pursuant to that agreement has been properly constituted.²⁵

In **Cruden Construction Ltd v. Commission for the New Towns**²⁶ it was held that, where there was no dispute in existence at the time of the arbitration notice, the referral to arbitration was premature.

A referral to arbitration may be invalid if the dispute falls outside the terms of the arbitration clause. For example, some clauses only cover disputes which arise 'under' the contract, whereas others may include disputes which arise 'in connection with' the contract or even cover all disputes arising during the contract irrespective of what they are or how they arose. In **Ashville Investments Ltd v Elmer Contractors Ltd**²⁷ it was held that a clause empowering an arbitrator to decide disputes arising 'in connection with' the contract gave him jurisdiction to decide disputes about mistake, misrepresentation, negligent misstatement and rectification of the contract.²⁸

The Act requires that any challenge to the tribunal's jurisdiction should, "*be made to the court only after an award has been made on the subject matter. However, the course of action will depend upon the circumstances of each arbitration.*"²⁹ Regarding other jurisdictions, in England, the arbitral tribunal may continue with the proceedings, and render an award, while the application in court is still pending.

If the arbitrator rules that he does not have jurisdiction on the matter, he is unable to make an award on the merits as he will not be able to make an award on the substantive issues referred to him.³⁰ The purpose of permitting the arbitrator to rule upon his own jurisdiction is foremost to permit the arbitrator to abide by his fundamental statutory duty for instance, that of acting fairly and impartially and with a degree of control in avoiding unnecessary delay and expense.³¹

²⁵ Richard Swan, "The Jurisdiction of the Arbitration" (Digest Issue 32) Available at <http://www.trett.com/.../TheJurisdictionoftheArbitration...> Accessed on 3rd August 2012.

²⁶ 1994.

²⁷ 1998.

²⁸ *Supra*, note 23.

²⁹ *Supra* note 5 at 337.

³⁰ L G Caltex Gas Co Ltd v China National Petroleum Corp [2001].

³¹ *Supra*, note 26.

3.2.2 Interim Reliefs

As in litigation, the availability of interim reliefs to maintain the *status quo* pending the outcome of the arbitration is important in the arbitration process. For example, if one party destroys documents or dissipates its assets, then, the other party may suffer irreparable harm. In this regard the arbitral tribunals do not have the same enforcement powers as courts. The courts therefore have an important role to play in granting interim reliefs to protect parties' interests.³²

The parties will seek interim measures of protection from the courts for two reasons. First, because it may be the exclusive power of courts to order certain types of interim protection³³ and second, because although the arbitrators might have the authority to grant interim measures, only courts have the power to enforce them.

Under the 1996 Act, the court has power to protect the subject matter of the arbitration, and this includes preventing one party from breaking the substantive agreement to which the arbitration relates in a manner which might render the arbitration meaningless. The power can only be exercised in the case of emergency, and also the circumstances must be such that the arbitrators themselves cannot act. This normally means that the application to the court will be at a time before the arbitrators have been appointed.³⁴

Telenor East Holding II AS v. Altime Holdings & Investments Ltd³⁵ raised the common situation in which a dispute has arisen about rights under a contract, and one party wishes to have the status quo preserved pending the outcome of arbitration. The issue was whether the court may intervene in such a case. It was held that the court may intervene in such a case.

In **Emmott v. Michael Wilson & Partners Ltd**³⁶ the first decided case on the provisions of Section 42 of the Arbitration Act 1996, which permit the court on application to enforce a peremptory order made by arbitrators. Mr. Justice Teare adopted the now accepted approach

³² Richard W. Naimark & Keer, *Supra* note 19.

³³ For instance, Mareva injunction, or an injunction to attach bank accounts.

³⁴ s44 of the Arbitration Act 1996.

³⁵ [2011] EWHC B5 (Comm).

³⁶ [2009] EWHC 1 (Comm.).

that courts should lend their support to arbitrators without attempting to second-guess their exercise of discretion.

It is now well established that an English court has the same jurisdiction under Section 44 of the Arbitration Act 1996 to grant a party to an arbitration, a worldwide freezing order (WFO) as would be available to that party in ordinary litigation under CPR Part 25 and Section 37 of the Supreme Court Act 1981.

The English courts have jurisdiction to grant interim relief in support of both English and foreign arbitrations, generally in the form of an order freezing the assets of the defendant by way of security for any future award. An order will be made if there is a real risk that the defendant's assets will be dissipated and if it is otherwise just and equitable for an order to be made. In **Swift-Fortune Ltd v. Magnifica Marine SA, the Capaz Duckling**³⁷ David Steel J refused an injunction, on the grounds both of delay and of the claimant's failure to disclose material facts to a foreign court in support of an ultimately misguided application for relief to that court.

In **Cetelem SA v. Roust Holdings Ltd**³⁸, the Court of Appeal reaffirmed that the court's power to grant an interim injunction as a matter of urgency was confined to situations where such an order was to be made for the purposes of preserving assets or evidence within the meaning of section 44(3) of the 1996 Act.

Under section 44(2)(e), the court is granted the authority to issue freezing orders, and to appoint a receiver in relation to the arbitration proceedings. The court's empowerment in this context is crucial given that an arbitral tribunal cannot avail itself of either of those powers. As regards the appointment of a receiver, this remains the preserve of the court given the protection of the public interest involved.

In England, the courts enjoy broad powers with respect to the preservation of evidence and property akin to those powers available in legal proceedings. A party can make an application for such an interim measure without the agreement of the other party or the arbitral tribunal when it requires urgent relief and the arbitral tribunal is powerless to grant such relief. The

³⁷ [2007] EWHC 1630 (Comm).

³⁸ [2005] EWCA Civ 618.

courts enjoy more coercive powers on enforcement and jurisdiction over third parties in comparison to arbitral tribunals, therefore their assistance can be beneficial in maintaining the efficiency and effectiveness of arbitration.³⁹

Taking and Preserving Evidence

With respect to the taking and preservation of evidence, since an arbitral tribunal does not possess the power to compel attendance of relevant witnesses, it may be necessary to resort to the courts. This is particularly the case, if the witness whose presence is required is not in any employed or other relationship to the parties to the arbitration, and so cannot be persuaded by them to attend voluntarily.

The Arbitration 1996 allows the courts to compel the attendance of a witness within its jurisdiction that is unwilling to give evidence. However, the courts may only do so by agreement of the parties or with the permission of the arbitral tribunal.⁴⁰

Section 43 of the English Arbitration Act therefore provides that a party to arbitral proceedings can use the usual court procedures to secure the attendance of witnesses. Under English civil court procedure this means that the party may serve a witness summons on the witness to secure attendance before the arbitral tribunal, either for the purpose of giving oral evidence or for the purpose of producing documents or other evidence. Applications for the preservation of evidence or the taking of witness evidence may be made to the court under Section 44 of the English Arbitration Act.

The construction of section 44 of the UK Arbitration Act remains strictly subject to the traditional party autonomy rule, according to which the arbitral proceedings are controlled by the will of the arbitrating parties. The introductory wording of section 44(1) makes it clear that the court's support powers are only triggered to the extent that the parties have not agreed otherwise.

The fact that the court's powers under section 44 are residual, and cannot be invoked in their own right, is also echoed by subsection 5, which provides that:

³⁹ *Supra* note 5 at 350-351.

⁴⁰ Section 44 of the Act.

“In any case the court shall act only if or to the extent that the arbitral tribunal and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”

In **Assimina Maritime Ltd v. Pakistan Shipping Corporation and another**⁴¹ it was held that the court’s supportive power to preserve evidence can even be used against non-parties to the arbitration in order to secure the provision of specified documents that are anticipated to bear directly on the resolution of the issues underlying the arbitral proceedings.

Appeals

Finally, after an award has been rendered, the courts may become involved at two points: (1) during arbitration, for example, when a party challenges and seeks to set aside the award, or lodges an appeal against the award under the applicable arbitral law or regime; or (2) at the point of enforcement, where the successful party seeks the recognition and enforcement of the award.

As a matter of fact, arbitration laws and rules are based on the premise that, arbitral proceedings will end in an award and that the award will be final and binding upon the parties. However, unsuccessful parties still frequently attempt to appeal against arbitral awards to the courts. Indeed, even where the relevant rules of arbitration provide that an award is final and binding on the parties and that the parties agree to carry it out without delay, the law of the seat of arbitration usually provides some way of challenging an arbitral award.

The 1996 Act provides for instances where a party can challenge an award claiming lack of substantive jurisdiction⁴² on the part of the arbitral tribunal or in specific circumstances that involve serious irregularities.⁴³

An appeal on a point of law is also permissible under Section 69 of the Act. The right to appeal is only available where court’s jurisdiction to hear the appeal, has not been excluded

⁴¹ [2004] EWHC 3005 (Comm).

⁴² Section 67 of the Act.

⁴³ Section 68 of the Act.

by the parties. In any case, where there is no exclusion, appeal is available with leave of the court, unless parties agree to it.

On applications challenging the award on the grounds that the arbitral tribunal lacked jurisdiction under Section 67 of the English Arbitration Act, the court may either confirm the award, vary the award or set the award aside in whole or in part.⁴⁴

Section 68(2) of the English Arbitration Act sets out an exhaustive list of the circumstances which constitute a serious irregularity if they cause substantial injustice to the applicant, namely: breach of Section 33 of the English Arbitration Act (general duties of the arbitral tribunal); the arbitral tribunal exceeding its powers; failure to conduct the arbitral proceedings in accordance with the arbitration agreement; failure by the arbitrators to resolve all matters in dispute referred to them; uncertainty or ambiguity of the award; the award being obtained by fraud or in a manner contrary to public policy; failure to comply with formal requirements relating to the award; or admitted irregularity in the arbitral proceedings or the award.⁴⁵

In **ASM Shipping Ltd v. TTMI Ltd**⁴⁶ the court held that actual or apparent bias of an arbitrator is a substantial injustice and can amount to a serious irregularity for the purposes of Section 68 of the English Arbitration Act.

If an award is successfully challenged on grounds of serious irregularity under Section 68, the court may either remit the award (in whole or in part) to the arbitral tribunal for reconsideration, set the award aside or declare it to be of no effect.⁴⁷ Awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties.

Recognition and Enforcement of Awards

Section 66 of the English Arbitration Act provides that domestic awards may be enforced with the permission of the court as if they were court judgments. Permission shall only be refused if the person against whom the award is to be enforced shows that the arbitral tribunal

⁴⁴ Guy Pendell and David Bridge CMS, "Arbitration in England and Wales, CMS Guide to Arbitration, Vol I
⁴⁵ Available at <http://www.eguides.cmslegal.com/.../arbitration_volume.../C..> (accessed on 24/11/2012).

⁴⁶ *ibid.*

⁴⁷ [2006] EWCA Civ 1341.

⁴⁸ *ibid.*

lacked substantive jurisdiction to make the award. It has recently been confirmed that this right of enforcement under Section 66 also applies to declaratory awards, where the victorious party's objective in obtaining an order for enforcement is to establish the primacy of a declaratory award over an inconsistent judgment.⁴⁸

The English Arbitration Act has contributed significantly to revitalizing English arbitration and to ensuring that London remains one of the leading centers for international commercial arbitrations.⁴⁹

The English Arbitration Act has made arbitration a more attractive option for dispute resolution by increasing party autonomy, as well as reducing the scope for court interference in the arbitral process. Arbitrators have been given wider procedural powers which can contribute to making arbitration more efficient. The success of these provisions depends on arbitrators exercising their powers in practice fairly and imaginatively, distinguishing the parties' choice of arbitration as their preferred method of dispute resolution from more formal and rule-bound court proceedings.⁵⁰

It is believed that the English Arbitration Act strikes a fair balance between the authority of arbitrators on the one hand and an assurance of sufficient judicial support to avoid injustice on the other. The Act allows a substantial measure of freedom for the parties to contract out but reserves a small core of powers to the courts in all cases. These include the power to assist in taking and preservation of evidence, power to order interim reliefs, power to order stay of proceedings and consider applications for appeal or review.

Party autonomy and the independence and authority of the arbitrators are the hallmarks of the 1996 Act. Court involvement is limited to support, assistance and giving effect to the arbitration process agreed by the parties. It is evident that the courts in the UK have accepted and endorsed these two primary objectives of the Act, i.e. upholding party autonomy and ensuring an exclusively supporting role for the courts.

⁴⁸ *West Tankers Inc v Allianz SpA and Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm).

⁴⁹ *Supra* note 42.

⁵⁰ *ibid.*

3.3 Case Study 2: Canada

3.3.1 The Role of the Courts in Arbitration in Canada

Canada has a Federal Arbitration Act which attaches the UNCITRAL Model Law as a schedule titled the Commercial Arbitration Code. The Act applies to commercial disputes that regard matters under exclusive federal jurisdiction or where one of the parties is the federal government or a federal corporation.⁵¹

All other matters fall under provincial and territorial jurisdiction and are subject to provincial and territorial arbitration Acts. With the exception of Québec, all of the provinces and territories have an International Arbitration Act giving effect to the Model Law and a separate domestic arbitration act. Québec gives effect to the Model Law for extra provincial and international trade matters by reference to it in its Code of Civil Procedure, wherein, the title on arbitration proceedings is to be interpreted taking the Model Law into account.⁵²

In Canada, the policy is designed to limit court intervention. Thus, the Act provides in Section 6 that, no court may intervene in matters governed by the Act, except (a) to assist the arbitration process; (b) to ensure that arbitration is carried on in accordance with the arbitration agreement, (c) to prevent manifestly unfair, or unequal treatment of a party to an arbitration agreement; and (d) to enforce awards.⁵³

The role of the courts in arbitration in Canada therefore is limited to providing assistance in arbitration, in order to achieve the objectives of arbitration and to prevent unfair, or unequal treatment of any party. The objective is to restrain and limit, unnecessary judicial intervention, so as to allow the arbitration to proceed expeditiously, subject to the agreement and overriding concerns for fundamental fairness.

On the other hand, judicial intervention in Canada is expanded in circumstances, where it will facilitate efficient and final resolution of disputes by arbitral tribunal.⁵⁴

⁵¹ Barry Leon and Andrew McDougall, Perley-Robertson, Hill & McDougall LLP "Canada - Global Arbitration Review" available at < <http://www.globalarbitrationreview.com/know.../canada>. > accessed on 31st May 2012 .

⁵² *ibid.*

⁵³ *Arbitration Act*, R.S.A. 2000, c. A-43

⁵⁴ J.C. Levy, "The New Arbitration Act: Judicial Intervention," in *The New Arbitration Act* (Alberta: Legal Education Society of Alberta, 1991) at 12.

Scholars, analyzing recent Canadian case law (both at the federal and provincial levels), demonstrates that courts are increasingly giving effect to both, the Model Law and the New York Convention in enforcement of arbitral agreements, and limiting the scope of judicial reviews, of Canadian and International and foreign arbitral awards.⁵⁵

Jurisdiction to Stay

Canadian courts have consistently upheld parties' rights to arbitrate their differences where they have agreed to do so by contract and courts have increasingly resolved any ambiguities in such agreements in favour of giving effect to the parties' intention to refer disputes to arbitration.⁵⁶

Generally, parties will often approach courts early in the arbitral process, if they do not wish to participate in arbitration, or to submit their dispute to an arbitrator. In such situations, most laws "*require courts to enforce arbitration agreements that are validly made.*" Accordingly, with respect to disputes covered by valid arbitration agreements, courts are under duty to stay court actions, and refer the parties to arbitration. In determining whether or not there is a valid arbitration agreement, courts are guided by both the *lex arbitri*, (arbitral law), and the law of the contract applicable to the arbitration agreement.⁵⁷

The Act provides that, a court if a party to a matter requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The only exception to this mandatory provision is where the court finds that the agreement is null and void, inoperative or incapable of being performed.⁵⁸

In *BC Navigation S.C. (Trustee of) v. Canpotex Shippings Services Ltd.* ("BC Navigation"),⁵⁹ the Federal Court of Canada Trial Division, held that legal proceedings should be stayed in favour of arbitration. In that case, Denault J held that the governing law imposed an imperative duty upon the court to refer the parties to arbitration, unless the arbitration agreement was proved to be null and void, inoperative or incapable of being

⁵⁵ Claude R. Thomson & Annie M.K. Finn, "International Commercial Arbitration: A Canadian Perspective," in *International Commercial Arbitration in the New Millennium* (Toronto: Canadian Bar Association, 2001) at 7.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ Commercial Arbitration Act, section 8.

⁵⁹ *BC Navigation S.C. (Trustee of) v. Canpotex Shippings Services Ltd.* (1987), 16 F.T.R. 79 (F.C.T.D.).

performed. The learned judge further held that, even if the governing law did not so hold, he would have still exercised his discretion to grant a stay of the proceedings since, a party should always be held to his or her contractual undertaking.⁶⁰

In addition, the mandatory language of Article 8(1) of the Model Law, as adopted in the respective provincial legislation, effectively provides that, unless the arbitration agreement is null and void, inoperative or incapable of being performed and, provided that a timely request is made, the court does not have the discretion to refuse to refer a matter to arbitration or to stay the court proceedings. Courts have applied these principles in favour of arbitration in cases where parties seek to stay judicial proceedings in the courts.

