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A CRITICAL REVIEW ON THE ADOPTION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICA: A CASE STUDY ON SOUTH AFRICA

BY

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DECLARATION

I, **Rachael Anyango Mboya**, do hereby declare that this Research paper is my original work, which has been done in line with the requirements and regulations of the University of Nairobi for the degree of Master of Laws (LLM). This Research project has not been submitted before, for any degree or examination to any other University, nor has it been prepared with the assistance of any other person outside the University of Nairobi.

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DEDICATION

This research project is dedicated to myself, Rachael Anyango Mboya. Thank you for always believing in yourself. Thank you for always trusting that you can do it, because you can and always have.

Completing my Master of Laws at a very young age has always been a dream and it is now a reality at the age of 24. I couldn't be prouder. May you live to break bigger records and set higher standards for yourself.

LIST OF ABBREVIATIONS

1. ADR – "Alternative Dispute Resolution"
2. AFSA – "Arbitration Foundation of SA"
3. AASA – "Association of Arbitrators of SA"
4. CCJA – "Common Court of Justice and Arbitration"
5. CRCICA – "Cairo Regional Centre for International Commercial Arbitration"
6. EACJ – "East African Court of Justice"
7. ICJ – "International Court of Justice"
8. ICC – "International Chamber of Commerce"
9. ICA – "International Commercial Arbitration"
10. ICSID– "International Centre for Settlement of Investment Disputes"
11. KIAC – "Kigali International Arbitration Centre"
12. LCIA – "London Court of International Arbitration"
13. NCIA – "Nairobi Centre for International Arbitration"
14. OHADA – "Organization for the Harmonization of Business Law in Africa"
15. UAA – "Uniform Act on Arbitration"
16. UN – "United Nations"
17. UNCITRAL – "United Nations Commission on International Trade Law"
18. SA – "South Africa."

LIST OF STATUTES AND REGULATIONS

1. The Constitution of Kenya 2010
2. The Kenyan Arbitration Act No. 4 of 1995
3. The "Nairobi Centre for International Arbitration Act No. 26 of 2013"
4. The "Nairobi Centre for International Arbitration, Arbitration Rules 2015"
5. The "South African International Arbitration Act No. 15 of 2017."
6. The "South African Arbitration Act No. 42 of 1965"
7. The "South African Recognition and Enforcement of Foreign Arbitral Awards Act of 1977*(repealed)*"
8. The "AFSA International Arbitration Rules, 2021"
9. The "OHADA Uniform Act on Arbitration, 2017"
10. The "Arbitration Rules of the Common Court of Justice and Arbitration (CCJA Rules), 1999"
11. The "East African Court of Justice Arbitration Rules, 2012"

LIST OF INTERNATIONAL INSTRUMENTS

1. The East African Community Treaty, 1999
2. Treaty on the Harmonization of Business Law in Africa (OHADA), 1993
3. The "United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules," 2013
4. The "UNCITRAL Model Law on International Commercial Arbitration", 1985 with amendments as adopted in 2006
5. The "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" of June 10, 1958 (the "New York Convention")
6. The "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (the Washington Convention), 1965.

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ABSTRACT

The UNCITRAL Model Law on International Commercial Arbitration, initially formulated in 1985 and subsequently amended in 2006, holds a distinguished reputation as a pivotal legislative tool in the realm of international commercial arbitration. The United Nations Commission on International Trade Law (UNCITRAL) has played an important role in advancing and advocating for the growth of international commercial arbitration (ICA), surpassing the contributions of any other institution. The "Model Law" was meticulously designed to provide guidance to States in enhancing and modernizing their arbitration laws and signifies a global recognition and acknowledgment of the fundamental principles governing the practice of ICA.

The UNCITRAL's focus on uniformity is of fundamental importance. In the arbitration world where parties are from vastly different national backgrounds and often have experience of legal systems which differ significantly, it is important that every effort be made to harmonize and modernise the "rules of the game." In any such process, it must also be recognised that there may be some issues where particular countries are not prepared to go along with the broader consensus. The process must therefore be flexible enough to accommodate and provide differing views on specific issues, but the ultimate objective should always be to achieve harmonization and uniformity, wherever possible.

This research study carries out a critical review on the acceptance of the UNCITRAL Model Law in Africa, with a specific case study on South Africa (SA). The aim of carrying out this research is to provide African states with the necessary literature as they consider whether or not they should adopt the Model Law. This study strongly advocates for the adoption of the internationally acclaimed UNCITRAL Model Law on International Arbitration as a crucial step towards revitalizing and expediting the progress of international arbitration in Africa. By embracing this Model Law, the region can pave the way for enhanced investments and economic growth.

South Africa (SA) is used as the focus of the study as it is the 11th and most recent African state to approve the Model Law, as noted in the Appendix 1 to this Research. SA is regarded as one of the most developed African nations hence, this research analyzes what informed SA's decision to accept the Model Law, how this has boosted the growth of arbitration practice in SA and what lessons other African countries may learn from South Africa.

CHAPTER ONE

1.0 INTRODUCTION

A "Model Law" is crafted as a prescriptive regulatory manuscript that is proposed to nations for their consideration, approval, and subsequent incorporation into their domestic legal frameworks. It serves as an efficacious means to contemporize and harmonize national laws, particularly in cases where countries may find it necessary or preferable to adapt the provisions of the framework to align with unique *"local requirements"* that differ across different legal systems. Flexibility is inherent in its approach, allowing for necessary adjustments to accommodate specific regional contexts, while not mandating rigid conformity.

The growth of international business as a result of recent technological advances has sparked interest in legal unification. This is not a modern concept however, as endeavors to bring harmony to laws across countries through multilateral and bilateral treaty documents can be dated to the nineteenth century. Model laws provide a practical solution to modernize and unify national laws, as they can be adapted to suit the requirements of different systems. In the statements of Lord Justice Kennedy, the *"certainty of enormous gain to civilized mankind from the unification of law, needed no exposition."*[1]

Arbitration is a mode of resolving disputes in which all sides submit proof and justifications to an impartial, self-governing third party who is empowered to make a binding ruling based on set criteria. The arbitral award is final and binding, functioning as a court's judgment and is acknowledged as such. It is a significant alternative to litigation and is regulated by established legal principles. Although the law of arbitration has been in place for some time, it has only recently gained widespread interest and there are ongoing efforts to ensure it is given its rightful place in conflict resolution. The implementation of the UNCITRAL Model Law on International Commercial Arbitration in 1985 was a major milestone in this regard.