In the leading case of **Onex Corp. v. Ball Corp**⁶¹ the Ontario Court had to consider whether a dispute between parties to a complex joint venture agreement concerning rectification of a contractual term ought to be submitted to the courts or to arbitration. Blair J. referred the dispute to arbitration and stayed the court action despite a dispute between the parties that rectification does not fall within the scope of the arbitration clause and that it is not a remedy that an arbitral tribunal is capable of granting.

Similarly, the Alberta Court of Appeal in the case **Kaverit Steel & Crane Ltd. v. Kone Corp.**⁶², allowed a stay of court proceedings and referred a matter to arbitration where parties to a licensing agreement had agreed to arbitration. Kearns J.A., delivering the jurisprudence of the Court of Appeal, held that the power to grant or withhold a reference to arbitration is very limited under the Alberta *International Commercial Arbitration Act*, and the law requires that the parties be held to their bargain.

3.3.2 Jurisdiction to Offer Assistance (including interim measures of protection)

Generally, courts have a vital role to play in assisting arbitral tribunals. Courts are often required to appoint arbitrators, decide on challenges to the jurisdiction of the arbitral tribunal, grant interim relief, grant orders for the procurement of evidence or witnesses, and to order the participation of third parties in arbitration. Indeed, in most jurisdictions, the law allows

⁶⁰ *Ibid.*

⁶¹ (1994), 12 B.L.R. (2d) 151 (Ont. Gen Div.), Blair J. [hereinafter "Onex"].

⁶² (1992), 4 C.P.C. (3d) 99, 87 D.L.R. (4th) 129, (Alb. C.A.), leave to appeal to the Supreme Court of Canada refused (1992), 93 D.L.R. (4th) vii [hereinafter "Kaverit Steel"].

the parties and the arbitral tribunal to ask the courts to assist the arbitral process whether in appointing arbitrators, deciding challenges to the jurisdiction of arbitral tribunal, granting interim relief, or ordering parties to produce evidence or witnesses, as well as orders to third parties. As with other areas of court involvement, courts' assistance, should not be too interventionist, but should have the primary aim of upholding the arbitral process, and making it more efficient.⁶³

Under the Model Law, upon which all arbitrations laws in Canada are based, a party can request an interim measure of protection from the court. Interim relief is required from a court where non-parties need to be bound by an order, where there is a concern that a party may not comply with the order of the arbitral tribunal, or in urgent situations before the arbitral tribunal is constituted.⁶⁴

In *Dent Wizard International Corp. v Brazeau*,⁶⁵ an Ontario court granted injunctive relief to restrain a plaintiff from pursuing an American Arbitration Association (AAA) arbitration in Missouri. The defendant had signed a secrecy agreement with the plaintiff while undergoing training, but then left and began competing with the plaintiff's business. The plaintiff had already commenced court proceedings in Ontario, which were well underway, and the judge considered that it would be unjust for the defendant to have to respond to both proceedings, and decided that the plaintiff would suffer no injustice if the injunction was granted.

In *Lac d'Amiante du Canada ltee c Lac d'Amiante du Quebec ltee*,⁶⁶ the Quebec Superior Court granted an anti-suit injunction to prevent ICC arbitration in New York from going forward. The court did so based on the fact that the parties, who had been involved in a long drawn-out legal battle concerning the purchase and transfer of mining rights, had mutually renounced arbitration at an earlier stage of the litigation, and therefore the fact that one party wanted to change their position and pursue arbitration anew constituted improper "forum-shopping". The court held that no injustice would be suffered and that the Québec Superior Court had sole jurisdiction. The Quebec Court of Appeal upheld the decision.

⁶³ *Supra*, note 49.

⁶⁴ *Ibid*.

⁶⁵ 1998 CarswellOnt 4895, 31 CPC (4th) 174 (Ont Ct J, Gen Div)

⁶⁶ 1999 CarswellQue 2752, REJB 1999-13747, (Qc CS) aff'd 1999 CarswellQue 3688, REJB 1999-15419 (Qc CA).

In Canada, the law allows the court wide jurisdiction to assist in arbitration. This discretion is extended to the provincial courts as well. For instance, the Alberta *Arbitration Act* provides broad powers for the courts to assist arbitral tribunals. In particular, the relevant portion of section 8 of the Act states that,

“the court’s powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions”. *“On the application of the arbitral tribunal, or on a party’s application with the consent of the other parties or the arbitral tribunal, the court may determine any question of law that arises during the arbitration.”*⁶⁷

In essence, the courts in Canada have been bestowed the same general powers in arbitration as they enjoy in litigation. However, the role of the court goes further with respect to the determination of a question of law. Indeed, this provision does not exist in international arbitration rules and laws. Importantly, the provision gives the arbitral tribunal, or any party with the consent of the other parties, or the arbitral tribunal, to refer to the court any question of law that arises during the arbitration, for determination. Further, with leave of the court, such decision on matters of law may be appealed to the Court of Appeal. The aim is to ensure that, parties to arbitration proceedings utilize the court’s jurisdiction, in interpreting legal issues, especially where the arbitrator, is not a lawyer.

Assisting in Taking Evidence

Courts will assist in the obtaining of evidence for arbitration. Article 27 of the Model Law provides that an arbitral tribunal can seek the assistance of the court in taking evidence.⁶⁸

Section 29(5) of the Alberta *Arbitration Act*, utilizes a broad language in allowing the court to make orders and give directions with respect to the taking of evidence for an arbitration, just as if, the arbitration were a court proceeding. In recently, an appellate court ordered for the involvement of third parties in **Jardine Lloyd Thompson Canada Inc. v. SJO Catlin** (“**Jardine**”). The Alberta Court of Appeal dealt with the issue of scope of examinations for

⁶⁷ Section 8(2).

⁶⁸ *Supra*, note 49.

discovery in international commercial arbitrations. The arbitration was governed by the Alberta *International Commercial Arbitration Act*, which incorporates the Model Law.

The Alberta Court of Appeal held that Article 27 of the Model Law, and the Alberta Rules of the Court, could be used to obtain the evidence of third parties at the arbitration hearing, and prior to the hearing. It stated that Article 27 speaks of "*assistance in taking evidence*" and that those words, did not mean evidence only taken at the hearing. O'Brien J. stated:

"It is correct, of course, that the parties themselves cannot by their own agreement intrude into the affairs of a third person so as to entitle them to take evidence of any nature from such person. But the Model Law empowers a tribunal to seek the assistance of the court to take evidence in a manner consistent with the laws of the place of arbitration. The policy of the law is to provide assistance to tribunals in appropriate circumstances where the tribunal has satisfied itself that the evidence is relevant to the issues before it".

Canadian courts play a fundamental role in supporting the arbitral process with regard to evidentiary issues. Although most major arbitral rules and laws confer power on arbitral tribunals to order the production of documentary evidence and to compel the attendance of witnesses, arbitral tribunals lack the power to enforce their orders. Thus, the courts are indispensable in this area of arbitration.⁶⁹

3.3.3 Judicial Review and Enforcement of Arbitral Awards

Canadian courts have increasingly exercised restraint in reviewing international commercial arbitration awards made in Canada and have refused to overturn such awards except in very limited circumstances. In doing so, Canadian courts have upheld the Model Law principle of limited scope of review of arbitral awards.⁷⁰

⁶⁹ John J Marshall and Stellanie M Criebardis Hyer, "The Role Of The Courts In Arbitration" Calgary Alberta April 19, 2006

⁷⁰ Supra, note 53

In the case of **Quintette Coal Ltd. v. Nippon Steel Corp.**,⁷¹ the British Columbia court refused to set aside an international commercial arbitral award made in British Columbia on the ground of an alleged error of law. In doing so, the court cited the British Columbia *International Commercial Arbitration Act*, which confers no power on courts to set aside an award on the ground of error of law. On appeal, the Court of Appeal upheld the trial decision and also held that courts must try to minimize judicial intervention in international commercial arbitration awards.

More recently, in the case of **Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A. et al.**⁷² [26 Lax J. of the Ontario Superior Court of Justice, refused to set aside a decision of an international commercial arbitral award made in Ottawa, Canada and enforced the award. In doing so, Madam Justice Lax stated that courts extend a high degree of deference to the decisions made by arbitral tribunals acting pursuant to the Model Law. Her Honour also stated that the grounds for refusing to enforce an award are to be construed narrowly, and the public policy ground should be invoked only where enforcement would violate basic notions of morality and justice. Examples would include instances of corruption, bribery or fraud, or where the tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state.

In Canada, final arbitration awards are recognized as legally binding between parties without the need for any judicial proceedings. However, a party that wishes to enforce a final award by the customary means of seizure and sale, garnishment, contempt and the like, must first apply to the local court to obtain judgment enforcing the award.

Canadian courts have also been very supportive of international arbitration in post-award proceedings. In the recent case of **United Mexican States v. Karpa**, the Ontario Court of Appeal upheld an award by a NAFTA panel and rejected arguments that the award should be set aside because the tribunal had drawn an adverse inference from the failure of Mexico to

⁷¹ (1990), 47 B.C.L.R. (2d) 201, 48 B.L.R. 32 (B.C.S.C.), upheld by the Court of Appeal (1990), 50 B.C.L.R. (2d) 207, [1991] 1 W.W.R. 219 (B.C.C.A.), leave to appeal denied (1990), 50 B.C.L.R. (2d) xxviii (S.C.C.) [hereinafter "Quintette"].

⁷² 1999, 45 O.R. (3d) 183 (Ont. S.C.J.), Lax J. [hereinafter "Corporacion Transnacional"], appeal dismissed. (2000), 49 O.R. (3d) 414 (Ont. C.A.).

produce information which, according to Mexico, could only have been produced in violation of Mexican law. The Court of Appeal noted that the adverse inference drawn by the tribunal was based on the selective provision of information by Mexico. The Court of Appeal also rejected arguments that the award of damages was contrary to public policy because it amounted to a rebate of taxes which was illegal under Mexican law. The Court of Appeal found that the award of damages was rationally connected to the discriminatory conduct found by the tribunal.⁷³

3.3.4 Appeals

Arbitration laws and rules are based on the premise that arbitral proceedings will end in an award and that the award will be final and binding upon the parties. Despite this underlying premise, unsuccessful parties frequently attempt to appeal arbitral awards to the courts. "Even where the relevant rules of arbitration provide that an award is to be final and binding on the parties and that the parties agree to carry it out without delay, the law of the seat of arbitration usually provides some way of challenging an arbitral award."⁷⁴

Just like in the UK, in Canada, a party can challenge an award by bringing an application to the court to set it aside on grounds of lack of jurisdiction, excess of jurisdiction, breach of public policy, or lack of proper procedure (i.e., a party is under some incapacity, a party is not given proper notice, or the composition of the tribunal or the procedure is not in accordance with the agreement of the parties).⁷⁵

Canadian courts in general have shied away from intervention with respect to judicial review of arbitration awards when the awards involve the Model Law. In **Quintette Coal Ltd. v. Nippon Steel Corp**⁷⁶, the British Columbia Court of Appeal upheld a trial judge's refusal to set aside an arbitral award on the basis that the arbitral award was beyond the scope of the submission to arbitration. The lower court stated that the British Columbia enactment of the Model Law did not confer power on courts to set aside such an award. The lower court noted

⁷³ (2005) 74 OR (3d) 180 (CA).

⁷⁴ *Supra*, note 67.

⁷⁵ *Supra*, note 49.

⁷⁶ *Quintette Coal Ltd. v. Nippon Steel Corp.*, [1991] 1 W.W.R. 219 (B.C.C.A.).

the "world-wide trend toward restricting judicial control over international commercial arbitration awards."⁷⁷

The Court of Appeal agreed and further held that courts must try to minimize judicial intervention in international commercial arbitration awards. Gibbs J.A. held:

*"We are advised that this is the first case under the British Columbia Act in which a party to an international commercial arbitration seeks to set the award aside. It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun, J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case"*⁷⁸

From the foregoing discussion, it is clear that international commercial arbitration is finding a safe haven in Canada. Canadian and international arbitration institutions are coordinating the resolution of many commercial disputes involving parties from different countries using Canada as the venue for arbitration, subject to the laws of Canadian provinces, while including some Canadian arbitrators on arbitration panels.

Canada has established the following principles: limited scope of court intervention, consistent recognition and enforcement of foreign arbitral awards, party autonomy and freedom of contract as shown in the foregoing discussion. Such principles provide parties involved in international arbitrations in Canada with the advantages of certainty, predictability, consistency and expediency in dealing with international commercial disputes.

⁷⁷ *ibid.*
⁷⁸ *Ibid.*

Canadian courts continue to affirm the basic principles of support for arbitration, there can be no doubt that the overall effort of Canadian judges is to support arbitration and its necessary functions as shown in the cases cited above.

3.4 Case Study 3: France

France has hosted the International Chamber of Commerce in Paris since the 1920s and is well known as a favourable venue for arbitration. It has helped international commercial arbitration with the means to become a trusted dispute resolution mechanism and to establish itself as an independent legal order.⁷⁹

The autonomy of the arbitration agreement, policies facilitating the enforcement of international awards, very limited court interference and party autonomy are some of the classic features of the French law on international arbitration, which has been supported by the French courts for decades.⁸⁰

France adopted a new arbitration law in 2011, modernizing the rules, applicable to both domestic and international arbitration. This new law codifies the principles developed in case law, and aims to preserve the trust of international arbitration users within the French legal system.⁸¹

The legislative provisions and legal principles governing arbitration are for the most part in **Book IV *Nouveau Code de Procedure Civile* 1981 (the CPC)** which comprises a Title I, regarding domestic arbitration and a Title II (articles 1504 *et seq.*) regarding international arbitration both emanating from the 2011 Decree. However, several other principles can be found in the *Code Civil* and case law.⁸²

The CPC provisions relating to arbitration are the main source of French law on international and domestic arbitration. They provide a full and detailed description of the legal regimes

⁷⁹ Jean de la Hossieraye, Stéphanie de Giovanni and Juliette Huard-Bourgeois, CMS, "Arbitration in France, CMS Guide to Arbitration, Vol I" Available at <http://www.eguides.cmslegal.com/.../arbitration_volume.../C..>.

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid.*

applicable to both forms of arbitration, from the validity of the arbitration agreement to the procedure to set aside an award.⁸³

French courts have a vast body of experience in relation to international arbitration and have played a strong role in France's recognition as one of the most arbitration-friendly jurisdictions in the world. In Paris, a specific chamber of the Paris Court of Appeal deals with international arbitration cases.⁸⁴

The French courts have also played an important role in encouraging international arbitration in France by establishing a solid tradition of judicial non-interference in the arbitral process. Provided there is a *prima facie* arbitration agreement, French courts will insist, if need be, in the establishment of the arbitral tribunal and leave it to the arbitrators to determine the existence and extent of their jurisdiction. No court interference whatsoever will occur during the course of the arbitral process. At the action to set aside or enforcement stage, the award will be scrutinized only by reference to five limited grounds, all of which are narrowly construed as shown hereinafter.⁸⁵

As a matter of principle, the French courts have no jurisdiction to hear disputes covered by an arbitration agreement.⁸⁶ However, the courts can play a role at various stages of the arbitral process. First, when the procedure agreed by the parties for constituting the tribunal ends up in a deadlock, the parties can apply to the courts for assistance in this regard. Second, where a party applies for provisional and conservatory measures, the court may grant such measures. Finally, an award may, as a matter of principle, only be enforced after leave to do so has been sought and obtained from the courts.

3.4.1 The Supportive Role of the Courts

There is a strong tradition of non-interference of the courts in the arbitral procedure in France, but French courts have always shown their support to arbitration when required.⁸⁷

⁸³ Supra, note 79.

⁸⁴ *ibid.*

⁸⁵ Supra, note 6.

⁸⁶ *Tribunal of First Instance of Paris, Chambre Arbitrale de Paris v. République de Guinée*, 30 October 1986.

⁸⁷ Michael Bühler and Pierre Heitzmann, Jones Day, "PLC Arbitration Handbook France" 2009.

The 2011 Decree created a judge whose task is to support the arbitral proceedings: the judge acting in support of arbitration or *juge d'appui*. This judge helps to ensure the effectiveness of the arbitration process.⁸⁸

Article 1505 of the CPC provides that the judge acting in support of an international arbitration shall be the President of the *Tribunal de Grande Instance* (*Court of First Instance*) of Paris where: the arbitration is taking place in France; the seat of the arbitration is in another country but the parties have agreed that French procedural law should apply to the proceedings; the parties have expressly granted jurisdiction to French courts over disputes relating to the arbitral procedure; or one of the parties is exposed to a risk of denial of justice.⁸⁹

3.4.2 The Supporting Role of the French Courts in Case of Risk of a Denial of Justice

The judge acting in support of the arbitration can be seized if it is shown that a party is at risk of a denial of justice.⁹⁰

In these circumstances, the judge can be asked to: act as an appointing authority; extend the time limits for arbitration; or decide on the incapacity, removal or resignation of an arbitrator. There is no requirement to establish any connection with France to obtain this jurisdiction.⁹¹

3.4.3 Court Intervention in the Selection of Arbitrators

A court can intervene in the selection of arbitrators. The French *Cour de cassation* ruled in *Prodin v. Pierre Nigioni*.⁹² that the court could enjoin a party to disclose whether it had appointed in previous arbitrations the co-arbitrator it had nominated, given that the other party had doubts as to the arbitrator's independence and was refusing to appoint its co-arbitrator as a result.

⁸⁸ Supra, note 79.

⁸⁹ Article 1505 of the CPC.

⁹⁰ Article 1505(4) of the CPC.

⁹¹ Before the 2011 Decree, the courts had required at least a minimal connection with France. See *Cour de cassation* (Civ. 1ere.), 1 February 2005, *Etat d'Israel c/ Société NIOC*, Rev Arb, 2005, pp 218 – 219. The requirement of a link with France was construed very widely.

The *Cour de cassation* held that, where the claimant could not apply to another foreign court to obtain the judicial appointment of an arbitrator on behalf of the respondent, the *Tribunal de Grande Instance* of Paris has jurisdiction to make this judicial appointment.

⁹² 20 June 2006.

The parties to arbitration proceedings governed by French law and/or with a seat of arbitration in France can apply to the President of the *Tribunal de grande instance* if difficulties are encountered in the Constitution of the arbitral tribunal, in particular in order to nominate an arbitrator.⁹³ The application is dealt with in the same manner as urgent proceedings (*référé*) and the President's order is, in principle, not open to challenge.⁹⁴

The French *Cour de cassation* ruled in the case of **Israel v. NIOC**⁹⁵ that parties to an international arbitration may apply to the courts for assistance in the nomination of an arbitrator in order to prevent a denial of justice (given that the claimant could not apply to another court to have its case heard). Although the seat of arbitration was not located in France, and the proceedings were not governed by French law, the court ruled that a remote connection with France was sufficient to justify assistance from the French courts.

In disputes before the courts relating to the Constitution of the arbitral tribunal, if the arbitration agreement is manifestly void or manifestly not applicable, the judge acting in support of the arbitration (the *juge d'appui*) shall declare that no appointment needs to be made.⁹⁶

Where the matter is referred to court, the French courts hold in such situations that both parties are deemed to have waived the arbitration agreement in order to prevent a denial of justice as was held by the *Court of Appeal of Paris in British Leyland International Services v. Société d'Exploitation des Etablissements Richard*.⁹⁷

This supportive role of the court is meant to reinforce the authority of the arbitral tribunal and enable the parties to conduct the arbitral proceedings in accordance with the principles of due process and equal treatment of the parties.

3.4.4 Enforcement of Arbitration Agreements and Rule on Jurisdiction

The French courts have endorsed a liberal attitude towards arbitration agreements, in particular by ruling that arbitration agreements are valid as a matter of principle in

⁹³ Article 1493, of the CCP.

⁹⁴ Article 1457 of the CCP.

⁹⁵ *Cass. civ. Ire, 1 February 2005, NIOC case, Stockholm International Arbitration Review 2005:1 p. 230, note F.-X. Train).*

⁹⁶ Article 1455 of the CPC.

⁹⁷ 6 June 1978

international matters. The courts are also protective of the arbitrators' jurisdiction regarding the enforceability of the arbitration agreement.⁹⁸

Where a party attempts to bring proceedings in a French court despite the existence of an arbitration agreement, the French courts will not stay their proceedings (in contrast with other court systems, e.g. the English courts), but rather, will decline jurisdiction. In cases involving international arbitration where the arbitral tribunal has not yet been seized of the matter, the court will decline jurisdiction if the arbitration agreement is not manifestly null and void, or inapplicable to the dispute.⁹⁹

It is important to note however that the court may not decline jurisdiction of its own accord; this decision must be made upon the demand of a party. The court's decision on jurisdiction may be appealed within 15 days under a special procedure designed to avoid costs and delay (*contredit*).¹⁰⁰

When the parties have agreed to submit a dispute to arbitration, the arbitration may go ahead in spite of a party's refusal to participate in the proceedings, or in certain aspects of the proceedings (such as the appointment of the arbitral tribunal, or the submission of briefs and evidence) and assistance may be sought from the courts in that regard. Likewise, a subsequent refusal to participate in the proceedings will not paralyse the arbitration.¹⁰¹

Delay in arbitration due to frequent applications of a party to court is also reduced, as a court will normally decline its jurisdiction in favour of the arbitral tribunal where an arbitration agreement exists *prima facie*.

In France, there is no option of obtaining a preliminary court ruling on jurisdiction. Article 1465 of the CPC, which is applicable both to domestic and international arbitration, provides that "the arbitral tribunal has exclusive jurisdiction to rule on objections to its jurisdiction".

⁹⁸ France: International Arbitration - CDR Available at <<http://www.cdr-news.com/.../259-france-international-a...>>

⁹⁹ Article 1448(1) of the CPC.

¹⁰⁰ Article 1448(2) of the CPC.

¹⁰¹ *Supra*, note 98.

It is a general principle of French international arbitration law that the validity of the arbitration agreement is decided by the arbitrators applying the *competence-competence* principle, unless the clause is manifestly null and void.¹⁰²

According to the competence-competence principle (Article 1466 of the CCP for domestic arbitration and Article 1495 of the CCP for international arbitration, only an arbitral tribunal can entertain and rule on challenges to its jurisdiction.

Article 1458 provides for an exception in this regard. Before arbitral proceedings have commenced, a party can indeed apply to the courts to have the arbitration clause declared manifestly null and void as was held in *Cour de cassation, Uni-Kod v. Ouralkali*.¹⁰³

Otherwise, the national courts will review the arbitral tribunal's jurisdiction only when an action is brought to set aside or prevent enforcement of the award. Thus, jurisdiction of the arbitral tribunal is an issue that will only be addressed by a national court after the tribunal has made a ruling itself in this regard.

3.4.5 Interim Reliefs

Pursuant to Article 1468 of the CPC, provisional and protective measures are in principle ordered by the arbitral tribunal itself. Conservatory attachment and judicial securities on the other hand must be ordered by the courts at the request of the arbitral tribunal or the parties.

The French courts may have jurisdiction to order preliminary or interim measures in cases of urgency. Applications are generally heard in the presence of all parties. *Ex parte* applications are indeed always subject to a later *inter partes* hearing. The courts have broad powers regarding the nature of the interim relief granted, that may include: freezing orders; restraining and positive orders; and provisional payment by a party of amounts manifestly due to the other (*référé-provision*), in the event of urgency, where the arbitral tribunal is not

¹⁰² Article 1448 of the CPC.

¹⁰³ 30 March 2004.

constituted yet and cannot accordingly hear such a request.¹⁰⁴ In these cases, the request for provisional measures does not imply a waiver of the arbitration agreement.¹⁰⁵

In appropriate circumstances, for example when there is an emergency or when the arbitral tribunal is not yet constituted, French courts or the *juge des référés* can be requested to grant interim measures in order to prevent some irreparable harm to one of the parties or to preserve the status quo. In such a case, the application to the courts does not amount to a waiver of the arbitration agreement.¹⁰⁶

French courts are not reluctant to order interim relief sought by parties in appropriate circumstances, since applying to an arbitral tribunal for such measures may cause delays that are incompatible with interim relief. However, the courts are cautious not to interfere with the arbitrators' exclusive jurisdiction to rule on the merits of the case, notably through requests for interim relief that are not completely separable from an appreciation of the merits.¹⁰⁷

Ex-parte proceedings are exceptional in French civil procedure and are allowed only where due process would be detrimental to a party's rights. Such proceedings can be brought before the national courts in the context of international arbitration, whether proceedings are pending before an arbitral tribunal or not. Thus, the parties to an arbitration are entitled to apply *ex parte* to the courts to obtain interim measures (e.g. to obtain security, or to gather evidence).¹⁰⁸

In any event, since the arbitrators have no authority for the purposes of enforcement, any decision that amounts to an award (including decisions granting preliminary or interim relief) would have to be submitted to the national courts for recognition and enforcement if the party against whom the award is made refuses to perform it spontaneously. The parties may

¹⁰⁴ Court of Appeal of Paris, *Syigma France v. Camair – Cameroun Airlines*, 27 April 2007.

¹⁰⁵ *Supra*, note 98.

¹⁰⁶ (*Versailles*, 8 October 1998, *Akso case*, *Rev. arb.* 1999 p. 57, note A. Hory).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

therefore decide to apply directly to the national courts for preliminary or interim relief, since their decisions will be immediately enforceable.¹⁰⁹

3.4.6 Role of Courts in the Obtaining of Evidence

Pursuant to Article 1449 of the CCP, if the arbitral tribunal has not yet been constituted, an application may be made to the President of the Tribunal de grande instance or of the Tribunal de commerce who shall rule on measures relating to the taking of evidence in accordance with the provisions of Article 145 (e.g., broad pre-arbitration investigatory powers, including the forced production of documents and the appointment of an expert by the court in technical matters).¹¹⁰

Such evidence may subsequently be used in the arbitration. Once the arbitral tribunal is constituted, pursuant to article 1469(1) CPC, if a party to the arbitration intends to rely on an official (*acte authentique*) or private deed (*acte sous seing privé*) to which it was not a party, or on evidence held by a third party, it may, upon leave of the arbitral tribunal, have that third party summoned before the President of the Tribunal de grande instance for the purpose of obtaining a copy thereof or the production of the deed or item of evidence. Application shall be made, heard and decided as for expedited proceedings (*référé*). Penalties may be attached to the court's orders.¹¹¹

In practice, it was extremely rare for the parties to seek the assistance of French courts in evidentiary matters at the arbitration stage (in contrast to the pre-arbitration stage, where the appointment by the court of an expert is frequently requested for instance). However, this may now change at the arbitration stage as well, on the basis of the above provisions, which are a product of the 2011 Reform.¹¹²

¹⁰⁹ *ibid.*
¹¹⁰ Jean-Christophe Honlet, Bart Legum and Anne-Sophie Dufêtre Salans LLP, "Commercial Arbitration: Knowhow Global Arbitration Review, France" Available at <http://www.globalarbitrationreview.com/know.../france/> (accessed on 23/11/2012).

¹¹¹ *ibid.*
¹¹² *ibid.*

3.4.7 Appeals

International awards made in France cannot be appealed against, before the courts. The only court action available to an unsatisfied party is an action to set aside the award (*recours en annulation*). This ensures the efficiency of the international arbitration process.¹¹³

Based on article 1520 CCP, an international award made in France may only be challenged on the following five limited grounds: (i) if the arbitral tribunal decided the case in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired; (ii) if the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed; (iii) if the arbitral tribunal decided the case otherwise than in accordance with the terms of the mission conferred on it; (iv) if the rules of due process were breached; and (v) if the recognition or enforcement of the award would be contrary to French international public policy.

These grounds are restrictive and enable the courts to ensure observance of certain minimum standards for the international enforceability of an award.¹¹⁴ It is also possible in limited circumstances, including fraud, to submit application for revision of an arbitral award. If the arbitral tribunal cannot be reconvened, the application shall be made before the Court of Appeal which would have jurisdiction to hear an action to set aside the award.

The application for annulment can be instituted immediately after the award is made, but not after the expiry of a one-month period (three months where the defendant resides abroad) starting from the date of official service of the award bearing the order granting leave for enforcement.¹¹⁵

One of the practical effects of making an application to set aside an award or appealing an order granting leave to enforce an award is that execution of the award is stayed.¹¹⁶

¹¹³ Article 1518 CCP.

¹¹⁴ Before the 2011 Decree entered into force, the courts had already established that international awards could not be challenged for failure to respect certain criteria which solely applied to domestic awards, such as the legal time limit for rendering an award, or the need for the arbitrators to hold meetings.

¹¹⁵ Article 1486 of the CCP.

¹¹⁶ Article 1506 of the CCP.

However, in limited circumstances, the Court of Appeal may grant leave to enforce the award on a provisional basis.

In any event, the award creditor is not prevented from taking protective measures – for example, freezing the award debtor’s assets on a provisional basis (*saisie conservatoire*) – that will assist in executing the award when the time comes. In this regard, the French *Cour de cassation* held in **Deutz-Fahr group SPA v Motokov France SA et al**¹¹⁷, that assets could be frozen on a provisional basis without asking for leave to do so in court, thereby treating arbitral awards in the same way as court decisions.

Article 1479 of the CCP (which applies to international arbitral proceedings) provides that it is possible to apply for immediate execution of the award. The test is set forth at Article 515 of the CCP, which provides that provisional execution will be authorised if the judge considers that it is necessary (for example, to prevent a dispersal of assets) and when the nature of the case imposes it (for example, to prevent the damage suffered by the award debtor from worsening).

An action to set aside an award must be brought before the *Cour d’appel* in the place where the award was made.¹¹⁸ And it must be initiated within one month of notification of the award and shall be affected by service, unless otherwise agreed by the parties.¹¹⁹

The court seized of an action to set aside an award cannot re-hear the case or overturn the arbitral tribunal’s findings of fact or law. The court can only declare the award null and void on the limited grounds contained in Article 1520 of the CPC as shown above. If the judge decides to set aside the award, this decision does not affect the existence of the arbitration agreement. As a result, the parties can resubmit their dispute to the arbitral tribunal.

A decision denying an application to set aside the award shall be deemed to be an enforcement order of the whole of the award or of the parts of the award that have not been overturned.¹²⁰

¹¹⁷ on 12 October 2006.

¹¹⁸ Article 1519 of the CPC.

¹¹⁹ CPC, art 1519(2) – (3).

¹²⁰ Article 1527(2) of the CPC.

3.4.8 Enforcement of an Award

The general rule under French law is that an arbitral award shall be recognized in France if its existence is proved, unless such recognition is not manifestly contrary to French international public policy.¹²¹ An award, whether made in France or abroad, must be presented to the Court of First Instance (*Tribunal de grande instance*) sitting as a single judge, to be enforceable in France.

The judge will usually grant (or refuse) leave for enforcement (*exequatur*), therefore making the award enforceable, provided the existence of the arbitral award is established by production of the original with the arbitration agreement, or copies of them that satisfy the conditions required for their authenticity.¹²²

If the award and/or the arbitration agreement are not in French, a certified translation by a translator registered on the list of experts of French courts is required.¹²³ No other action or document is required from the successful party.

The award bearing the *exequatur* can then be served on the party against whom enforcement is sought. Also, the prevailing party can seek to attach assets to secure enforcement of the award.

The first instance court hearing the application is seized by way of an *ex parte* request and reviews the award on a *prima facie* basis.¹²⁴ It can either refuse or grant leave to enforce, but can never modify the decision issued by the arbitrators.

The procedure may become adversarial at the appeal stage, since the order granting the leave for enforcement of a foreign international arbitration award may be challenged, on the same grounds as those defined for the annulment of the award itself. The appeal suspends the enforcement of the award¹²⁵, except if the provisional enforcement of the award is ordered by the arbitrators, or by the President of the Court of Appeal, notwithstanding the filing of recourse against the award.

¹²¹ CPC, art 1514. See Cour de cassation (Civ. 1ere) 17 October 2000, *Asecna c/ N'Doye*, Bul. Civ. I; No 243, D. 2000, Rev Arb, 2000, pp 648 – 656.

¹²² CPC, art 1515(1).

¹²³ Article 1515(2).

¹²⁴ Article 1498.

¹²⁵ Article 1506.

Leave for enforcement of the Award must be sought from the *Tribunal de grande instance*.¹²⁶ The French courts consider that when an arbitral award was made abroad, the applicant can choose to apply to the *Tribunal de grande instance* of the district where assets belonging to the award debtor are located and where execution of the award will thus be performed, or to the President of the Paris *Tribunal de grande instance*.

The judge performs a purely supervisory function which, pursuant to Article 1498 of the CCP, consists of checking *prima facie* whether: (i) the document filed before him is an arbitral award; and (ii) whether it is not manifestly in breach of international public policy.¹²⁷

In the vast majority of cases, the French courts therefore grant leave to enforce the arbitral award in France. France has adopted a very liberal approach regarding the enforcement of awards.¹²⁸ As an illustration, the French Supreme Court (*Cour de cassation*) has consistently ruled that actions to set aside an award pending before a court of the place of arbitration, or even the annulment of an award by a foreign court at the place of arbitration do not prevent the recognition and enforcement of such awards in France.¹²⁹

The award may only be enforced by virtue of an enforcement order (*exequatur*) issued by the *Tribunal de Grande Instance* of the place where the award was made.¹³⁰ In the case of foreign international awards, this place will be the *Tribunal de Grande Instance* of Paris.¹³¹ *Exequatur* proceedings are not adversarial and the request for enforcement must be filed with the Court Registrar.¹³² Orders denying the enforcement of an award can normally be appealed. Such appeal must be brought within one month of service of the enforcement order.¹³³

3.5 Conclusion

This Chapter has highlighted the practice on the role of the courts in two leading Commonwealth jurisdictions, namely Canada and United Kingdom, and a leading Civil Law

¹²⁶ Articles 1477 and 1500 of the CCP.