[1] "Conceive the security and the peace of mind of the shipowner, the banker, or the merchant who knows that in regard to his transactions in a foreign country the law of contract, of moveable property, and of civil wrongs is practically identical with that of his own country..." ("Kennedy, The Unification of Law, Journal of the Society of Comparative Legislation, vol. 10 (1909), pp. 212 et seq., 214-15")

The United Nations Commission on International Trade Law (UNCITRAL) formally adopted the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") on June 21, 1985, during the eighteenth session of the Commission.[2] Subsequently, the General Assembly, through resolution 40/72 on December 11, 1985, proposed that, "there is need for urging all nations to duly contemplate adopting the Model Law on International Commercial Arbitration."[3] This recommendation was made with the aim of promoting the adoption of a standard legal structure for judicial processes and recognizing the specific International Commercial Arbitration practice requirements, signifying the value of achieving consistency and harmony in this domain.

The UNCITRAL Model Law on International Commercial Arbitration underwent an amendment on July 7th, 2006, during the 39th session of the UNCITRAL Commission. In response to this revision, the General Assembly, through resolution number 61/33 on December 4th, 2006, recommended that all nations should favour implementing the revised articles of the "Model Law" when they are passing their domestic legislation. This call was made with the intention of encouraging the incorporation of the updated provisions to further enhance the efficacy and applicability of the Model Law in the realm of evolving international commercial arbitration policy.

The Model Law protects party liberty while limiting judicial participation in adjudication. This Model Law was meticulously crafted to address the substantial variations present in national arbitration legislation. Recognizing the inadequacy of existing national laws to handle the complexities of international arbitration cases, the Model Law meant to establish a strong foundation for achieving uniformity and improvement in national arbitration laws. Encompassing all levels of the arbitration procedure, ranging everything from creating an arbitration agreement to enforcing verdicts made by arbitrators, the Model Law demonstrates universal agreement on the fundamental and essential aspects of international arbitration.

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[2] The UNCITRAL Model Law on International Commercial Arbitration.
Available at:
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model-law-arbitration-commonwealth.pdf

[3] Ibid

Following its implementation by UNCITRAL, the Model Law has emerged as the universally acknowledged benchmark for contemporary adjudication legislation, leading to the enactment of arbitration laws based on its principles in numerous jurisdictions. The choice of a "Model Law" format was deliberate, as it offers States the flexibility to adopt and incorporate its provisions into their individual arbitration laws, thus facilitating harmonization and modernization efforts. It has been widely recognized that the "New York Convention" and the "UNCITRAL Model Law" stand as the foundational pillars of international commercial arbitration, representing the fundamental legal frameworks that underpin and support the practice on an international scale.

Most domestic arbitral laws lack pertinent provisions and are couched in permissive terms, something that does not augur well for international commercial arbitration.[4] It was thus imperative to improve on the New York Convention to consolidate the gains of harmonization. The Model Law is therefore a framework intended to assist nations on internal dispute resolution laws.

There is an excellent bargain of variation in the law and practice of arbitration throughout Africa. Many nations have passed "progressive arbitration laws" in line with the UNCITRAL Model Law, which is encouraging. Nevertheless, there are still some that have not. As a further complicating factor, the African continent is home to various legal traditions, such as those based on French law, English law, Portuguese law, and Sharia law in certain regions. This phenomenon is known as "legal pluralism."'[5]

The majority of nations in West and Central Africa are part of "OHADA" (the Organization for the Harmonization of Business Law in Africa). Established by a treaty in 1993, OHADA's primary objective is to encourage foreign investment by bringing its member nations closer together in terms of business legislation. As part of this harmonization effort, the OHADA nations agreed to a "Uniform Arbitration Act", which draws significant inspiration from the UNCITRAL Model Law. Outside the OHADA member nations in the West and Central African region, Nigeria stands as the sole nation that has enacted modern arbitration legislation that closely aligns with the clauses of the UNCITRAL Model Law. This is a testament to Nigeria's commitment in advancing

[4] "Examination of Arbitration Related UNCITRAL Texts and Their Adoption by African States by Prof. Dr. Kennedy Gastorn Secretary General, Asian-African Legal Consultative Organization (AALCO)."
[5]"Steven Finizio, Thomas Fuhrich, "Africa's Advance", African Law and Business, available at: https://www.africanlawbusiness.com/news/5068-africas-advance"

international commercial arbitration within the region and aligning its arbitration practices with globally recognized standards.

In the southern region of Africa, fewer nations have embraced arbitration laws that draw inspiration from the UNCITRAL Model Law. These countries comprise of Madagascar, Mauritius, Zambia, and Zimbabwe. Additionally, Angola, Mozambique, and South Africa have in the recent years enacted legislation that draw significant inspiration from the Model Law. In contrast, the English Arbitration Act of 1950 is the primary inspiration for other common law nations' arbitration laws, including Botswana, Lesotho, Malawi, Namibia, and Swaziland. This indicates a prevailing preference for the English legal framework in these jurisdictions, rather than implementing the UNCITRAL Model Law as the foundation for their domestic arbitration law.

South Africa (SA) is chosen as the case study for this research because it is regarded as one of the most developed African nations. The arbitration practice in SA is also regarded as very well developed however, until December 2017, SA had not adopted the UNCITRAL Model Law. This research seeks to answer the question on why SA had not accepted the Model Law and what later informed its choice to do so.

As Africa moves towards an arbitration world where parties are from vastly different national backgrounds and often have experience of different legal systems, it is important that every effort should be made to harmonize and modernise the "rules of the game". This research seeks to supplement the ever-expanding literature on international arbitration by providing an African-centered review and proposals on the adoption of UNCITRAL Model Law, within the context of the current modernized world.

The research also seeks to establish why African countries have been slow to incorporating the UNCITRAL Model Law on their domestic arbitration legislation and how this challenge may be addressed. It seeks to provide African states and Arbitration institutions with the necessary literature that may guide them on why this Model Law is important, and how it plays a key role in promoting African states as reputable arbitration seats worldwide. It also seeks to highlight the specific needs and concerns that ought to be identified and accommodated and which, deter African countries from embracing the concept of harmonized arbitration laws.

1.1 STATEMENT OF THE PROBLEM

Every state has very contrasting domestic laws in general in dealing with a similar issue. Arbitration widely has an international connotation to it and arbitration is more often international in nature. The UNCITRAL Model Law on International Commercial Arbitration[6] serves as a vital tool in establishing standardized guidelines for the implementation of arbitration laws. It fosters an international consensus among states on essential aspects of arbitration, such as the arbitration agreement, composition of the tribunal, arbitrator selection, jurisdiction, and the extent of court intervention. By adopting the Model Law into their domestic legislation, states can establish a uniform legal framework that aligns with international practices.