¹²⁷ *Supra*, note 45.

¹²⁸ Article 1502, CCP.

¹²⁹ *Cass. civ. 1re*, 23 March 1994, *Hilmarton case*, *Yearbook 1995 Vol XX* p. 663; Paris,

¹³⁰ CPC, art 1516(1).

¹³¹ *Ibid*, art 1516.

¹³² *Ibid*, art 1516(2) – (3).

¹³³ Art 1523.

jurisdiction; France. It has emerged from the three case studies reviewed and analyzed herein; that, the role of the courts in arbitration is limited and clearly defined to ensure that there is no possibility of abuse by the courts. The courts in the above three jurisdictions, have been very articulate in defining the role of the court to make it supportive of arbitration proceedings, rather than, limiting the overall arbitral process.

Chapter Four will deal with the comparison on the legal gaps on the role of courts in arbitration in Kenya, *vis a vis*, the best practices on the role of courts in the three selected jurisdictions discussed herein.

CHAPTER FOUR

4.0 A Comparison of the Legal Gaps on the Role of Courts in Arbitration in Kenya Vis-A-Viz the Best Practices on Role of Courts in the Three Selected Jurisdictions Discussed in Chapter Three.

4.1 Introduction

Chapter Three discussed best practices on the role of the Courts in arbitration in the UK, Canada and France. The salient aspects of the role of the Courts in arbitration in the two common law jurisdictions (UK and Canada) and the Civil Law Jurisdiction (France) were discussed with special focus on how Courts, enhance the effectiveness of arbitration as a mode of dispute resolution. The discussion focused on the role of the Courts in the following three areas: (1) Stay of proceedings (2) assistance; and (3) appeals.

This Chapter will establish short falls or loopholes on the role of courts in arbitration in Kenya in terms of the thematic areas discussed in Chapter Two, as compared with the best practices in the three jurisdictions analyzed in Chapter Three.

From the study of the role of courts in arbitration in France, UK and Canada, it has emerged that the role of the courts in arbitration in the three jurisdictions is limited, and clearly defined to ensure that there is no possibility of abuse. The courts in Canada where the Model Law has largely been adopted have been very articulate in defining the role of the court to ensure that the same is supportive, rather than limiting, to the overall arbitral process in the country. Canadian, French and English approaches provide the optimum balance between providing priority to the parties' agreement to arbitrate and simultaneously ensuring there is access to courts, if one of the parties presents a genuine challenge to the jurisdiction of the tribunal.

The 1996 Act seeks to minimize judicial intervention in arbitration process. It includes a clause which states that, the courts should not intervene in arbitration process, except as provided by the Act. Indeed, the principle of limited court intervention in the 1996 Act is clear recognition of the underlying policy of party autonomy, the desire to limit and define the role courts in arbitration, in order to give effect to that policy.¹

¹ David St. John Sutton & Judith Gill, *Russell on Arbitration* (London: Sweet & Maxwell Limited, 2003), p. 293.

The power of the court to assist in arbitration is also provided for in the 1996 Act. As with the other aspects of court intervention in arbitration, the key principle in the Act with respect to court assistance is to maintain a balance between competing interests. In this regard, the 1996 Act, strikes a balance between court intervention, and effectiveness of the arbitral process. The Act permits a reasonable degree of judicial intervention at each stage, which is designed to make England an attractive venue for international arbitration.

In Canada, the policy is designed to limit court intervention. Thus, the Act provides in Section 6 that, no court may intervene in matters governed by the Act, except (a) to assist the arbitration process; (b) to ensure that arbitration is carried on in accordance with the arbitration agreement, (c) to prevent manifestly unfair, or unequal treatment of a party to an arbitration agreement; and (d) to enforce awards.²

The role of the courts in arbitration in Canada therefore is limited to providing assistance in arbitration, in order to achieve the objectives of arbitration, and to prevent unfair, or unequal treatment of any party. The objective is to restrain and limit unnecessary judicial intervention, so as to allow the arbitration to proceed expeditiously, subject to, the agreement and overriding concerns for fundamental fairness.

On the other hand, judicial intervention in Canada is expanded in circumstances, where it will facilitate efficient and final resolution of disputes by arbitral tribunal.³ There is a strong tradition of non-interference of the courts in the arbitral procedure in France, but French courts have always shown their support to arbitration, when required.⁴ The French courts have also played an important role in encouraging international arbitration in France, by establishing a solid tradition of judicial non-interference in the arbitral process. Provided there is a *prima facie* arbitration agreement, French courts will insist, if need be, in the establishment of the arbitral tribunal and leave it to the arbitrators to determine the existence and extent of their jurisdiction. No court interference whatsoever will occur during the course of the arbitral process. On application to set aside or enforce an award, the same will be

² *Arbitration Act*, R.S.A. 2000, c. A-43.

³ J.C. Levy, "The New Arbitration Act: Judicial Intervention," in *The New Arbitration Act* (Alberta: Legal Education Society of Alberta, 1991) at 12.

⁴ Michael Bühler and Pierre Heitzmann, Jones Day, "PLC Arbitration Handbook France" 2009.

scrutinized only by reference to five limited grounds, all of which are narrowly construed as shown hereinafter.⁵

The Kenyan position on the role of the court in arbitration is stated in Section 10 of the Arbitration Act. The section states thus:

*“Except as provided in this Act, no court shall intervene in matters governed by this Act.”*⁶

In effect, the Arbitration Act, 1995 restricts the jurisdiction of the court in arbitration to matters provided for under the Act. However in practice, the Kenyan Courts have not been consistent with respect to the implication of Section 10, with respect to their role in arbitration. For instance, in **Sadrudin Kurji & another v. Shalimar Limited & 2 Others**⁷ it was held that despite the restriction of the role of the court in arbitration to facilitating quicker settlement of disputes, it does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. As such, the courts are allowed in exceptional cases in which the rules are not adhered to set in and correct obvious errors.

In **Rawal V The Mombasa Hardware Ltd**,⁸ the court held that the existence of an arbitration agreement in a contract is not an impediment to resolving disputes in court until a party to the contract objects. Further, it was stated that an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of a plaint.⁹

In so holding, the court failed to appreciate its duty to give effect to arbitration agreement, by staying proceedings to allow for arbitration. In other words, the court was stating that, even where the parties have clearly agreed to arbitrate their dispute and one party is desirous that the agreement be upheld; the court may go ahead and allow litigation of the same matter to continue in court.

⁵ Supra, note 6.

⁶ Section 10, Arbitration Act 1995 (Kenya).

⁷ [2006] eKLR.

⁸ [1968] E.A. 398.

⁹ *Ibid.*

The effect of this is to render uncertain, the enforcement of arbitration agreements in Kenya. This does not send the right signal, especially to international commercial arbitration, in that it implies that the local courts may still exercise their compulsory jurisdiction over a matter which is a subject matter of international commercial arbitration in Kenya. A cursory glance at the role of courts in arbitration in Kenya as discussed in Chapter Two indicates that, there are various instances where the Kenyan Arbitration Act empowers the Court to intervene in the arbitration process. However, even where there is no express statutory provision giving the Court such power, the court may read in public interest as a justification to entertain or hear a dispute arising within the arbitration proceedings. This is despite the fact that the Act is clear that, except where it is otherwise provided, the court has no role in arbitration proceedings.

The courts, particularly the High Court, have inherent jurisdiction to act in public interest. The Court is, therefore, entitled to intervene in arbitration proceedings even where that is not provided for expressly. Such intervention is justified in public interest. For instance, courts in Kenya entertain Constitutional applications and judicial review proceedings against arbitrators, and arbitral tribunal in public interest.

The Court of Appeal in **Anne Hinga v Victoria Gathara**¹⁰ appears to read the role of the courts in arbitration in broad terms by holding that public policy is not exhaustible. The Court concluded that public policy can never be defined exhaustively and should be approached with extreme caution as failure of recognition on the ground of public policy would involve some element of illegality.

The Act also restricts recourse to the High Court or Court of Appeal by declaring most references to the High Court as final and non-appealable.¹¹ This is designed to restrict recourse to Courts by parties who are unwilling to take part in the arbitration process or who are keen on avoiding payment of the award rendered against them.

¹⁰ Civil Appeal No. 8 of 2009.

¹¹ Section 32B (6) of the Arbitration Act.

4.2 Stay of proceedings

The courts in the UK have interpreted their jurisdiction to stay, to mean that legal proceedings should be stayed in favour of arbitration, unless the arbitration agreement is invalid. The English practice on the jurisdiction of the courts to stay legal proceedings for arbitration is that the courts must grant a stay of the court action *"unless the court is satisfied that the arbitration agreement is 'null and void, inoperative, or incapable of being performed."*¹²

Canadian courts have consistently upheld parties' rights to arbitrate their differences where they have agreed to do so by contract, and courts have increasingly resolved any ambiguities in such agreements in favour of giving effect to the parties' intention to refer disputes to arbitration.¹³

The Act provides that, a court if, a party to a matter requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The only exception to this mandatory provision is, where the court finds that the agreement is null and void, inoperative or incapable of being performed.¹⁴

The French courts have endorsed a liberal attitude towards arbitration agreements, in particular, by ruling that arbitration agreements are valid as a matter of principle in international matters. The courts are also protective of the arbitrators' jurisdiction regarding the enforceability of the arbitration agreement.¹⁵

Where a party attempts to bring proceedings in a French court despite the existence of an arbitration agreement, the French courts will not stay their proceedings (in contrast with other court systems, e.g. the English courts), but rather, will decline jurisdiction.

¹² *Supra* note 1 at 298.

¹³ *ibid.*

¹⁴ Commercial Arbitration Act, section 8.

¹⁵ France: International Arbitration - CDR Available at <<http://www.cdr-news.com/.../259-france-international-a...>>

In cases involving international arbitration where the arbitral tribunal has not yet been seized of the matter, the court will decline jurisdiction, if the arbitration agreement is not manifestly null and void, or inapplicable to the dispute.¹⁶ In the interest of enforcing the freedom of the parties to contract, and the resultant agreement to arbitrate their disputes, the courts in Kenya are given the powers to stay legal proceedings pending arbitration. This is necessary, given that the courts have no direct power, and of their own motion to compel arbitration.¹⁷

Section 6 provides that a court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies, not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless, it finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or that, there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.¹⁸

The Kenyan Arbitration Act gives the court discretion to intervene to grant stay of proceedings for arbitration. However, this power is limited in that the court can only act where specific conditions are met in granting a stay of proceedings.¹⁹ The attitude of the Kenyan courts has been inhibitive in that they strictly interpret and apply these conditions limiting their power to stay proceedings in favour of arbitration.

Thus, where one party goes to court in breach of an arbitration agreement, the courts are reluctant to stay the proceedings in favour of arbitration relying on strict interpretation of the conditions for stay under Section 6 of the Arbitration Act. In the case of **Peter Muema Kahoro & Another v Benson Maina Githethuki**²⁰ a Plaintiff had filed a suit seeking to enforce an agreement for sale of land by way of permanent injunction and in addition, applied and was granted *ex-parte* temporary injunction pending *inter-partes* hearing of the application.

¹⁶ Article 1448(1) of the CPC.

¹⁷ Kariuki Muigua, "Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya." A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010)

¹⁸ Available at <http://www.kmco.co.ke/attachments/080> <Accessed on 8 July 2010>.

¹⁹ Section 6(1) (a) and (b).

¹⁹ *ibid.*

²⁰ [2006] HCCC(Nairobi) No. 1295 of 2005.

The agreement contained an arbitration clause under which parties had undertaken to refer any dispute arising to a single arbitrator appointed by the Law Society of Kenya. The Defendant entered appearance, and in addition filed grounds of opposition against the application for injunction.

The Defendant then brought an application seeking to strike out the plaintiff's suit and the application thereof on the ground that the court was not seized of jurisdiction to try the matter. It was argued that the Plaintiff having failed to invoke the arbitration agreement clause, the court had no jurisdiction to entertain the suit and/or the application as the reliefs sought by the Plaintiff were best sought under section 7 of the Arbitration Act. The Plaintiff, in response, argued that an arbitration clause does not limit or oust the jurisdiction of the court.

The court interpreted Section 6 of the Arbitration Act strictly finding that striking out of the suit was beyond the ambit of the section. The court also refused to stay the proceedings on the basis that the Defendant failed to move the court in appropriate time under section 6, to refer the matter to arbitration. It stated that by taking steps in the proceedings, the defendant had waived his right to rely on, and invoke the arbitration agreement. In other words, the court held that parties can choose to ignore the arbitration agreement and file the proceedings in a court.

The Courts have, in most instances, also contradicted themselves in their decisions even where the law is clear. This has ended up creating uncertainty on the position of the arbitration law and an opportunity for unscrupulous litigants to exploit to delay arbitration proceedings in Kenya.²¹

In **Rawal v. The Mombasa Hardware Ltd.**²² the court held that the existence of an arbitration agreement in a contract is not an impediment to resolving disputes in court until a party to the contract objects. Further, it was stated that an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of plaint.²³

²¹ *ibid.*

²² *Supra*, note 8.

²³ *Ibid.*

In so holding, the court failed to appreciate its duty to give effect to arbitration agreement by staying proceedings to allow for arbitration. In other words, the court was stating that even where the parties have clearly agreed to arbitrate their dispute and one party is desirous that the agreement be upheld; the court may go ahead and allow litigation of the same matter to continue. The effect of this is to render uncertain enforcement of arbitration agreements in Kenya. This does not send the right signal, especially to international commercial arbitration fraternity in that it implies that the local courts may still exercise their compulsory jurisdiction over a matter which is a subject matter of international commercial arbitration in Kenya.

In **Peter Mwema Kahoro & another v. Benson Maina Gitethuki**,²⁴ the Court held that by taking a step to acknowledge the claim against which stay was sought, the defendant impliedly affirmed the correctness of the (court's) proceedings and his willingness to go along with the determination by the courts instead of arbitration and thus the refusal of stay of proceedings.²⁵

However, merely entering appearance and filing grounds of opposition to a pending application cannot suffice as evidence of acknowledgement of the claim. In any case, the applicant party was merely taking steps to protect his interests should the application for stay or striking out be refused by the court as was the case. It is also not fair for the court to punish the applicant for the mistake of his counsel by relying on a mere technicality when it upheld his overriding right to access justice as guaranteed under the Constitution.

Indeed, the above decision contradicted the decision of Justice Visram (as he then was) in **Kenya Seed Co. Limited v. Kenya Farmer's Association Limited**.²⁶ In that case, the learned judge held that an action to resist interim injunction is not a step in the proceedings. Applications for interim applications are interlocutory proceedings whereas the steps proscribed have to be taken in substantive proceedings.²⁷

The strict condition for grant of stay that there should be a dispute between the parties with regard to matters agreed to be referred to arbitration makes proceedings unduly cumbersome

²⁴ [2006] eKLR, <http://www.kenyalaw.org> <accessed on 9 July 2010>.

²⁵ *Eagle Star Insurance Company Limited V Yuval Insurance Company Limited* [1993] 1 Lloyd's Rep. 291, HL.

²⁶ HCCC No. 1218 of 2006 (Nairobi, unreported, Visram J).

²⁷ *Ibid*.

as it shifts the burden of proof to the applicant for stay.²⁸ That the applicant can prove that the matter is the subject of an arbitration agreement should be enough to shift the burden to the party opposing the application to show that either there is no dispute or the instant dispute is not one of those contemplated by the arbitration agreement for reference to arbitration.

The provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is disadvantaged in expediting the application especially when the Plaintiff is not receptive. For instance, a judge can do nothing when an application for stay of proceedings is inadvertently lodged a day after entry of appearance, except to dismiss the same. There is no room for equity when the law is strict in its stipulations.

The application for stay must be done at the same time when the applicant acknowledges the claim against which it seeks a stay of proceedings.²⁹ Courts in Kenya have opted to interpret this provision strictly and will not stay proceedings unless the application was filed at the time of filing the memorandum of appearance. For instance, in the case **Neliwa Builders and Civil Engineers Ltd v. Jacob Mgaru Solomon & 3 others** it was held that the mere entering of appearance, filing of a defence and a notice of preliminary objection disentitles a defendant from invoking the provisions of section 6(1) of the Act to refer the matter to arbitration.³⁰

An unwarranted question has arisen as to who among the parties to the proceedings can invoke the provisions of Section 6(1) of the Act. The Section uses the phrase “...if a party applies not later than the time when that party enters appearance or files any pleadings...” These words appear to suggest that only a person who is required to enter an appearance in the proceedings can apply for a stay under this section.

In **Majidoon Kenya Ltd v. Kenya Old Co Ltd**,³¹ Justice Fred Ochieng posited that the right to apply for a stay of proceedings was not exclusively vested on the defendant or respondent. He suggested that there was no bar on the plaintiff to seek a stay of proceedings which he has instituted. It is difficult to follow the reasoning of the learned judge as he does not focus on

²⁸ Section 6 of the Arbitration Act.

²⁹ Section 6(1) of the Arbitration Act No. 4 of 1995. the Section before amendment made reference to when a party enters appearance or “files any pleadings or takes any other step in the proceedings”.

³⁰ [2001] eKLR, <http://www.kenyalaw.org> <accessed on 9 July 2010>.

³¹ (2006)eKLR.

the question of interpretation of the wording of the section. Although this would signify a change of mind on the part of the plaintiff and could facilitate arbitral jurisdiction, it is inconceivable that such application can be made in compliance with the provisions of Section 6 (1) of the Act. This is principally because the plaintiff does not enter appearance in civil proceedings.

In **Pamela Akora Imeje v. Akore ITC International Ltd & Bart Jan Roze Boom**,³² the plaintiff applied for a stay of proceedings for the dispute to be referred to arbitration but the High Court declined on the premise that Section 6(1) could only be invoked by the defendant. Justice Hatari Waweru was categorical that: "That provision is available only to the defendants. The very wording of the sub-section makes this plain and obvious. Having made her bed, as it were, the plaintiff must lie on it. She chose to file suit, she must fall or stand on it." It is my submission that the reasoning of Justice Waweru is more persuasive than that of Justice Ochieng.³³

Other than the filing of a defense which acts as a waiver of the respondents' right to seek a stay of proceedings under section 6(1) of the Act, the Court of Appeal has yet to enunciate other circumstances that would *estop* a party to an arbitration agreement from making the application.³⁴ The closest the High Court has come was the decision in **Timothy Rintari v. Madison Insurance Co Ltd**,³⁵ where the plaintiff had invoked the arbitration clause in the agreement but the defendant declined. Subsequently, the plaintiff commenced proceedings in the High Court and the defendant applied for a stay of the proceedings. The court struck off the application holding that the defendant was *estopped* by his conduct from relying on the provisions of section 6(1) of the Act.

The provisions on the time for applying for stay of proceedings need to be amended in a bid to render them more certain.

³² (2007)eKLR.

³³ See ENID A. M. & GILL: THE LAW OF ARBITRATION, 8 (2001) ; See also Supra note 105 at 300.

³⁴ In *Bahari Transport Company v. A.P.A. Insurance Co. Ltd*, the defendant had filed a defense and then applied for a stay of proceedings. The High Court dismissed it with costs.

³⁵ (2005)eKLR.

Court Assistance

Generally, courts have a vital role to play, in assisting arbitral tribunals. Courts are often required to appoint arbitrators, decide on challenges to the jurisdiction of the arbitral tribunal, grant interim relief, grant orders for the procurement of evidence or witnesses, and to order the participation of third parties in arbitration.

Indeed, in most jurisdictions, the law allows the parties and the arbitral tribunal, to ask the courts to assist the arbitral process whether in appointing arbitrators, deciding challenges to the jurisdiction of arbitral tribunal, granting interim relief, or ordering parties to produce evidence or witnesses, as well as orders to third parties. As with other areas of court involvement, courts' assistance, should not be too interventionist, but should have the primary aim of upholding the arbitral process, and making it more efficient.³⁶

In England, the courts have power to protect the subject matter of the arbitration, and this includes preventing one party from breaking the substantive agreement to which the arbitration relates in a manner which might render the arbitration meaningless. The power can only be exercised in the case of emergency, and also the circumstances must be such that the arbitrators themselves cannot act. This normally means that the application to the court will be at a time before the arbitrators have been appointed.³⁷

In England, the courts enjoy broad powers with respect to the preservation of evidence and property akin to those powers available in legal proceedings. A party can make an application for such an interim measure without the agreement of the other party or the arbitral tribunal when it requires urgent relief and the arbitral tribunal is powerless to grant such relief. The courts enjoy more coercive powers on enforcement and jurisdiction over third parties in comparison to arbitral tribunals, therefore their assistance can be beneficial in maintaining the efficiency and effectiveness of arbitration.³⁸

³⁶ *Supra*, note 49.

³⁷ s44 of the *Arbitration Act 1996*.

³⁸ *Supra* note 5 at 350-351.

The English *Arbitration Act* 1996 allows the courts to compel the attendance of a witness within its jurisdiction that is unwilling to give evidence. However, the courts may only do so by agreement of the parties or with the permission of the arbitral tribunal.³⁹

In Canada, the law allows the court wide jurisdiction to assist in arbitration. This discretion is extended to the provincial courts as well. Under the Model Law, upon which all arbitration laws in Canada are based, a party can request an interim measure of protection from the court. Interim relief is required from a court where non-parties need to be bound by an order, where there is a concern that a party may not comply with the order of the arbitral tribunal, or in urgent situations before the arbitral tribunal is constituted.⁴⁰

In essence, the courts in Canada have been bestowed the same general powers in arbitration as they enjoy in litigation. However, the role of the court goes further with respect to the determination of a question of law. Indeed, this provision does not exist in international arbitration rules and laws. Importantly, the provision gives the arbitral tribunal, or any party with the consent of the other parties, or the arbitral tribunal, to refer to the court any question of law that arises during the arbitration, for determination. Further, with leave of the court, such decision on matters of law may be appealed to the Court of Appeal. The aim is to ensure that parties to arbitration proceedings utilize the court's jurisdiction, in interpreting legal issues, especially where the arbitrator, is not a lawyer.

Courts will assist in the obtaining of evidence for arbitration. Article 27 of the Model Law provides that an arbitral tribunal can seek the assistance of the court in taking evidence.⁴¹

Canadian courts play a fundamental role in supporting the arbitral process with regard to evidentiary issues. Although most major arbitral rules and laws confer power on arbitral tribunals to order the production of documentary evidence and to compel the attendance of witnesses, arbitral tribunals lack the power to enforce their orders. Thus, the courts are indispensable in this area of arbitration.

³⁹ Section 44 of the Act.

⁴⁰ *ibid.*

⁴¹ *Supra*, note 49.

There is a strong tradition of non-interference of the courts in the arbitral procedure in France, but French courts have always shown their support to arbitration when required.⁴² The 2011 Decree created a judge whose task is to support the arbitral proceedings: the judge acting in support of arbitration or *juge d'appui*. This judge helps to ensure the effectiveness of the arbitration process.⁴³

Pursuant to Article 1468 of the CPC, provisional and protective measures are in principle ordered by the arbitral tribunal itself. Conservatory attachment and judicial securities on the other hand must be ordered by the courts at the request of the arbitral tribunal or the parties.

French courts are not reluctant to order interim relief sought by parties in appropriate circumstances, since applying to an arbitral tribunal for such measures may cause delays that are incompatible with interim relief. However, the courts are cautious not to interfere with the arbitrators' exclusive jurisdiction to rule on the merits of the case, notably through requests for interim relief that are not completely separable from an appreciation of the merits.⁴⁴

Pursuant to Article 1449 of the CCP, if the arbitral tribunal has not yet been constituted, an application may be made to the President of the Tribunal de grande instance or of the Tribunal de commerce who shall rule on measures relating to the taking of evidence in accordance with the provisions of Article 145 (e.g., broad pre-arbitration investigatory powers, including the forced production of documents and the appointment of an expert by the court in technical matters).⁴⁵

In addition to the power to stay judicial proceedings, the High Court in Kenya has jurisdiction to interfere or play a supportive role in the arbitral process. For example, under section 7 of the Act, the Court has jurisdiction to issue interim orders, such as an injunction at the instance of either party. This may be justified by the need to maintain the *status quo* pending the determination of the dispute. To the credit of this provision, the court relies on any finding of

⁴² Michael Bühler and Pierre Heitzmann, Jones Day, "PLC Arbitration Handbook France" 2009.

⁴³ *Supra*, note 79.

⁴⁴ *ibid.*

⁴⁵ Jean-Christophe Honlet, Bart Legum and Anne-Sophie Dufêtre Salans LLP, "Commercial Arbitration: Knowhow Global Arbitration Review, France" Available at <http://www.globalarbitrationreview.com/know.../france/> (accessed on 24/11/2012).

fact made by the arbitral tribunal on the issues before the court. Similarly, the High Court may on application of the arbitral tribunal or either party with sanction of the tribunal order a party to take such interim measures as are necessary.⁴⁶

With regard to appointment of arbitrators, the court can intervene at the option of the parties but only in the circumstances prescribed by section 12 of the Act and the court's decision is final.⁴⁷ Without belaboring the point, this section is facilitative of the arbitral process.

Closely allied to this power is the competence of the High Court to determine any question arising in the event of termination of the mandate of the arbitral tribunal.⁴⁸ Section 17 confers jurisdiction to hear an application challenging decisions of the arbitral tribunal on preliminary questions and the court's decision is final.⁴⁹ A further supportive role of the High Court is embodied in section 28 of the Act. This section mandates the court to assist in taking of evidence if an application to that effect is made by the arbitral tribunal or either party with countenance of the tribunal. The High Court may execute the request within its competence and according to its rules of taking evidence.

The procedure for applying for court interventions is very strict as to afford lawyers intending to delay arbitration proceedings room for manoeuvres. There is no reason why the procedure for such applications cannot be relaxed to ensure that it secures justice for the opposite party without being tyrannical and prone to abuse. For example, it could help providing that applications under the Arbitration Act be not dismissed for adopting wrong procedure and that the courts endeavour to uphold them with due regard to the justice and fairness to the parties need to avoid delays in arbitration.

The few remedies fashioned to prevent abuse of court process do not offer much help especially when lawyers get into the fray with their bagful of tricks-and delay is the darling trick of most lawyers! Soon, what was a simple issue is reduced to complex lawyers' business. The court's interventions in arbitration are not immune to lawyers out to abuse the process of the court.

⁴⁶ Section 18 of the Act.

⁴⁷ Section 12(5).

⁴⁸ Section 15.

⁴⁹ Section 17(7) of the Act.

Appeals

The 1996 English Act provides for instances where a party can challenge an award claiming lack of substantive jurisdiction⁵⁰ on the part of the arbitral tribunal or in specific circumstances that involve serious irregularities.⁵¹

An appeal on a point of law is also permissible under section 69 of the Act. The right to appeal is only available where court's jurisdiction to hear the appeal, has not been excluded by the parties. In any case, where there is no exclusion, appeal is available with leave of the court, unless parties agree to it.

On applications challenging the award on the grounds that the arbitral tribunal lacked jurisdiction under Section 67 of the English Arbitration Act, the court may either confirm the award, vary the award or set the award aside in whole or in part.⁵²

Section 68(2) of the English Arbitration Act sets out an exhaustive list of the circumstances which constitute a serious irregularity if they cause substantial injustice to the applicant, namely: breach of Section 33 of the English Arbitration Act (general duties of the arbitral tribunal); the arbitral tribunal exceeding its powers; failure to conduct the arbitral proceedings in accordance with the arbitration agreement; failure by the arbitrators to resolve all matters in dispute referred to them; uncertainty or ambiguity of the award; the award being obtained by fraud or in a manner contrary to public policy; failure to comply with formal requirements relating to the award; or admitted irregularity in the arbitral proceedings or the award.⁵³

If an award is successfully challenged on grounds of serious irregularity under Section 68 of the English Arbitration Act, the court may either remit the award (in whole or in part) to the arbitral tribunal for reconsideration, set the award aside or declare it to be of no effect.⁵⁴

Awards can be appealed on points of law only. An award may only be appealed after permission has been granted by the court or by the agreement of the parties.

⁵⁰ Section 67 of the Act.

⁵¹ Section 68 of the Act.

⁵² Guy Pendell and David Bridge CMS, "Arbitration in England and Wales, CMS Guide to Arbitration, Vol I" Available at <http://www.eguides.cmslegal.com/.../arbitration_volume.../C..> (accessed 24/11/2012).

⁵³ *ibid.*

⁵⁴ *ibid.*

Arbitration laws and rules are based on the premise that arbitral proceedings will end in an award and that the award will be final and binding upon the parties. Despite this underlying premise, unsuccessful parties frequently attempt to appeal arbitral awards to the courts. "Even where the relevant rules of arbitration provide that an award is to be final and binding on the parties and that the parties agree to carry it out without delay, the law of the seat of arbitration usually provides some way of challenging an arbitral award."⁵⁵

Just like in the UK, in Canada a party can challenge an award by bringing an application to the court to set it aside on grounds of: lack of jurisdiction, excess of jurisdiction, breach of public policy, or lack of proper procedure (i.e., a party is under some incapacity, a party is not given proper notice, or the composition of the tribunal or the procedure is not in accordance with the agreement of the parties).⁵⁶

International awards made in France cannot be appealed before the courts. The only court action available to an unsatisfied party is an action to set aside the award (*recours en annulation*). This ensures the efficiency of the international arbitration process.⁵⁷

Based on article 1520 CCP, an international award made in France may only be challenged on the following five limited grounds: (i) if the arbitral tribunal decided the case in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired; (ii) if the arbitral tribunal was improperly constituted or the sole arbitrator was improperly appointed; (iii) if the arbitral tribunal decided the case otherwise than in accordance with the terms of the mission conferred on it; (iv) if the rules of due process were breached; and (v) if the recognition or enforcement of the award would be contrary to French international public policy.

These grounds are restrictive and enable the courts to ensure observance of certain minimum standards for the international enforceability of an award.⁵⁸

⁵⁵ Supra, note 67.

⁵⁶ Supra, note 49.

⁵⁷ Article 1518 CCP.

⁵⁸ Before the 2011 Decree entered into force, the courts had already established that international awards could not be challenged for failure to respect certain criteria which solely applied to domestic awards, such as the legal time limit for rendering an award, or the need for the arbitrators to hold meetings.

From the study in Chapter Two, it is clear that there is undue constriction on the power to appeal from interlocutory orders and even arbitral awards. This unnecessarily, limits growth in arbitration jurisprudence in Kenya and makes arbitration less appealing choice, for contracting parties.

There is, therefore, need for amendment to permit appeal on agreement between parties and with leave of the court. There is also no reason why the bulk of jurisdiction on arbitration matters should be limited only to the High Court. Presently, the parties are constrained to the extent that where the value of some of the dispute does not merit a suit in the High Court they opt not to seek court intervention. It would be better to introduce a graduated system just like in civil litigation where, determining the jurisdiction of a court depends on the value of the subject-matter. If anything, the costs of litigation in High Court are higher compared to that of litigation in the lower courts and the High Court is not always in the vicinity of the parties except for those in the urban areas.

Recognition and Enforcement of Arbitral Awards

Section 66 of the English Arbitration Act provides that domestic awards may be enforced with the permission of the court as if they were court judgments. Permission shall only be refused if the person against whom the award is to be enforced shows that the arbitral tribunal lacked substantive jurisdiction to make the award.

It has recently been confirmed that this right of enforcement under Section 66 also applies to declaratory awards, where the victorious party's objective in obtaining an order for enforcement is to establish the primacy of a declaratory award over an inconsistent judgment.⁵⁹

Canadian courts have increasingly exercised restraint in reviewing international commercial arbitration awards made in Canada and have refused to overturn such awards except in very limited circumstances. In doing so, Canadian courts have upheld the Model Law principle of limited scope of review of arbitral awards.⁶⁰

⁵⁹ *West Tankers Inc v Allianz SpA and Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm).

⁶⁰ *Supra*, note 53.

In Canada, final arbitration awards are recognised as legally binding between parties without the need for any judicial proceedings. However, a party that wishes to enforce a final award by the customary means of seizure and sale, garnishment, contempt and the like, must first apply to the local court to obtain judgment enforcing the award.

The general rule under French law is that an arbitral award shall be recognized in France if its existence is proved, unless such recognition is not manifestly contrary to French international public policy.⁶¹

An award, whether made in France or abroad, must be presented to the Court of First Instance (*Tribunal de grande instance*) sitting as a single judge, to be enforceable in France.

In Kenya a domestic award shall be recognized as binding and, upon application in writing to the High Court, shall be enforced.⁶² An international arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York awards.⁶³

The law in Kenya requires the party relying on the award or applying for its enforcement to furnish it with the original arbitral award or a certified copy thereof and the original arbitration agreement or a duly certified copy.⁶⁴ However the High Court may order otherwise where a party seeks indulgence on compliance with these requirements to supply those documents.⁶⁵

The High Court has inconsistently used its discretion to allow recognition of awards where the procedural requirements for recognition and enforcement are not strictly adhered to. For instance, in **Kundan Singh Construction Ltd V Kenya Ports Authority**⁶⁶ an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Act.

⁶¹ CPC, art 1514. See Cour de cassation (Civ. 1ere) 17 October 2000, *Asecna c/ N'Doye*, Bul. Civ. I; No 243, D. 2000, Rev Arb, 2000, pp 648 - 656.

⁶² Section 36 (1) *supra*.

⁶³ Section 36 (2) *supra*.

⁶⁴ Section 36 (3) *supra*.

⁶⁵ Section 36 (4) *supra*.

⁶⁶ H.C.C.C No. 794 of 2003 (Milimani, unreported).

The Judge found that there was no duly authenticated original arbitral award or a duly certified copy of it. Rather, he found that what was on court record were photocopies of the arbitral award and arbitration agreement contrary to the requirements of section 36(2) of the Act which could only be waived upon application which had not been made.