The Model Law is thoughtfully designed to guide states in modernizing and upgrading their international arbitration laws, in order to accommodate the distinctive characteristics and requirements of international commercial arbitration. By adopting the Model Law's provisions, countries can adapt their domestic arbitration laws to meet the demands of an evolving global arbitration landscape, promote international understanding and cooperation in handling cross-border disputes and fostering a more consistent and predictable environment for businesses engaged in global trade and commerce.

It is financially burdensome and ineffective to refer African disputes to European arbitral authorities for resolution. This referral also indicates that the African arbitration system has not been successful. International trade agreements should include a clause that directs any disputes to be handled through arbitration within Africa. The business and investment world can gain from an African international commercial arbitration system, which has a reliable and cost-efficient system with nearby venues, thus providing convenience. Such a system should be trustworthy and competent, and its presence can increase cross-border commerce and investment.

For far too long, African countries have been without an effective system of laws and infrastructure to facilitate the efficient running of international commercial arbitration. Many African nations have yet to put in place a well-defined legal construct concerning international commercial arbitration. Additionally, some of these states are not part of any major multilateral treaties related

[6]Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17.

to resolving international disputes, meaning that local international arbitrators lack a platform to demonstrate their knowledge and experience in this field.[7]

The examples of South Africa and Tanzania aptly illustrate the prevailing situation in some African nations with regards to their arbitration laws. Prior to adopting the UNCITRAL Model Law, South Africa's arbitration laws deviated significantly from those of other jurisdictions, creating a lack of harmonization in the resolution of international disputes. Similarly, Tanzania's Principal Arbitration Act, which dates back to 1932, does not conform to the structure and principles outlined in the UNCITRAL Model Law, highlighting the outdated nature of its arbitration laws.

The lack of harmonization and modernization may raise concerns about the consistency and reliability of arbitration proceedings in these jurisdictions. Foreign investors and businesses often seek certainty, efficiency, and compliance with international standards in dispute resolution processes, which may be perceived as lacking in territories without arbitration laws based on the UNCITRAL Model Law. Harmonizing arbitration laws with the Model Law can foster confidence and trust among international investors, ultimately promoting Africa as an attractive destination for arbitration services and encouraging foreign investments in the region.

The reluctance of some African states to adopt the UNCITRAL Model Law on International Commercial Arbitration can indeed be linked to concerns about potential threats to national identity and legal culture. The fear of losing control over their unique legal systems and traditions may deter certain countries from embracing a standardized international framework. However, it is essential to recognize that the absence of the Model Law in these jurisdictions has implications for the growth of their international arbitration practice. The reluctance to align with the Model Law and other internationally recognized standards may create uncertainty for investors and international business persons. This lack of a coherent and modern arbitration framework could in turn deter potential investors from conducting business in these countries, as they may be unsure whether their interests and rights will be adequately safeguarded in the event of a dispute that is subject to arbitration.

[7] Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa' Available at http://www.mcgill.ca/files/isid/LDR.2.pdf

By not adopting the Model Law, African states may miss out on opportunities to attract foreign investments and stimulate economic growth. A harmonized and modernized legal framework provides a conducive environment for international business dealings, as investors have confidence in the stability and predictability of the arbitration process. The adoption of the Model Law can play a pivotal role in promoting the growth of international arbitration in Africa, encouraging investment and enhancing the region's reputation as a viable destination for resolving international commercial disputes.

By carefully considering the benefits of adopting the Model Law, African states can address concerns about potential harm to national identity and legal culture while simultaneously bolstering their attractiveness as business and investment destinations. This move could lead to greater confidence among international investors, ultimately fostering a more dynamic and prosperous international arbitration practice within the region.

The primary focus of this study is to examine and analyze the progress made by African countries in adopting the UNCITRAL Model Law since its inception by the UN Commission on June 21st, 1985, with subsequent amendments in 2006. The main objective is to understand the reasons behind the relatively slow adoption of the UNCITRAL Model Law in the African context. By doing so, the study aims to offer valuable insights and guidance to African states, shedding light on the comprehensive provisions and objectives of the Model Law. Through a detailed examination of the adoption trends, potential barriers, and challenges faced by African nations in implementing the UNCITRAL Model Law, this research aims to contribute to a deeper understanding of the role this legal framework plays in harmonizing and promoting International Commercial Arbitration in the region.

The study endeavours to provide African states with essential information on the Model Law's features and the benefits it brings to fostering a uniform and effective framework for handling international arbitration cases. By doing so, it aspires to encourage wider adoption and utilization of the UNCITRAL Model Law, ultimately enhancing Africa's position as a reputable destination for settlement of international arbitration disputes and fostering economic growth through increased foreign investments.

1.2 RESEARCH OBJECTIVES

The study is designed to achieve the following objectives:

1. To discuss the development of International Commercial Arbitration in Africa and conduct an analysis of the challenges encountered in its practice. By exploring the evolution of arbitration in the continent, the research aims to provide valuable insights into the growth and obstacles faced in the field of International Arbitration within African jurisdictions.
2. To comprehensively discuss the UNCITRAL Model Law on International Commercial Arbitration, delving into its origins, development, necessity, and overall objectives. This section will highlight the Model Law's pivotal role as a significant tool in the realm of International Commercial Arbitration, elucidating why its adoption is essential for fostering a standardized and effective international arbitration practice.
3. To conduct an investigation into the adoption of the UNCITRAL Model Law on International Commercial Arbitration in South Africa, with a focus on analyzing the influence of its adoption on South Africa's reputation as a credible arbitral seat. This analysis aims to showcase the positive impact that aligning with the Model Law has had on South Africa's arbitration practice and the role that this Model Law plays in boosting the credibility and attractiveness of African states as reputable destinations for settlement of international arbitration disputes.
4. To explore how the practice of International Commercial Arbitration in Africa can be further improved by embracing the UNCITRAL Model Law. This section will analyze how the Model Law's adoption can address existing challenges in international arbitration practice in Africa, promote uniformity, and attract foreign investments to the region.

Through achieving these goals, the study aims to provide valuable insights into the development of international arbitration in Africa, highlight the importance of the UNCITRAL Model Law, and present a pathway towards enhancing the efficiency and credibility of International Commercial Arbitration practice in the African continent.

1.3 RESEARCH QUESTIONS

1. What is the current status of the development of International Commercial Arbitration in Africa, and what challenges have been encountered in its practice within the continent?
2. What is the UNCITRAL Model Law on International Commercial Arbitration, and what specific objectives does it aim to achieve in the context of international arbitration?
3. How has the adoption of the UNCITRAL Model Law progressed in Africa since its inception in 1985 and what impact has this adoption had on the growth and reputation of arbitration centres in the region?
4. What were the legislative motives behind South Africa's adoption of the Model Law, and how was it integrated into the country's domestic law?
5. What proposals can be put forth to enhance the conduct and efficiency of International Commercial Arbitration in Africa?

1.4 HYPOTHESIS

The research is founded on the following hypotheses:

1. The UNCITRAL Model Law on International Commercial Arbitration serves as a comprehensive and unified legal framework that applies to both domestic and international aspects of international commercial arbitration. Consequently, adopting the UNCITRAL Model Law is a pivotal step towards enhancing the practice of international commercial arbitration in Africa, leading to the growth and establishment of reputable arbitration centers within African states.
2. The UNCITRAL Model Law encourages the gradual harmonization of international arbitration laws while accommodating the unique legal cultures and traditions of individual countries.
3. The adoption of the UNCITRAL Model Law by African states will challenge the stereotype that African countries lack the capacity and competence to handle complex international commercial arbitration disputes.

1.5 JUSTIFICATION OF THE STUDY

The premise of this dissertation holds great significance due to several interrelated reasons that pertain both to the nature of the Model Law on International Commercial Arbitration and its reception within the international business community. This research study recognizes the significance of exploring the Model Law on International Commercial Arbitration for multiple reasons.

The first crucial reason for delving into the Model Law lies in the fact that arbitration, in general, has proven to be a highly effective alternative dispute resolution mechanism to litigation in the context of international business disputes. Even prior to the inception of the UNCITRAL projects, arbitration had been a focal point of attention in numerous international conferences, seminars and treaties, indicating its relevance and importance in resolving cross-border commercial conflicts. This longstanding historical interest in arbitration underscores the need to comprehensively study and understand the Model Law's role in further enhancing the efficiency and viability of international commercial arbitration.

By delving into the Model Law, this research seeks to explore how the UNCITRAL's contributions have further enhanced and refined the arbitration process, making it an even more reliable and effective means of dispute resolution. Understanding the Model Law's key features and objectives can shed light on how it has evolved to meet the changing needs and complexities of modern international business transactions. Moreover, the study's focus on the reception of the Model Law is crucial, as it examines how various jurisdictions have embraced and implemented its provisions. This reception analysis can provide valuable insights into the Model Law's practical implications and its acceptance within different legal systems worldwide. Overall, examining the Model Law on International Commercial Arbitration serves as a gateway to better comprehend the evolution and significance of arbitration in international business, offering valuable insights into its efficiency, adaptability, and its contribution to the global business landscape.

The second reason for carrying out this study is that the examination of the reception of the Model Law on International Commercial Arbitration holds significant importance, especially in the context of concerns regarding harmonization and unification of laws and its potential impact on national identity and legal culture, particularly for developing African States. The study will delve into the origins of the Model Law, tracing its historical development and the rationale behind its creation by UNCITRAL. Understanding how the Model Law originated and its fundamental principles is crucial to grasp the rationale behind its development and the objectives it aims to achieve. This exploration will shed light on the motivations and considerations that guided its creation, and how it seeks to strike a balance between harmonization and respecting the unique legal cultures and traditions of different countries.

For developing African countries, in particular, the study of the Model Law's reception is highly pertinent. It allows for a nuanced analysis of how these countries have integrated the Model Law into their legal systems and how it has influenced their practices of international commercial arbitration. Identifying any changes or adaptations made to local legal systems due to the Model Law's reception provides valuable insights into how the balance between harmonization and national identity has been achieved. By exploring the reception of the Model Law in these contexts, the research can provide valuable insights into the challenges and opportunities that arise when adopting international legal instruments in diverse legal systems. It will contribute to a deeper understanding of how the Model Law can be effectively integrated into local legal systems without compromising national identity and legal culture, ultimately fostering a more informed and balanced approach to its adoption and implementation.

The third reason for conducting this research is the burgeoning interest in the Model Law on International Commercial Arbitration over the past decade. Many countries, particularly those in need of updating or establishing their arbitration frameworks, have turned to the Model Law as a suitable and reliable reference. In this context, the significance of conducting a study on the reception of the Model Law in African States, such as South Africa, becomes apparent. South Africa's experience with adopting and implementing the Model Law can serve as a valuable guide for numerous other countries contemplating its adoption. By examining South Africa's journey, other African States can gain valuable insights into the benefits and challenges associated with integrating the Model Law into their own legal systems.

South Africa's experience can provide valuable lessons and offer a blueprint to other African nations on how to effectively navigate the process of harmonizing national laws with international standards, thereby promoting greater confidence among foreign investors and businesses. Lessons learned from South Africa's reception of the Model Law can help other countries navigate the adoption process more smoothly, ensuring that the Model Law's principles are effectively incorporated into their legal frameworks. Furthermore, understanding the impact of the Model Law's adoption on international arbitration practice in South Africa can also provide useful benchmarks for evaluating the effectiveness of its implementation and identifying areas for further improvement in the region's arbitration practice.

Fourthly, the reception of the Model Law on International Commercial Arbitration has had a notable impact on the competitiveness of arbitration centers in adopting countries. While the extent to which the mere adoption of the Model Law can transform a country into a major international arbitration venue may be subject to debate, it is evident that arbitration centers established or reorganized in such adopting countries have gained distinct advantages. By adopting the Model Law, these countries' arbitration centers have benefitted from having a transparent and user-friendly legal framework that is written in the official languages of the United Nations, and has been approved by leading experts in the field of international arbitration. The Model Law's approval by leading world experts further enhances its credibility and reliability, lending a sense of legitimacy and international recognition to the arbitration proceedings conducted in these centers. It also presents them as attractive centres to foreign investors seeking a reliable and effective dispute resolution mechanism.

Lastly, the significance of this research on the adoption of the Model Law on International Commercial Arbitration lies in its impact on a state's sovereignty, specifically in limiting the involvement of domestic courts in arbitral proceedings. As such, it becomes crucial to investigate how countries that have adopted the Model Law, such as South Africa, have struck a balance between safeguarding state sovereignty and upholding the private interests of the parties engaged in arbitration.