However, in **Structural Construction Co. Ltd V International Islamic Relief Organization**⁶⁷ the lack of an original or certified copy of the arbitration agreement was held not to be fatal and a copy annexed to the supporting affidavit held to be acceptable for the purposes of the application for enforcement. It was also decided in this case that the non-representation of a party at the arbitration proceedings due to their neglect to appoint their advocate of choice did not entitle them to challenge the recognition and enforcement of an award.

4.3 Conclusion

The prevailing policy for court intervention at the international level is minimal court intervention. The key approaches in court intervention in arbitration around the world seems to follow two key patterns; minimal intervention of the court except in public interest and supporting arbitration in order to realize its rationale and enhance the role of the arbitrator in exercise of his jurisdiction and powers.

The mainstream court practice in Kenya paints a different picture. The court comes across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases it seems the court considers its role in matters that are subject to arbitration agreement as being parallel to that of the arbitrator.

Thus, where one party goes to court in breach of an arbitration agreement, the courts are reluctant to stay the proceedings in favour of arbitration relying on strict interpretation of the conditions for stay under section 6 of the Arbitration Act. The Courts have, in most instances, also contradicted themselves in their decisions even where the law is clear. This has ended up creating uncertainty on the position of the arbitration law, and an opportunity for unscrupulous litigants to exploit, to delay arbitration proceedings in Kenya.

⁶⁷ [2006] eKLR <http://www.kenyalaw.org> <accessed on 12 July, 2010>.

No doubt parties to arbitration agreements in Kenya have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made.⁶⁸

Though arbitration has proved to be a commendable alternative to court process, it has become constrained by the own rules of procedure making it more expensive. It is clear that unnecessary judicial interference in Kenya falsifies both the trust which the legislature and the parties have placed in the arbitrator, and discourages arbitrators from employing them boldly in the future.

Chapter five of the study will deal with Data Analysis, and how the same confirms the loopholes or short falls identified, in the role of courts in arbitration in Kenya as discussed in this chapter.

⁶⁸ *Supra* note 3.

CHAPTER FIVE

5.0 Data Analysis and the Current Status of the Role of the Courts in Arbitration in Kenya

5.1 Introduction

Chapter Four discussed and established the short falls or loopholes on the role of courts in arbitration in Kenya in terms of the thematic areas discussed in Chapter Two, as compared with the best practices in the three selected jurisdictions in Chapter Three.

The current chapter will deal with data analysis, and how the same findings confirm the loopholes or short falls in the role of courts before the commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings, and the interpretation of the courts, of their role in diverse decisions in arbitration in Kenya as discussed in Chapter Four.

The role of the courts in arbitration in Kenya has been elaborately discussed in Chapter Two of this thesis.

Data Analysis

The discussion will involve data findings, analysis, interpretation and presentation from arbitration practitioners in Kenya. The data was analyzed and presented using tables. As explained in the methodology section of Chapter one, the study gives the fact that random sampling would have collected irrelevant and unworthy data. I chose Target Respondent interview because it guaranteed a reliable outcome.

The study was an empirical investigation of the opinion of arbitration practitioners on the role of the courts in arbitration in Kenya. It sought to meet the objectives of the study by establishing whether the role of courts in arbitration in Kenya is effective and how it influences the process and development of domestic and international commercial arbitration in Kenya and also determine how diverse best practices on the role of the court in arbitration compare with the role of the court in arbitration in Kenya on aspects of effectiveness. In addition, it also sought to suggest amendments to the Kenyan arbitration law to limit court

intervention in arbitration, in order to promote Kenya, as an attractive venue for international commercial arbitration.

The data is analyzed in two parts. The first part deals with demographic findings. The second part, deals with the findings on specific information, based on the respondents' opinion on the role of courts in arbitration in Kenya.

Demographic Findings

This section gives the general information of the respondents including the status of the respondent as an arbitrator, duration of practice as an arbitrator and the average number of arbitrations done so far. The study targeted 17 arbitrators having the rank of member, fellow and chartered arbitrators. Out of the 17 arbitrators who were supplied with questionnaires, 10 responded by filling the questionnaires and also accepting to be interviewed. Thus, 60% of the target respondents responded to the study questionnaire and were interviewed.

Table 3.1(a): Duration of Practice as Arbitrators in Kenya

Duration in (years)	Frequency	Percentage
Less than 5	2	20.0
Less than 9	1	10.0
10 years and above	7	70.0
Total	10	100.0

Table 3.1(a) shows how long the respondent has been in practice. Majority, (70.0%) of the respondents have experience spanning more than 10 years, with the least (20.0%) having been arbitrating for less than 5 years. This implies that the study was in a position to get reliable information on role of the courts in arbitration in Kenya as the respondents are among the most experienced arbitrators in Kenya.

All the respondents interviewed were members of the Chartered Institute of Arbitrators (Kenya Branch). The institute is Kenya's leading arbitration body and the respondents came highly recommended as being highly knowledgeable and well-versed in the area. This means that the respondents were in a position to give viable information on the role of the courts in

arbitration in Kenya. Indeed, all the respondents were above the rank of a member, and were composed of 3 members, two Fellows, and 4 Chartered Arbitrators. The respondents have in all handled over 300 arbitrations with the average number per respondent being over 20 arbitrations since becoming a member of the Institute.

Table 3.1 (b): Average arbitrations done

Respondent	Number of arbitrations
1	50
2	10
3	50
4	50
5	8
6	5
7	10
8	5
9	5
10	5
Average No. of arbitrations	$198/10=19.8$

Table 3.1(b) shows that the average number of arbitration done by the Respondents sampled and interviewed is approximately 20. This demonstrates, that the Respondents are very experienced arbitrators, and their opinion is a clear indicator, of the role of the courts in arbitration in Kenya.

5.2 Intrusive role of courts in Arbitration in Kenya

This section gives specific findings on the intrusive role of courts in arbitration in Kenya, and the respondents' suggestions on how to minimize it.

Table 3.2: Findings on whether or not courts in Kenya are intrusive in Arbitration process

Response (No/ Yes)	Frequency	Percentage
No	3	30
Yes	5	50
Others	2	20
Total	10	100

Table 3.2 explains the respondents' opinion on whether the role of the court in arbitration in Kenya is intrusive. Majority 50 % thought that the role of the court was intrusive.

The justifications offered for the opinion that the role of the court was intrusive include the fact that the court issues orders which are against arbitration while the best approach should be business friendly with disputes handled in a realistic manner and time bound. Another respondent opined that judges who have no previous interaction with arbitration practice assume jurisdiction even when they should not.

The remaining percentages were divided equally in their opinion that the role of the court in arbitration in Kenya is either not intrusive or were not of the opinion that it is not consistent to be classified as intrusive or not.

In fact, the general view was that the role of the court ranges from interference, to support, to interpretation and there is no consistency. Others argued that judges often fall in technicalities to impede arbitration. Most judges see arbitrators as competitors given that arbitration in Kenya has gained popularity as a result of the failure of the courts to dispense justice expeditiously.

Table 3.3: How the role of courts in arbitration in Kenya compares with other jurisdiction

Interviewees' response	Frequency	Percentage
Excellent	0	0
Very good	1	10
Fair	5	50
Poor	3	30
Cannot Tell	1	10
Total	10	100.0

Table 3.3 shows the respondents' opinion on the how the role of the courts in arbitration in Kenya compares with other jurisdictions. Majority of the respondents 50 % are of the view that Kenya compares below average with other jurisdictions they are acquainted with on the role of the court in arbitration.

Thus, the study hypothesis is confirmed in that majority of the respondents were of the view that the role of the courts in arbitration in Kenya render arbitration process ineffective, and is not conducive to international commercial arbitration.

Indeed, only a mere 10% thought that Kenya compared favourably. This means that according to the stakeholders, there is need to review the role of the courts in arbitration in Kenya to measure with the best practices in the three selected jurisdictions discussed in Chapter three herein.

The opinion given included that Kenya is not well developed in terms of jurisdiction of the court in arbitration, the public is not well-exposed to arbitration and there is also no sufficient exposure on the part of the judiciary with respect to arbitration and how it works.

Some respondents stated that not many judges appreciate the role of arbitrators and arbitration. Even now that some are being trained by the Institute, they still find it difficult to appreciate the process and therefore are not as eager to facilitate it.

Table 3.4: Whether in the respondents' experience as arbitrators, their performance has been affected by role of the courts

	Frequency	Percent
Yes	6	60
No	3	30
No Answer	1	10
Total	10	100.0

Table 3.4 shows whether in their experience as arbitrators their performance has been affected by the role of the courts. Majority 60 % recounted experiences where their performance as arbitrators was negatively affected by the courts. Most of the remaining 30 % who responded to the question had had their performance affected but could not qualify whether this was for the better or worse.

The Average Time for Conclusion in cases of Court's Intervention

Majority of the respondents were of the view that although a normal arbitration would normally conclude in about a month without court intervention, on average, court intervention sets the process backwards by almost a month.

Further, most of the respondents thought that such delay was not justified because in most cases it was on a procedural issue which does not go to enhance the arbitration process or the final arbitral award.

Table 3.5: Whether the delay in arbitration due to courts' intervention is justified

	Frequency	Percent
Yes	0	0
No	8	80
Depends	2	20
Total	10	100.0

Table 3.5 shows the opinion of the respondents on whether the delay in arbitration due to court intervention is justified. Majority 80 % of the respondents felt that it was not because courts had no business meddling in arbitration, while 20 % this depended on circumstances as there were cases when court intervention was necessary in the interest of justice.

This means that there is need to evaluate the instances where the court intervenes to discern whether they are justified and necessary or not and to eliminate the unnecessary interventions which end up causing delay in the arbitration process.

Table 3.6: Whether the respondent would recommend fixed time for court intervention in arbitration

	Frequency	Percent
Yes	10	100.0
No	0	0.0
Total	10	100.0

All the respondents agreed that there was need to dictate a time limit in which the court should handle any application intervening in any arbitration matter. As for the proposals on the time limitation, the majority was for a maximum of 30 days period while the highest time limit proposal was 3 months.

Table 3.7: Whether the role of court in arbitration has limited attractiveness of Kenya as a seat of international commercial arbitration

Response	Frequency	Percent
Yes	7	70
No	1	10
Don't Know	2	20
Total	10	100.0

Table 3.7 shows whether role of court in arbitration has limited attractiveness of Kenya as a seat of international commercial arbitration. Majority 70 % of the respondents agree while only a paltry 10 % does not agree.

This means that the role of the Kenyan court in arbitration has tended to limit the attractiveness of Kenya and Nairobi as a choice destination for international commercial arbitration.

Other Findings of the Study

The respondents offered further opinion and insight, on what ails the role of the court in arbitration in Kenya. The consensus appeared to be that, the root cause of the problem is limited judicial exposure on arbitration as a dispute resolution mechanism. Thus, it was argued that it is necessary for judges to be trained on arbitration, and to be encouraged to see arbitrators as partners in the administration of justice, and reduction in backlog of cases rather than competitors to the existing judicial system.

Most of the respondents were also of the view that there was need to limit the nature and approach to court intervention in arbitration in Kenya. In their view, there was need for an overhaul of the Arbitration (Amendment) Act, 2009 to fill the gaps and address challenges faced in conducting arbitration in Kenya.

Further, some, were of the opinion that there was need for a law to be enacted, or practice direction, to give priority to arbitration applications in court to ensure speedy disposal of arbitral matters.

Proposals were also made for the strengthening of the commercial courts as well as enactment of time bound rules of procedure to ensure that arbitration applications in court are dispensed with within a specific period after filing.

The findings in this chapter demonstrate that the role of the court in arbitration in Kenya is poorly rated by the key arbitration practitioners in the country. Indeed, the general conclusion is that the state of arbitration practice in the country is not made any better by the court intervention in the arbitral process.

Further, majority of the arbitration practitioners were of the considered opinion that the role of the court in arbitration in Kenya contributed to making Kenya less attractive as a seat of international commercial arbitration. This further confirms the hypothesis of the study.

5.3 Conclusion

From the foregoing discussion, it is clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. But, it also leaves a lot to be desired especially due to the constrictions that are imposed by the provisions of the 1995, Arbitration Act that the courts are called to apply in their intervention in arbitration. Thus, many reforms are needed if the role of the courts is to develop into one which is facilitative of arbitration, and to shake off such qualities as we have indicated above, which unnecessarily render arbitration process as inexpedient and cumbersome.

Chapter Six of the thesis will encompass a summary, recommendations and conclusions on the study. The Chapter through the recommendations, will highlight, the ways and means of domesticating and institutionalizing the best practices discussed and analyzed in Chapter three, towards an effective role of the courts in arbitration in Kenya.

CHAPTER SIX

6.0 Summary, Conclusions and Recommendations

6.1 Summary of the Findings:

This chapter concludes the salient findings of the study. Additionally, the Chapter will also have highlights of the proposals for reforms, in order to realize effective the role of courts in arbitration in Kenya and to make the same, conducive to robust domestic and international commercial arbitration in Kenya. The chapter is based on the findings of the preceding chapters which identified the deficiencies of the law and practice in court intervention in arbitration in Kenya.

The study sought to critically analyze the role of the court in arbitration in Kenya as provided for under the Arbitration Act 1995. The aim was to determine how the role of the courts in arbitration in Kenya compares with best practices from the selected three jurisdictions of the world, and specifically in the UK, Canada and France.

The study also sought to find out whether the role of the court in arbitration in Kenya is conducive to effective domestic and international arbitration. Further, it interrogated the question whether the law and practice on the role of the court in arbitration in Kenya are to blame for limited utilization of Kenya as a seat for international commercial arbitration. The problem of the study was, thus, to critically analyze the status of the role of the court in arbitration in Kenya, how it ranks in comparison with best practices from around the world and how the role of court in arbitration impacts on the process and development of arbitration in Kenya.

The objectives of this study was: to critically analyze the role of courts in arbitration in Kenya under the Arbitration Act of 1995; to establish whether the role of courts in arbitration in Kenya is effective and how it influences the process and development of domestic and international commercial arbitration in Kenya; to determine how diverse best practices on the role of the court in arbitration compare with the role of the court in arbitration in Kenya on aspects of effectiveness and; to propose reforms in the light of the best practices towards a

more effective role of the court in arbitration in Kenya towards a conducive environment for domestic arbitration and international commercial arbitration in Kenya.

The hypothesis of the study was that the role of the court in Kenya as provided for under Arbitration Act No. 4 of 1995 inhibits effective arbitration and is not conducive for international commercial arbitration and that the application of best practices from leading jurisdictions around the world can help in making the role of the court in arbitration in Kenya as provided for under Arbitration Act 1995 effective.

The research methodology used in the study was mainly desktop research given that most of the materials and literature are available as secondary data in the internet, books, journal articles, reports and relevant studies in the area. However, target respondents interviews were used in order to obtain the opinion of the key stakeholders in the arbitration sector.

The study was divided into six chapters. Chapter One introduced the background of the Arbitration Act 1995 and the key concepts in the study discussing the role of court in arbitration in general. Further, the chapter included a background of the study, literature review and theoretical framework of the study as a way of laying the foundation for discussion in the other parts of the study. The Chapter also discussed how the role of the court impacts on the process and development of domestic and international commercial arbitration in general and, in particular in Kenya.

Chapter Two critically analyzed the role of the court in arbitration as outlined in the arbitration Act, 1995. The various aspects of the role of court before commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings was appraised and their merit and demerits in enhancing effective arbitration in Kenya were determined. In addition, the envisaged role of the court in the framework for court-mandated arbitration in Kenya pending enactment into law was also analyzed.

The discussion and analysis in the Chapter was organized around key thematic arguments based on an analysis of the statutory provisions and the case law examined. In particular, the following thematic issues were analyzed: the rationale of arbitration, minimum interference by the court, the jurisdiction, powers and autonomy of the arbitral tribunal, the need and conditions for court intervention and the duty of the court to intervene in public interest. The

analysis showed the extent to which courts interfere in arbitration proceedings and whether the interference promotes or inhibits the process of arbitration.

From the discussion in Chapter Two, it emerged that there are various instances where the Kenyan Arbitration Act empowers the Court to intervene in the arbitration process. However, even where there is no express statutory provision giving the Court such power, the court may read in public interest as a justification to entertain or hear a dispute arising within the arbitration proceedings. This is despite the fact that the Act is clear that except where it is otherwise provided, the court has no role in arbitration proceedings. The Act also restricts recourse to the High Court or Court of Appeal by declaring most references to the High Court as final and non-appealable. This is designed to restrict recourse to Courts by parties who are unwilling to take part in the arbitration process or who are keen on avoiding payment of the award rendered against them.

It also emerged that the mainstream court practice in Kenya paints a different picture. The court comes across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases it seemed the court considers its role in matters that are subject to arbitration agreement as being parallel to that of the arbitrator. Thus, where one party goes to court in breach of an arbitration agreement, the courts are reluctant to stay the proceedings in favour of arbitration relying on strict interpretation of the conditions for stay under section 6 of the Arbitration Act. The Courts have, in most instances, also contradicted themselves in their decisions even where the law is clear. This has ended up creating uncertainty on the position of the arbitration law and an opportunity for unscrupulous litigants to exploit to delay arbitration proceedings in Kenya.