Investigating how Model Law adopting countries have addressed this delicate balance is crucial to understanding the practical implications of the Model Law's adoption. It can provide valuable insights into the effectiveness of the Model Law's implementation and its compatibility with diverse legal systems. The research can highlight best practices and potential challenges in harmonizing national law with the Model Law to ensure that state sovereignty is respected while providing an enabling environment for private parties to engage in international arbitration.

While it is true that there is already a substantial body of scholarly literature on international commercial arbitration, the further study presented by this research holds several important benefits. One significant conceptual benefit is the argument that it is feasible to create a model law that serves as a flexible framework for legal reforms in countries with diverse legal cultures and varying levels of political and economic development. In this context, the research contends that the UNCITRAL Model Law is a commendable starting point for initiating such legal reforms.

The second benefit is that by delving deeper into the reception and adoption of the Model Law in different jurisdictions, the research can provide empirical evidence and practical insights into how the Model Law's flexibility accommodates various legal cultures and addresses the unique needs of different countries. By examining the reception and implementation of the Model Law in African States and, in particular, in South Africa, the research can provide practical insights into how a unified legal regime can be adapted to accommodate the specific needs and legal cultures of different countries. This analysis can demonstrate that the Model Law's inherent flexibility allows for necessary adjustments to align with individual legal systems, without compromising its effectiveness in promoting international commercial arbitration.

By showcasing the Model Law as a commendable starting point for such reforms, the research provides valuable guidance for countries seeking to enhance their arbitration practices while preserving their unique legal identities and accommodating their individual political and economic contexts. The research can also shed light on the benefits of adopting a model law approach as opposed to rigid and prescriptive legislative models. It can demonstrate how the Model Law's guiding principles and provisions serve as a solid foundation for legal reforms, fostering an environment conducive to efficient and credible international arbitration, regardless of the country's development level or legal traditions.

This research can contribute to a more nuanced understanding of how the Model Law can serve as a guide for legal harmonization and modernization efforts in countries seeking to enhance their arbitration practices and attract foreign investors. It can also shed light on the practical challenges and best practices in implementing the Model Law, serving as a valuable resource for other jurisdictions contemplating similar legal reforms.

1.6 THEORETICAL FRAMEWORK

This study relies on the **legal transplantation theory** and the **soviet legal theory** of arbitration to advance its case for the adoption of the UNCITRAL Model Law by African States:

i. **Legal Transplantation Theory:** This theory, as advocated by Alan Watson,[8] posits that the development of law involves the borrowing or importing of legal norms from one legal system into another. In the context of this research, it is used to understand how African states may adopt or incorporate international laws and principles, such as the UNCITRAL Model Law on Arbitration, to incentivize the growth of their local economy and enhance their arbitration practices.

ii. **Soviet Legal Theory of Arbitration:** This theory, associated with Vladimir Lenin,[9] views arbitration as a separate system of justice, operating independently and parallel to the traditional court system. In the context of this study, the theory is used to explore how the recognition of arbitration as an independent system of justice influences the reception and implementation of the UNCITRAL Model Law in adopting countries, with specific relevance to African states and their arbitration practices.

By relying on these theories, the research seeks to present a compelling case for the adoption of the UNCITRAL Model Law by African states. It aims to demonstrate how legal transplantation, through the adoption of international legal frameworks, and recognizing arbitration as a distinct system of justice can contribute to the growth of reputable arbitration centers in Africa and create an enabling environment for the practice of international commercial arbitration in Africa.

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[8] A. Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh: Scottish Academic Press, 1974) [hereinafter Legal Transplants]. Watson examines the concept of transplantation by assessing, for example, how Roman Law was received in medieval Europe, how English law was spread out through Commonwealth countries, and the influence of the French Code on the classification of civil laws in Europe.

[9] J. Hazard & I. Shapiro, "The Soviet Legal System (1962).

Adoption of laws by States is not a phenomenon that started recently but is one that was introduced many centuries ago. Adoption of Model laws globally has continued to rise especially in international practices where uniformity and legal harmony is seen as important. However, it is impossible to achieve uniformity given the different legal cultures of the State from which each international party is from. This has then given the platform for the adoption of Model Laws into national law, that help to create a uniform procedure on the handling of international matters, while still preserving the legal cultures and traditions of each party. The UNCITRAL Model Law is one of these laws that allows any State to adopt it with modifications in order for it to perfectly suit the needs and demands of each State.

The theory of legal transplantation, as advocated by Alan Watson,[10] serves as a core basis for grounding this research study. It is the most important and preferable theory guiding this research on the adoption of the UNCITRAL Model Law on International Commercial Arbitration, as it advocates for the transplantation or borrowing of legal principles and norms into a state's legal system, in a bid to foster economic growth and development.

According to this theory, the development of law can be understood as a process of borrowing or importing legal norms from one legal system into another. In the context of this research, the theory of legal transplantation emphasizes that countries may adopt or incorporate international laws and principles, particularly from Western legal systems or international organizations, as a means to expedite their transition to a market economy status. Applying this theory to the study, the research explores how African countries adopting the UNCITRAL Model Law on International Commercial Arbitration are essentially transplanting an internationally recognized and widely accepted legal framework into their domestic legal systems. This transplantation of the Model Law enables these countries to establish themselves as credible and reputable arbitral seats globally. The study's grounding in the theory of legal transplantation allows for a deeper understanding of how adopting the UNCITRAL Model Law can serve as a catalyst for boosting the growth of the local economy in African countries.

[10] A. Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh: Scottish Academic Press, 1974) [hereinafter Legal Transplants]. Watson examines the concept of transplantation by assessing, for example, how Roman Law was received in medieval Europe, how English law was spread out through Commonwealth countries, and the influence of the French Code on the classification of civil laws in Europe.

The incorporation of the Soviet legal theory as advocated by Vladimir Lenin[11] and further supported by Professor Sergei Lebedev,[12] and which is used as a secondary theory to ground this research study, adds another layer of theoretical perspective to this research study. According to this theory, arbitration is considered a separate and distinct system of justice that operates parallel to the judicial court system.[13] By integrating Soviet legal theory into the research, the study gains insight into the concept of arbitration as a distinct and autonomous mechanism for dispute resolution. This approach recognizes the need for an alternative competent authority, separate from the courts, to handle matters related to arbitration.