Chapter Three reviewed best practices on the role of the courts in arbitration in UUK, Canada and France. The salient features of the role of the Courts in arbitration in the two common law jurisdictions (UK and Canada) and the Civil Law Jurisdiction (France) were discussed with special focus on how Courts enhance the effectiveness of arbitration as a mode of dispute resolution. The discussion focused on the role of the Courts in the following three areas: (1) Stay of proceedings (2) assistance; and (3) appeals.

The aim of the Chapter was to show how the law in England, Canada and France has ensured a balance in maintaining the role of the Courts to intervene in arbitration, and upholding arbitration as an Alternative to the Court process.

It emerged that the role of the courts in arbitration in the three countries is limited and clearly defined to ensure that there is no possibility of abuse. The courts in the three countries have been very articulate in defining the role of the court to make it supportive rather than limiting to the overall arbitral process in the country.

Chapter Four established the short falls or loopholes on the role of courts in arbitration in Kenya in terms of the thematic areas discussed in Chapter Two as compared with the best practices in the three jurisdictions in Chapter Three.

From the study, it emerged that the prevailing policy for court intervention at the international level is minimal court intervention. The key approaches in court intervention in arbitration around the world seems to follow two key patterns; minimal intervention of the court except in public interest and supporting arbitration in order to realize its rationale and enhance the role of the arbitrator in exercise of his jurisdiction and powers.

The mainstream court practice in Kenya paints a different picture. The court came across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases it seemed the court considers its role in matters that are subject to arbitration agreement as being parallel to that of the arbitrator.

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No doubt parties to arbitration agreements in Kenya have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and

enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made.⁶⁹

Though arbitration has proved to be worthy alternative to court, it has become constrained by the rules of procedure in Kenya making it more expensive. It is clear that unnecessary judicial interference in Kenya falsifies both the trust which the legislature and the parties have placed in the arbitrator, and discourages arbitrators from employing them boldly in the future.

Chapter Five dealt with Data Analysis, and how the same confirms the loopholes or short falls in the role of courts before the commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings and the interpretation of the courts of their role in diverse decisions in arbitration in Kenya as discussed in Chapter Four.

The discussion involved data findings, analysis, interpretation and presentation from arbitration practitioners in Kenya. The data was analyzed and presented using tables.

The study was an empirical investigation of the opinion of arbitration practitioners on the role of the courts in arbitration in Kenya. It sought to meet the objectives of the study by establishing whether the role of courts in arbitration in Kenya is effective and how it influences the process and development of domestic and international commercial arbitration in Kenya and also determine how diverse best practices on the role of the court in arbitration compare with the role of the court in arbitration in Kenya on aspects of effectiveness in addition, it also sought to suggest amendments to the Kenyan arbitration law to limit court intervention in arbitration in the interest of international commercial arbitration.

The data was analyzed in two parts. The first part dealt with demographic findings. The second part, dealt with the findings on specific information, based on the respondents' opinion on the role of courts in arbitration in Kenya.

The findings in this chapter showed that the role of the court in arbitration in Kenya is poorly rated by the key arbitration practitioners in the country. Indeed, the general conclusion was that the state of arbitration practice in the country is not made any better by the court

⁶⁹ *Supra* note 3.

intervention in the arbitral process. It is argued that for Kenya to take advantage of the opportunities and advantages of arbitration it is necessary to overhaul the current framework on which arbitration is. Further, majority of the arbitration practitioners were of the considered opinion that the role of the court in arbitration in Kenya contributed to making Kenya less attractive as a seat of international commercial arbitration.

The respondents offered further opinion and insight on what ails the role of the court in arbitration in Kenya. The consensus appeared to be that the root cause of the problem is limited judicial exposure to arbitration as a dispute resolution mechanism. Thus, it was argued that it is necessary for judges to be trained on arbitration and to be encouraged to see arbitrators as partners in administration of justice and reduction in backlog of cases. Most of the respondents were also of the view that there was need to limit the nature and approach to court intervention in arbitration in Kenya. In their view, there was need for an overhaul of the Arbitration (Amendment) Act, 2009 to fill the gaps and address challenges faced in conducting arbitration in Kenya.

Further, some were of the opinion that there was need for a law or practice direction to give priority to arbitration applications in court to ensure speedy disposal of arbitral matters. Proposals were also made for the strengthening of the commercial courts as well as enactment of time bound rules of procedure to ensure that arbitration applications in court are dispensed with within a specific period after filing.

6.2 Conclusions

The thesis set out to investigate how effective the role of courts in arbitration in Kenya has been and what can be done to ensure that it meets standards required in international commercial arbitration. It has been firmly shown and concluded that the role of courts in arbitration in Kenya is not effective and therefore, the need for reforms in the system to improve its effectiveness.

In Chapter one, it emerged that, to a great extent, while applying the provisions of the Arbitration Act of 1995, Courts in Kenya interfere in arbitration proceedings, and are ineffective for international commercial arbitration.

From Chapter two, it emerged that there are various instances where the Kenyan Arbitration Act empowers the Court to intervene in the arbitration process. However, even where there is no express statutory provision giving the Court such power, the court may read in public interest as a justification to entertain or hear a dispute arising within the arbitration proceedings. This is despite the fact that the Act is clear that except where it is otherwise provided, the court has no role in arbitration proceedings. The Act also restricts recourse to the High Court or Court of Appeal by declaring most references to the High Court as final and non-appealable. This is designed to restrict recourse to Courts by parties who are unwilling to take part in the arbitration process or who are keen on avoiding payment of the award rendered against them.

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Chapter three was aimed to show how the law in England, Canada and France has ensured a balance in maintaining the role of the Courts to intervene in arbitration, and upholding arbitration as an Alternative to the Court process. It emerged that the role of the courts in arbitration in the three countries is limited and clearly defined to ensure that there is no possibility of abuse. The courts in the three countries have been very articulate in defining the role of the court to make it supportive rather than limiting to the overall arbitral process in the country.

Chapter Four established the short falls or loopholes on the role of courts in arbitration in Kenya in terms of the thematic areas discussed in Chapter Two as compared with the best practices in the three jurisdictions in Chapter Three.

From the study, it emerged that the prevailing policy for court intervention at the international level is minimal court intervention. The key approaches in court intervention in arbitration around the world seems to follow two key patterns; minimal intervention of the court except in public interest and supporting arbitration in order to realize its rationale and enhance the role of the arbitrator in exercise of his jurisdiction and powers.

The mainstream court practice in Kenya paints a different picture. The court came across as being inconsistent in the interpretation of its role in arbitration. Indeed, in most cases it seemed the court considers its role in matters that are subject to arbitration agreement as being parallel to that of the arbitrator.

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No doubt parties to arbitration agreements in Kenya have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made.⁷⁰

Though arbitration has proved to be worthy alternative to court, it has become constrained by the own rules of procedure making it more expensive. It is clear that unnecessary judicial interference in Kenya falsifies both the trust which the legislature and the parties have placed in the arbitrator, and discourages arbitrators from employing them boldly in the future.

Chapter Five dealt with Data Analysis, and how the same confirms the loopholes or short falls in the role of courts before the commencement of arbitration proceedings, during arbitration proceedings and after arbitration proceedings and the interpretation of the courts of their role in diverse decisions in arbitration in Kenya as discussed in Chapter Four.

⁷⁰ *Supra* note 3.

The findings in this chapter indicate that the role of the court in arbitration in Kenya is poorly rated by the key arbitration practitioners in the country. Indeed, the general conclusion was that the state of arbitration practice in the country is not made any better by the court intervention in the arbitral process. It is argued that for Kenya to take advantage of the opportunities and advantages of arbitration it is necessary to overhaul the current framework on which arbitration is. Further, majority of the arbitration practitioners were of the considered opinion that the role of the court in arbitration in Kenya contributed to making Kenya less attractive as a seat of international commercial arbitration.

The respondents offered further opinion and insight on what ails the role of the court in arbitration in Kenya. The consensus appeared to be that the root cause of the problem is limited judicial exposure to arbitration as a dispute resolution mechanism. Thus, it was argued that it is necessary for judges to be trained on arbitration and to be encouraged to see arbitrators as partners in administration of justice and reduction in backlog of cases. Most of the respondents were also of the view that there was need to limit the nature and approach to court intervention in arbitration in Kenya. In their view, there was need for an overhaul of the Arbitration (Amendment) Act, 2009 to fill the gaps and address challenges faced in conducting arbitration in Kenya.

Further, some were of the opinion that there was need for a law or practice direction to give priority to arbitration applications in court to ensure speedy disposal of arbitral matters. Proposals were also made for the strengthening of the commercial courts as well as enactment of time bound rules of procedure to ensure that arbitration applications in court are dispensed with within a specific period after filing.

The theoretical basis, on which these conclusions were grounded, rested with the importance of arbitration as an alternative dispute resolution method in the Kenya.

6.3 Recommendations

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. But, it also leaves a lot to be desired especially due to the constrictions that are imposed by the provisions of the Arbitration Act

that the courts are called to apply in their intervention in arbitration. Thus, many reforms are needed if the role of the court is to become facilitative of arbitration and to shake off such qualities as we have seen above which unnecessarily render arbitration inexpedient and cumbersome.

A balance needs to be struck between court intervention and autonomy of the arbitral process. Lord Mustill described the process as a relay race: Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual.⁷¹

When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can, in case of need, lend its coercive powers to the enforcement of the award. In real life, the position is not so clear-cut. Very few commentators would now assert that the legitimate functions of the Court entirely cease when the arbitrators receive the file, and conversely very few would doubt that there is a point at which the Court takes on a purely subordinate role. But when does this happen? And what is the position at the further end of the process? Does the Court retake the baton only if and when invited to enforce the award, or does it have functions to be exercised at an earlier stage, if something has gone wrong with the arbitration, by setting aside the award or intervening in some other way?⁷²

The answer to these questions is that the courts and arbitral tribunals must work together to ensure that arbitration is an efficient and viable process. The courts have an important role to play in arbitration as they support and maintain the process. Courts have a particularly important place in granting stays, assisting arbitration, and in deciding appeals. Although the involvement of the courts is necessary to ensure an efficient arbitral process that lives up to parties' expectations and intentions, a balance is required to ensure that the courts do not

⁷¹ Lord Mustill, "Comments and Conclusions," in *Conservatory & Provisional Measures in International Arbitration*.

(Paris: International Chamber of Commerce, 1993) at 118.

⁷² Lord Mustill, "Comments and Conclusions," in *Conservatory & Provisional Measures in International Arbitration*.

(Paris: International Chamber of Commerce, 1993) at 118.

intervene to an extent that undermines the underlying purposes of arbitration. In this way, arbitration will continue to be a feasible alternative dispute resolution process.⁷³

The role of any legal order is to strike a balance between effectively assisting the arbitral procedure and providing intervention when parties' interests are at stake. This essentially consists of providing priority to the parties' agreement to arbitrate but simultaneously ensuring there is access to courts, if one of the parties presents a genuine challenge to the jurisdiction of the tribunal.⁷⁴

In striking a balance between assisting the tribunal and intervening where necessary to protect the interests of the parties, the overriding factor must be the interests of the parties and the avoidance of unnecessary delay or costs.⁷⁵

The basic idea of balancing party autonomy and judicial intervention is that arbitration and the courts are complementary legal processes. Arbitrators and courts are partners in a system of international commercial justice and not antagonists or competitors.

As arbitration and other ADR become increasingly institutionalized, it is essential that the law encapsulates the necessary policy changes, and reflect societal and global dynamics. This is inevitable if the country is to take advantage of international investment and commerce. Undeniably, investors and traders attach a high premium on the availability of effective dispute resolution mechanisms as an alternative to the court system. Arbitration as a form of ADR is the most preferred option. These mechanisms encourage investment and engender growth.

On its part, the Arbitration (Amendment) Act 2009, (hereinafter 'the Amendment Act') introduces a number of reforms on the Arbitration Act, 1995 that go to the core of the role of the Court in Arbitration Proceedings. The objectives of the amendments are clearly noble and far reaching.

⁷³ *ibid.*

⁷⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

⁷⁵ *Al-Naimi v Islamic Press Agency* [2000] 1 Lloyd's Rep. 522, 524.

The Amendment Act, *inter alia*, aims to make further provision as to the time within which an application to stay legal proceedings, provide for the appointment of a chairman in relation to an arbitration conducted by two or more arbitrators, provide for a right to challenge an arbitrator on the ground of physical or mental unfitness, permit an arbitrator to resign his appointment as arbitrator and permit the High Court to exculpate such an arbitrator from liability (Wako, S.A, Memorandum of Objects and Reasons of Arbitration Act, 2009).

In addition, the amendments are aimed at limiting the right of appeal from the High Court on a point of law, make further provision for the expedition of arbitration proceedings and the obligations of parties and the powers of arbitrators, allow an arbitrator to request evidence to be given on oath and make other amendments of a minor character for the better operation of the law.

Firstly, the provisions on the time for applying for stay of proceedings have been amended in a bid to render them more certain. The Amendment Bill provides that the application for stay be made when a party enters appearance or takes the appropriate procedural step to acknowledge the legal proceedings against that party. The effect of this amendment is that it makes it compulsory for a party to enter appearance to be entitled to application for stay. However, it fails to change the *status quo* in that an application will still have to be made 'when a party enters appearance'.⁷⁶

The clause on the other alternative i.e. 'takes the appropriate procedural step to acknowledge the legal proceedings against that party' will likely be interpreted by courts to apply only where entry of appearance does not apply. The best provision would be that contained in the Arbitration Act 1997 i.e. 'any time after appearance or when the party otherwise acknowledges the claim against him.' A proviso that, on application, the court may extend the time for making application despite delay upon citing the reasons and finding that it will not unduly prejudice the plaintiff should also be added.

The strict condition for grant of stay that there should be a dispute between the parties with regard to matters agreed to be referred to arbitration makes proceedings unduly cumbersome as it shifts the burden of proof to the applicant for stay (Section 6 of the Arbitration Act, Cap

⁷⁶ Section 5 of the amended Act.

49 of the Laws of Kenya). That the applicant can prove that the matter is the subject of an arbitration agreement should be enough to shift the burden to the party opposing the application to show that either there is no dispute or the instant dispute is not one of those contemplated by the arbitration agreement for reference to arbitration.

The Amendment Bill provides that upon application for stay, the proceedings sought to be stayed be put on hold until the ruling on the application.⁷⁷ The strict implication of Scott & Avery clauses is exempted where the court refuses stay of proceedings as is the case in UK.⁷⁸ This is meant to ensure that a party can launch a suit despite the fact that arbitration is not possible. There is need to also make provisions for instances where the clause in question provides for reference to arbitration only after exhaustion of other dispute resolution measures e.g. as is the case with ADR clause.⁷⁹

The amendments on appointment in the Amendment Bill make provisions for appointment of chairman (chairperson) and a tribunal of two arbitrators. In addition, major amendments have been introduced with regard to the grounds of challenge of arbitrators. The physical and mental incapacity of an arbitrator or justifiable doubt of the same is made a ground for challenge. The High Court is restricted in the instance of challenge of an arbitrator to either uphold or reject such a challenge. It is also to rule on entitlement to fees and expenses of the arbitrator upon removal following a challenge.⁸⁰

The amendments also seek to bland the effect of continuation of arbitration during a challenge as currently provided in the arbitration Act, 1995 and provide that an arbitration award shall be void if the application is successful.⁸¹

The Amending Act also makes provisions for what happens when an arbitrator withdraws. S/he is to apply to High Court for decision on relief for liability incurred by him/her and fees and expenses or repayment of the same. The court is bound to satisfy itself on the reasonableness or otherwise of the withdrawal before granting relief to the arbitrator.

⁷⁷ Section 6(2) of the Amendment Act.

⁷⁸ Section 9(5) of the 1996 Arbitration Act.

⁷⁹ Section 9 of the 1996 Arbitration Act.

⁸⁰ Section 16A of the Amendment Act.

⁸¹ Section 14(8) of the Amendment Act.

The Amending Act also introduces immunity of an arbitrator and his/her employees from liability for anything done or omitted during the arbitration⁸². But the same has to have been done in good faith in discharge or purported discharge of the arbitrator's office. The difference between the immunity proposed under the Amending Act and that existing in the UK is on whom the burden of proof is placed. In the Amending Act, it is not clear who is to show that the acts sought to be immunised from liability were done in good or bad faith. In the UK however, the party seeking to prove that the arbitrator is liable bears the responsibility of proving that the acts complained of were done in bad faith. In any case, the amendments do not cover any liability that may be incurred by reason of the arbitrator's withdrawal from office and a suit may be launched in that regard.

The interim powers of the arbitrators and, by extension, the High Court, during arbitration have been expanded in the Amending Act to include orders for party to provide security in respect of claim or amount in dispute or to provide security for costs.⁸³ This is in recognition of the fact that arbitration tribunals have to meet commercial requirements of expediency of decisions and to avoid frivolous claims and defence. But interim orders have been relegated in that they are not to be construed as awards and therefore the principles of recognition and enforcement of awards are not to apply to them. This helps save time as the parties will be limited in their ability to clog arbitration with unnecessary and indirect challenges to interim orders through the channels provided for challenging arbitral awards.