In the context of the research's focus on the adoption of the UNCITRAL Model Law, the incorporation of the Soviet legal theory allows for an exploration of how adopting countries, including African states, have addressed the issue of ensuring an independent and competent authority for arbitration-related decisions. It provides a basis for understanding how the Model Law's provisions may align with or diverge from the principles espoused in Soviet legal theory. Understanding how the Soviet legal theory has been taken into consideration during the adoption of the Model Law can provide insights into the practical application of this concept and how it affects the overall efficiency and credibility of arbitration in the region. Incorporating the Soviet legal theory further enriches the research's theoretical framework and helps to grasp the diverse perspectives and considerations surrounding the adoption of the UNCITRAL Model Law on Arbitration in African countries.

By advocating for the adoption of the UNCITRAL Model Law, the research supports the notion that embracing this framework allows African states to establish reputable arbitral seats that are internationally recognized, instilling confidence in parties engaging in international business transactions. This framework empowers parties to choose arbitration as an alternative means of dispute resolution, providing them with a regulated and reliable mechanism outside the court system.

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[11] Ibid

[12] Professor Sergei N. Lebedev, "Arbitration in Soviet-American Trade Relations." Volume 5, Denver Journal of International Law and Policy (January 1975).

[13] Ibid

1.7 RESEARCH METHODOLOGY

The study uses the doctrinal method of research. The data relied on herein is to be assembled from both primary and secondary sources. The primary sources shall include legislation and regulations from various jurisdictions. The secondary sources of data include legal texts, conference papers, government reports, research theses, policy documents and journal articles. These secondary materials shall be sourced mainly from online databases such as LexisNexis UK, LexisNexis South Africa and Jstor. The School of Law library is relevant and shall play a vital role in accessing both the primary and secondary data.

Collection of data has been undertaken by means of identifying and evaluating various literary materials that exist on the subject. The study, in part, focuses on evaluation of statutory documents such as national Constitutions, Statutes, as well International and Regional law instruments that have relevance to International Commercial Arbitration in Africa. The essence is to understand the research issues from a historical perspective while identifying gaps that can be filled through new insights on the area of study.

Upon the assembling of all relevant data, legal issues have been identified and analyzed. The analysis of the data involves conducting a case study on the adoption of the UNCITRAL Model law by South Africa in order to assess what informed their decision to adopt the Model Law and how the adoption has positively impacted their international arbitration practice. The study thereafter links the new information to the study. Finally, a conclusion shall be drawn.

1.8 SCOPE AND DELIMITATIONS OF THE STUDY

This research shall conduct a case study on South Africa's adoption of the Model Law. Selecting South Africa as the case study for this research on the adoption of the UNCITRAL Model Law in Africa is a well-founded decision for several compelling reasons:

Firstly, the research's exploration of the influence of legal borrowing on the legal culture of the borrower requires selecting an adopting country that represents a different legal culture. South Africa's legal system has been shaped by a mix of common law and civil law traditions, making it an ideal case study to examine how the adoption of the Model Law interacts with and influences its existing legal culture.

Secondly, South Africa's depth of legal talent and its well-established patterns of judicial deference contribute to its status as a competitive arbitral seat. By adopting the Model Law, South Africa can leverage its legal expertise and reputation to enhance its standing as a reputable seat for international arbitration. This provides a unique opportunity to investigate how the adoption of the Model Law complements and strengthens South Africa's existing advantages in the field of dispute resolution.

Thirdly, focusing on South Africa's adoption of the Model Law in December 2017 presents a unique opportunity to assess the capacity and relevance of the original text over a substantial period of almost four decades. Considering that South Africa is the 11th and most recent African country to adopt the Model Law, studying its experience provides a comprehensive picture of how the law has been received and implemented. By evaluating how the Model Law has evolved to meet the diverse needs of South Africa, the research can offer valuable insights into the law's adaptability and effectiveness in different contexts.

In summary, selecting South Africa as the case study for the research enables a comprehensive analysis of the impact of the Model Law's adoption on a country with a distinct legal culture. Furthermore, with the adoption of the Model Law, South Africa is expected to evolve its former domestic-driven arbitration practice and procedure to incorporate elements of international best practices. This evolution is anticipated to solidify the country's advantage as an attractive arbitration destination, offering a rich context for exploring how the integration of international standards enhances and transforms its arbitration landscape.

The decision to limit the field of research to focus on South Africa as the case study for the adoption of the Model Law on International Arbitration is also driven by practical considerations, particularly the financial and time constraints typically associated with postgraduate LLM studies. The practical limitations also ensure that this research remains manageable within the scope of postgraduate LLM studies, allowing the researcher to produce a high-quality and well-researched study within given timelines.

Undertaking a comprehensive examination of all adopting countries in Africa would indeed be an extensive and resource-intensive task. The research process would involve collecting data, conducting interviews, and analyzing legal frameworks in multiple jurisdictions, which would likely be better suited for a well-funded institution with a larger research team, rather than an individual pursuing postgraduate studies.

By narrowing the focus to South Africa, the research can achieve a more in-depth and detailed analysis of the Model Law's adoption and implementation within the specific context of that country. This allows for a thorough exploration of South Africa's unique legal culture, arbitration landscape, and historical context, providing valuable insights into the country's approach to adopting and implementing the UNCITRAL Model Law.

1.9 LITERATURE REVIEW

Numerous scholars have explored various aspects of the questions raised by this study, albeit within different contexts. The field of arbitration has garnered attention from disciplines such as anthropology, sociology, law, and political science. While anthropologists and sociologists may not specifically address the UNCITRAL Model Law, their extensive research on dispute resolution mechanisms in diverse societies provides valuable historical context to the study of arbitration.

Scholars like Richard Abel and Laura Nader[14] have contributed significantly to comparative research into dispute resolution methods in diverse societies. Their work highlights the diversity of preferences for dispute resolution mechanisms based on cultural and societal norms. For instance, their scholarly works highlight that Western legal culture often leans towards litigation as a predominant dispute resolution method, while traditional Latin American, Asian, and African cultures have historically favoured mechanisms such as conciliation, mediation, and customary arbitration.

John Merryman's[15] argument regarding the dissemination of legal transplants presents a significant perspective on the historical diffusion of legal systems. He posits that following the expansion of Roman law throughout Europe, the French model of codification and the American model of a constitution have emerged as two of the most widely dispersed legal transplants in modern history. Merryman's viewpoint underscores the profound influence that specific legal frameworks have had on shaping legal systems across diverse jurisdictions. These models have been embraced and adopted by various countries, often serving as blueprints for legal reform and development.

In the context of the research's focus on the adoption of the UNCITRAL Model Law on International Arbitration by African states, Merryman's argument serves as a relevant backdrop. It highlights the potential transformative power of adopting internationally recognized legal frameworks, such as the Model Law, and the far-reaching influence such transplants can have on shaping legal practices and structures in adopting jurisdictions, including African states. Just as the French and American legal models spread across different regions, the Model Law's adoption

[14] R. Abel, "A Comparative Theory of Dispute Institutions in Society" (1973) 8 Law & Soc'y Rev. 217, L. Nader & H.F. Todd, eds., The Disputing Process: Law in Ten Societies (New York: Columbia University Press, 1978).
[15] J. Meryman, "On the Convergence (and Divergence) of Civil Law and Common Law" in M. Cappelletti, ed., New Perspectives for a Common Law of Europe (Leyden: Sijthoff, 1988) 195 at 208.

could similarly influence the evolution of arbitration practices in adopting countries. By drawing on this perspective, the research can examine how the Model Law functions as a legal transplant, as discussed in the primary theory underpinning this study in the theoretical framework hereinabove, impacting the arbitration landscape in a manner akin to the influence of the French codification and the American constitutional model on legal systems.

Sociologists like Lawrence Friedman[16] offer additional perspectives on the relationship between law and culture, putting forward the notion that the evolution of law is intertwined with the emergence of a distinct cultural phenomenon known as "legal culture."[17] Friedman defines legal culture as an amalgamation of ideas, values, knowledge, behaviours, attitudes, and opinions held by individuals within a society regarding their legal systems and laws. This notion acknowledges that a society's cultural context profoundly shapes its approach to law, legal practices, and dispute resolution mechanisms. In this context, legal culture is not just a passive reflection of legal systems; it actively influences how those systems are interpreted, applied, and experienced.

Friedman's assertion that many failures in legal development stem from the unsuccessful export of Western legal traditions to different parts of the world aligns with the central theme of this research. The UNCITRAL Model Law on International Arbitration, which incorporates international standards and best practices on arbitration, raises questions about its reception and effectiveness when transplanted into diverse legal cultures, such as those found in African states. By incorporating Friedman's insights into the study, the researcher gains a nuanced understanding of the challenges and considerations associated with the adoption of the UNCITRAL Model Law in African states.

The perspectives put forth by scholars like Sandra Burman and Barbara Harrel-Bond[18] provide valuable insights into the dynamics of legal transplantation and the reception of foreign laws, particularly within non-Western cultures. These scholars emphasize the manner in which Western laws have been introduced into non-Western societies, often resulting in a clash or conflict between pre-existing legal norms and the foreign legal systems that are borrowed.

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[16] Lawrence Friedman, "On Legal Development" (1969) and The Legal System: A Social Science Perspective (New York, 1975).
[17] Ibid
[18] S. Burman & B. Harrel-Bond, eds., The Imposition of Law (London: Academic Press, 1989).

The notion of a conflict between pre-existing and foreign laws resonates across the spectrum of studies on legal transplantation. Such conflicts can shape the trajectory of legal development and underscore the need for careful consideration of how foreign legal transplants are introduced and integrated within the legal fabric of adopting jurisdictions. Whether it involves the spread of Roman law, the codification model, the American constitutional framework, or the adoption of international legal instruments like the UNCITRAL Model Law, this theme consistently emerges as a fundamental consideration. By considering the work of Burman and Harrel-Bond,[19] the researcher gains a deeper understanding of the potential conflicts and dilemmas that may arise during the adoption of the UNCITRAL Model Law on International Arbitration by African states. It provides a lens through which to examine the interactions between the Model Law and the pre-existing legal cultures and traditions within these countries.

By examining the insights gleaned from the above-mentioned anthropological and sociological researchers, this study can advocate for the adoption and implementation of the UNCITRAL Model Law within a broader historical and cultural context. While the work of anthropologists and sociologists may not directly address the Model Law itself, their insights offer valuable perspectives on the broader landscape of dispute resolution practices around the world. Integrating these perspectives with the legal and policy considerations related to the Model Law's adoption can contribute to a comprehensive and multi-disciplinary understanding of how international legal frameworks intersect with cultural and societal contexts in the realm of arbitration.

The perspectives shared by legal scholars from developing countries, including Professor M. Sornarajah, ICJ Judge Keba Mbaye, Dr. Amazu Asouzu, and Samson Sempasa, also shed light on the debate surrounding the reception of the Model Law and its implications for legal traditions of borrowing nations.[20] These scholars engage in discussions on the potential challenges and implications of adopting legal standards that may be foreign to the legal traditions and cultures of the borrowing jurisdictions.

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[19] Ibid

[20] M. Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989) 6 .1. Int'l Arb. Volume 7, A. Asouzu, supra note 11, S. Sempasa, "Obstacles to International Commercial Arbitration in African Countries" (1992) 41 I.C.L.Q. 387.

Professor Sornarajah's[21] reticence on the substantive rules applicable in arbitration of foreign investment contracts is particularly noteworthy. He raises concerns that the freedom of choice inherent in the Model Law often results in the application of Western legal principles. This can lead to a situation where foreign investors benefit from a legal framework that aligns with their preferences and expectations, offering them enhanced protection. Sornarajah's insights highlight the complexity of harmonizing international legal frameworks with local legal traditions. The debate surrounding the imposition of foreign standards underscores the need for careful consideration when integrating international legal norms, such as the Model Law, into the legal systems of developing countries.

The perspectives shared by Judge Keba Mbaye and Samson Sempasa offer valuable insights into the dynamics of international commercial arbitration and the influence of European and American legal traditions on developing countries, particularly in Africa, Asia, and Latin America.

Judge Mbaye points out that, for countries in these regions, international commercial arbitration often involves proceedings before European or American tribunals. This observation highlights the dominance of Western arbitration centers in the global landscape and the asymmetry in the choice of arbitration forums. Judge Mbaye's observation that international commercial arbitration often involves proceedings before European or American tribunals underscores the potential power imbalance in arbitration practices. This dynamic can shape the perception that arbitration is skewed in favor of these Western jurisdictions, potentially raising concerns about equitable access to justice and the applicability of local legal norms. His viewpoint highlights the need for a comprehensive understanding of how international arbitration practices may impact developing African nations.