The amendments seek to enjoin parties to arbitration to do all things necessary for proper and expeditious conduct of the arbitral proceedings.⁸⁴ But what is proper is not necessarily in the interest of expediency nor does it necessarily yield just results. The word 'proper' is clearly amenable to many meanings and could easily become a versatile ground for extraneous applications.

Beyond the amendments contained in Amendment Act, there are more reforms that are needed to our legal framework to streamline the role of the court in arbitration in Kenya. There is, for instance, need to incorporate the law regulating arbitration into an omnibus Act. There is also need to reevaluate the provisions concurrent arbitral and court proceedings and

⁸² Section 16B of the Amendment Act.

⁸³ (Section 18 (1) (a), (b) and (c) of the Amendment Act.

⁸⁴ Section 19A of the Amendment Act.

cater for consolidation of proceedings where necessary. The powers of the court in facilitating and aiding arbitration proceedings need to be clearly stipulated. The effect of a court order admitting challenges to enforcement of arbitral award is also not very clear.

There is undue constriction on the power to appeal from interlocutory orders and even arbitral awards. This unnecessarily limits growth in arbitration jurisprudence in Kenya and makes arbitration less appealing choices for contracting parties. There is, therefore, need for amendment to permit appeal on agreement between parties and with leave of the court.

There is also no reason why the bulk of jurisdiction on arbitration matters should be limited only to the High Court. Presently, the parties are constrained to the extent that where the value of some of the dispute does not merit a suit in the High Court they opt not to seek court intervention. It would be better if there is a graduated system just like in civil litigation was worked out for determining jurisdiction depending on the value of the subject-matter. If anything, the costs of litigation in High Court are higher compared to those of litigation in the lower courts and the High Court is not always in the vicinity of the parties except for those in the urban areas.

Training is key. The business community, legal fraternity and our judges need to be sensitized; so does the new generation of lawyers and business people. There is need for a judiciary-led ADR initiative comprising awareness training for the judiciary, legal professions, academic and private sectors plus a pilot court-annexed mediation programme and training of independent mediators to internationally recognized standards.

The Arbitration Act 1995 does not consider arbitration a profession or semi-profession and this explains the absence of minimum qualifications for appointment and detailed obligations for arbitral tribunals. Perhaps the most conspicuous omission of the Act is the failure to recognize ADR mechanisms. This is exacerbated by the fact that it makes no provision for the requisite institutional framework to promote arbitration and other dispute resolution mechanisms. If arbitration and ADR mechanisms are to be espoused in Kenya, it is necessary to institutionalize and popularize the processes.

First, it is incumbent on the government to formulate a systematic policy on methods of settlement of civil disputes otherwise than by litigation. Emphasis should now be on

arbitration and other alternative dispute resolution mechanisms. The policy would give the legal framework necessitating paradigm shift as it would constrain amendments to the Arbitration Act in several ways.

Second, the Act should expressly provide for ADR mechanisms, such as mediation. Third, it should recognize arbitration as a profession or semi-profession, prescribe minimum qualifications for members, duties, immunity and clearly articulated standards of conduct.

Finally, the legislature should be more pro-active in promoting arbitration and ADR. It should expressly provide that parties to disputes under different statutes such as, Insurance Act, Retirement Benefits Act, Capital Markets Act, and others may refer them to arbitration or mediation in the first instance. Such innocuous provisions would assist in popularizing and institutionalizing arbitration and ADR. It is submitted that only a multifaceted approach to reforms can elevate arbitration and ADR mechanisms to their rightful place in the dispute resolution matrix of the country.

An overhaul of the Arbitration Act is necessary to align the Kenya arbitration law with current trends in international arbitration. The procedure for applying for court interventions is very strict as to afford lawyers intending to delay arbitration proceedings room for manoeuvres. There is no reason why the procedure for such applications cannot be relaxed to ensure that it secures justice for the opposite party without being tyrannical and prone to abuse. For example, it could help providing that applications under the Arbitration Act be not dismissed for adopting wrong procedure and that the courts endeavour to uphold them with due regard to the justice and fairness to the parties need to avoid delays in arbitration. The law may also be amended to provide that arbitration applications be heard on priority basis.

There is also need to curb lawyers and arbitral parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial systems is that it often forces the court to stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help especially when lawyers get into the fray with their bagful of tricks-and delay is the darling trick of most lawyers! Soon, what was a simple issue is reduced to complex lawyers' business. The court's interventions in arbitration are not immune to lawyers out to abuse the process of the court.

Arbitration is part of the justice system of Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel's allegiance and compliance to clients' whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students, the role of ADR and arbitration in general and the fact that the two are not 'mechanisms designed by non-legal professionals to drive legal practitioners out of business.' Also, legal professional organizations like Law Society of Kenya and affiliate bodies like Chartered Institute of Arbitrators-Kenya branch need to adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. Thus, many reforms are needed if role of the court is to become facilitative of arbitration and to shake off such qualities as we have seen above which unnecessarily render arbitration inexpedient and cumbersome.

BIBLIOGRAPHY

Books

1. David St. John Sutton & Judith Gill, *Russell on Arbitration* (London: Sweet & Maxwell Limited, 2003).
2. E. Bergsten *Dispute Settlement: International Commercial Arbitration, United Nations Conference on Trade and Development*, (United Nations, New York and Geneva, 2005).
3. Claude R. Thomson & Annie M.K. Finn, "International Commercial Arbitration: A Canadian Perspective," in *International Commercial Arbitration in the New Millennium* (Toronto: Canadian Bar Association, 2001).
4. Ronald Dworkin, *Law's Empire*, (Harvard University Press, Cambridge: 1986).

Journal Articles

5. Adolf H. (2009) Improving the Enforcement of International Arbitration Awards in ASEAN Countries, ASEAN Law Association, 10th General Assembly.
6. Edward M. Morgan, "Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question", 60 *Southern California Law Review* 1059 (1986-1987).
7. J.C. Levy, "The New Arbitration Act: Judicial Intervention," in *The New Arbitration Act* (Alberta: Legal Education Society of Alberta, 1991) at 12.
8. Janičijević Dejan, "Delocalization in International Commercial Arbitration", 3(1) *Law and Politics* pp. 63 – 71 (2005).
9. John J Marshall and Stellanie M Criebardis Hyer , "The Role Of The Courts In Arbitration" Calgary Alberta April 19, 2006
10. Julian D. M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative international commercial arbitration* (Kluwer Law International, London: 2003).
11. Lebededev S. N. (1999), President – Maritime Arbitration Commission; Professor, Moscow on "Court Assistance with Interim Measures" in *Enforcing Arbitration*

Awards under the New York Convention: Experience and Prospects, United Nations, New York p 23.

12. Lord Mustill, "The New Lex Mercatoria: The First Twenty Five Years", 4 *Arbitration International* 86 (1988).
13. Michael Bühler and Pierre Heitzmann, Jones Day, "PLC Arbitration Handbook France" 2009.
14. Mustill M J "Arbitration: History and Background" (1989) Vol 6 No 2 Journal of New Zealand Law Commission, "Arbitration", Report No 20, at Para. 293.
15. O. Olatawura, "Delocalized Arbitration under the English Arbitration Act 1996: an evolution or a revolution", 30 *Syracuse Journal of International Law and Commerce* p, 49 (2003).
16. Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* 2 ed Sweet & Tomas Kenny-Grant, "The Role of the Court in Arbitration Proceedings", A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005, p. 2.
17. Tilahun Teshome, "The Legal Regime Governing Arbitration in Ethiopia." 1(2) *Ethiopian Bar Review*, pp. 117-118(2007).
18. Tomas Kennedy-Grant, "The Role of Courts in Arbitration Proceedings", A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005.
19. Tomas Kenny-Grant, "The Role of the Court in Arbitration Proceedings", A paper presented at the UNCITRAL-SIAC Conference "Celebrating Success", held at the Pan Pacific Hotel, Singapore, on 22-23 September 2005.

Internet Sources

20. Anastasia Tsakatoura, "The Immunity of Arbitrators", Available at: http://www.inter-lawyer.com/lex-e-scripta/articles/arbitrators-immunity.htm#_ftn1 (accessed on 20/07/2010).
21. Aniekam Iboro Ukpe, "Determining the *Lex Arbitri* in International Commercial Arbitration for Purposes of the Validity of an Arbitral Award", Available at: http://ciarbnigeria.org/Page_Builder_images/pages/Determining_Lex_Arbitri%5B1%5D.pdf (accessed on 20/07/2012).
22. Adam Samuel, "Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice", Available at: <http://www.adamsamuel.com/pdfs/separabi.pdf> (accessed on 20/07/2010).
23. Arbitration in France 'The Premium Forum for International Arbitration Paris, January 1, 2002 ' available at <http://www.aiparis.com/pages_html.asp?Id=venue >(accessed on 30th May 2012).
24. Ball Markham, "International Arbitration: The Fundamentals", available at: http://www.ili.org/images/books/intl_arb_fundamentals.pdf (Accessed 20 July 2012).
25. Barry Leon and Andrew McDougall, Perley-Robertson, Hill & McDougall LLP "Canada - Global Arbitration Review" available at < <http://www.globalarbitrationreview.com/know.../canada.>> accessed on 31st May 2012.
26. Colin Kaeser, "The emergence of arbitration in family law in Australia", 6(7) ADR Bulletin; available at: <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1261&context=adr> (accessed on 20/01/ 2011).
27. D.S.Chopra, "Supreme Court's Role vis-à-vis Indian Arbitration and Conciliation Act, 1996", Available at: http://works.bepress.com/dev_chopra/1 (accessed on 20/07/2010)

28. Eugene Bucher, "Why Arbitration?," available: http://www.eugenbucher.ch/pdf_files/Mercosur.pdf (accessed on 20/01/2011).
29. Guy Pendell and David Bridge CMS, "Arbitration in England and Wales, CMS Guide to Arbitration, Vol I "Available at <[http://www.eguides.cmslegal.com /.../arbitration _volume.../C..>](http://www.eguides.cmslegal.com/.../arbitration_volume.../C..>) (accessed on 20/01/2011).
30. Hamid El Ahdab A. (2007) Role of Courts in Arbitration in the Arab Countries, http://www.adrmeda.org/romeconference07/materials/Arbitration_Arab_Countries.pdf p 2 (Accessed 10 July 2012).
31. Hamid El Ahdab, "Role of Courts in Arbitration in the Arab Countries", available at: http://www.adrmeda.org/romeconference07/materials/Arbitration_Arab_Countries.pdf p 2 (Accessed 20 July 2012).
32. Jean de la Hosserye, Stéphanie de Giovanni and Juliette Huard-Bourgeois, CMS, "Arbitration in France, CMS Guide to Arbitration, Vol I "Available at <[http://www.eguides.cmslegal.com/.../arbitration volume.../C.>](http://www.eguides.cmslegal.com/.../arbitration_volume.../C.>) (Accessed 20 July 2012).
33. Jean-Christophe Honlet, Bart Legum and Anne-Sophie Dufêtre Salans LLP, "Commercial Arbitration: Knowhow Global Arbitration Review, France" Available at <http://www.globalarbitrationreview.com/know.../france/>(Accessed 20 July 2012).
34. Kariuki Muigua, "The Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya" Available at: http://www.kmco.co.ke/attachments/080_role_of_court_ (Accessed 20 July 2012).
35. Richard Swan, "The Jurisdiction of the Arbitration" (Digest Issue 32) Available at [http://www.trett.com/.../The JurisdictionoftheArbitration](http://www.trett.com/.../The_JurisdictionoftheArbitration), (Accessed on 3rd August 2012.)

APPENDICE I

Letter of Introduction



11th January 2011

To the attention of :-

- Prof. Gikhu Mulgat
- Njoroge Regeru
- Adams Marjan
- F.G. Gross
- Inamdhar
- John Harvelock

REF. JOHN OTIENO ABWUOR, REG. G62/72305/2008.

TITLE OF THESIS:

"ROLE OF THE COURT IN ARBITRATION : A CRITICAL ANALYSIS OF THE KENYAN Act No. 4 of 1995".

The above named is an LLM student at Parkland Campus of the University of Nairobi. He is carrying out a research in the above area which is of great interest to the Institute and Arbitration Practice in Kenya. We request that you allow him within your Chambers at your convenience, to interview and to have you fill the attached questionnaire, to enable him obtain relevant and useful data for his study.

Any assistance accorded to Mr. Abwuor, will highly be appreciated by the Institute.

Yours faithfully,

Simon Ondiek
Executive officer

CHARTERED INSTITUTE OF ARBITRATORS, KENYA

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Patron: The Chief Justice of Kenya
Member of the Association of Professional Societies in East Africa (APSEA)



11th January 2011

To the attention of:-

- Mr. Kariuki Mulgwa
- Mr. Laibuta
- Mr. Steve Kairu
- Mr. Gichui-Kaplan & Stratton
- Fred Ojlambo
- Kyalo Mbobu
- Mr. Paul Musili Wambua
- Jackline Kamau

REF. JOHN OTIENO ABWUOR, REG. G62/72305/2008.

TITLE OF THESIS:

"ROLE OF THE COURT IN ARBITRATION : A CRITICAL ANALYSIS OF THE KENYAN Act No. 4 of 1995".

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Any assistance accorded to Mr. Abwuor, will highly be appreciated by the Institute.

Yours faithfully,

Simon Ondiek
Executive officer

CHARTERED INSTITUTE OF ARBITRATORS, KENYA

APPENDICE II

Opinion of Arbitrators on the Role of the Courts in Arbitration in Kenya

Questionnaire

Please answer the following questions by placing a tick () in the space provided and/or giving details as may be requested. If in any question the alternatives provided are not exhaustive, provide your response under 'others'.

The questionnaire would appropriately be completed by at least a full member of the Chartered Institute of Arbitrators (Kenya Branch) and an Arbitrator with at least 5 years experience.

SECTION A

1. What is your designation as a member of the Chartered Institute of Arbitrators:

(a) Member { }

(b) Fellow { }

(c) Chartered Arbitrator{ }

2. What is the average number of arbitrations you have handled so far

.....

3. How long have you been practicing as an arbitrator in Kenya?

Less than 5 Years	Less than 9 years	More than 10 Years

4. In your opinion, is the role of the court in arbitration in Kenya intrusive?

(a) Yes { }

(b) No { }

(c) Other{ }

5. If yes, please state briefly why you consider it so

.....
.....

6. In your opinion, how does the role of the court in arbitration in Kenya compare with other jurisdictions you are acquainted with?

(a) Excellent { }

(b) Very good { }

(c) Fair { }

(d) Poor { }

(e) Cannot tell { }

SECTION B

7. Which of the following roles of the court in arbitration in Kenya would you recommend to be reformed:

Role of the Court in Arbitration	Tick if available
Disposing stay of proceedings applications	
Entertaining applications for and issuing interim orders	
Enforcing arbitrator interim orders	
Handling appointment of arbitrators	
Entertaining applications challenging arbitrators and their jurisdiction	
Applications to assist in collecting evidence	
Applications to assist in interpreting questions of law	
Applications to enforce fair hearing and natural justice (Constitutional applications/judicial view applications)	
Applications to set aside arbitral award	
Application for recognition of the award	
Application for the enforcement of the award	
Application for the enforcement and recognition of foreign award	
Appeal against interim order or award of the arbitrator	
Appeal against final award of the arbitrator	

8. Have you in your experience as an arbitrator been affected in the performance of your role by the intervention of courts?

- (a) Yes { }
- (b) No { }
- (c) I have no Idea { }

9. Briefly describe the experience and comment on whether or not it helped enhance or hinder the effectiveness of that particular arbitration?

.....

10. What is the average time a normal arbitration may take to conclude without court intervention?

At least a week or less	More than a week but less than a month	At least a month but less than two months	one month or more	Cannot tell
-------------------------	--	---	-------------------	-------------

11. How long do you think on average court intervention (one application) delays arbitration from completing in normal time?

A day or less	At least two days less than a week	At least a week or less	At least a month but less than two months	Two months or more	Cannot tell
---------------	------------------------------------	-------------------------	---	--------------------	-------------

12. In your opinion, is this delay in arbitration due to court intervention justified?

- (a) Yes { }
- (b) No { }
- (c) It depends { }

Why:-

.....

13. Would you recommend that there be fixed time for handling court application intervening in arbitration?

- (a) Yes { }
- (b) No { }
- (c) I don't know{ }

If yes, what time would you recommend to be fixed for handling such applications and why?

.....
.....

14. Do you think the role of the court in arbitration in Kenya has limited the attractiveness of Kenya as a seat of international commercial arbitration?

- (a) Yes { }
- (b) No { }
- (c) I don't know{ }

Please comment further:-

.....
.....

15. What reforms (if any) do you think are necessary to render the role of the courts in arbitration in Kenya effective?

.....
.....

16. What proposals would you recommend to be implemented in improving the role of the courts in arbitration to Kenya a preferred centre of international commercial arbitration?

.....
.....

Thank you for your co-operation and answers