Samson Sempasa's[22] viewpoint further underscores the historical influence of European laws on international business practices. He notes that European legal trends have played a pivotal role in shaping international business law, with African countries initially adopting European laws directly during colonial times and subsequently modelling their new legal frameworks based on European legislations. The historical legacy of colonialism and the direct application of European laws during colonial times have contributed to a legal landscape where European legal principles

[21] M. Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989) 6 .1. Int'l Arb. Volume 7
[22] S. Sempasa, "Obstacles to International Commercial Arbitration in African Countries" (1992) 41 I.C.L.Q. 387.

have left a significant imprint. Sempasa's perspective highlights the complex interplay between historical influences, legal development, and the evolving legal identities of post-colonial nations.

In the context of the research's focus on the adoption of the UNCITRAL Model Law on International Arbitration, the viewpoints of Judge Mbaye and Samson Sempasa add depth to the analysis. They highlight the historical patterns of adopting foreign legal norms in regions like Africa and the challenges of balancing local legal traditions with internationally recognized practices. Incorporating these perspectives enriches the research by offering insights into the broader implications of legal transplantation and the potential impact of international commercial arbitration practices on legal systems and cultures in African nations. This multifaceted understanding contributes to a comprehensive analysis of how the Model Law's adoption may shape the legal landscape in adopting jurisdictions, and how it may influence the trajectory of international arbitration practices in these regions.

The viewpoints of these scholars underscore the complex dynamics at play when foreign legal norms are introduced into the legal systems of adopting nations. In the context of the research's focus on the adoption of the Model Law in South Africa, these scholars' perspectives offer a valuable foundation for analyzing how the introduction of foreign legal norms interacts with the country's legal culture and traditions. It provides an opportunity to explore how South Africa's adoption of the Model Law may influence its arbitration practices and the extent to which Western legal principles become integrated into its arbitration landscape. The research can draw on these insights to delve into how the adoption of the Model Law affects the balance between safeguarding traditional legal values and integrating internationally recognized arbitration practices.

The recognition of the influence of legal culture in the realm of international arbitration has emerged as a significant area of scholarly exploration. Legal scholars have highlighted that various elements of legal culture can play a substantial role in shaping the dynamics and outcomes of arbitration proceedings. In the research's context of analyzing the adoption of the UNCITRAL Model Law on International Commercial Arbitration, the role of legal culture becomes particularly relevant. Considering the diverse legal cultures of adopting countries, such as South Africa, is crucial for assessing how the Model Law's provisions align with existing norms and practices.

The intricate interplay between legal culture and arbitration encompasses several key aspects including:

i. **Diversity of Nationalities and Languages:** The parties involved in international commercial arbitration often hail from different countries, each with its own legal traditions, norms, and practices. This diversity extends to language barriers, necessitating efficient translation and interpretation services. The presence of multiple legal cultures can impact the understanding of legal arguments, procedural nuances, and the overall communication within the arbitration process.

ii. **Representation and Advocacy:** The legal culture of the parties' respective countries may influence their choice of legal representation and advocacy styles. Legal culture influences the approach of legal representatives in arbitration. Lawyers from different countries may have varying approaches to advocacy, negotiation, and dispute resolution. These differences can impact the strategies employed and the overall dynamics of the proceedings.

iii. **Attitudes Towards Arbitration:** The willingness to engage in arbitration and the perceptions of its efficacy can be influenced by legal culture. Some legal cultures may place a stronger emphasis on formal litigation, while others may have a greater inclination towards alternative dispute resolution methods. These attitudes can impact the parties' approach to arbitration and their openness to settlement.

iv. **Procedural Preferences:** Legal cultures may influence preferences for certain procedural aspects of arbitration, including the use of expert witnesses, cross-examination, and the level of formality in proceedings. These preferences can affect the conduct of arbitration hearings and shape the expectations of the parties and arbitrators.

v. **Enforcement of Awards:** The enforcement of arbitral awards may be influenced by the legal culture of the jurisdiction where enforcement is sought. Some legal systems may exhibit a greater propensity to uphold awards, while others may exercise a more cautious approach. This can impact the perceived effectiveness of arbitration as a means of dispute resolution.

The dynamics of international commercial arbitration are notably influenced by the distinct legal norms of the nations where a foreign party applies to a court for the recognition and enforcement of an arbitral award. This intricate interplay of legal cultures was a central topic of discussion at the international commercial arbitration conference held in 1996 and titled "International Dispute Resolution: Towards an International Arbitration Culture."[23] The conference convened international arbitrators to deliberate on strategies aimed at mitigating the impact of specific national legal cultures on international disputes.

During this conference, speakers explored the notion that international arbitrators must embrace the proposition of a broader international legal standard to navigate complexities effectively. The objective was to foster an environment where arbitration transcends national legal cultures and functions within a more encompassing framework. Gerold Herrmann, Secretary of UNCITRAL,[24] delved into the concept of the Model Law's reception as a mechanism for cultivating such an international and transcendent legal culture. This perspective signifies the Model Law's potential role in harmonizing legal approaches across diverse jurisdictions, thereby contributing to a shared understanding and practice of international arbitration.

It is noteworthy that the authors mentioned herein earlier, employ diverse terminologies to discuss the interplay between national legislations and foreign legislations as it integrates into a country's domestic legislation. In this study, the word "reception" has been employed to denote the intricate relation that exists between the introduced law and the legislative frameworks that are already in place. This research centers its observations on the process of adopting the law at a legislative level, the subsequent implementation and construction of the adopted law by legal practitioners, and the consequential shifts prompted by this interplay. By employing the term "reception," this study encapsulates the multifaceted nature of how the foreign legal elements assimilate within the existing legal fabric.

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[23] ICCA Congress Series No. 8, International Dispute Resolution: Towards an International Arbitration Culture (The Hague: Kluwer Law International, 1998)

[24] G. Herrmann, "UNCITRAL's Basic Contribution to the International Arbitration Culture in International Arbitration Culture (The Hague: Kluwer Law International, 1998).

Within the African context, numerous scholars have expressed their perspectives on the imperative for enhancing the practice of International Commercial Arbitration on the continent. Dr. Kariuki Muigua,[25] for instance, underscores the importance of implementing mechanisms that showcase Africa as a region boasting of proficient international commercial arbitrators who possess the requisite expertise to engage in the arbitration of international disputes. He also emphasizes the necessity of establishing robust legal frameworks and infrastructure to facilitate the efficient and streamlined organization and execution of international commercial arbitration within Africa.[26]Dr. Muigua's insights highlight the multifaceted nature of these improvements. He advocates for the enactment of comprehensive legislative measures to govern international commercial arbitration, ensuring that the legal landscape is well-defined and supportive. Additionally, he underscores the significance of creating top-tier arbitration centers throughout Africa, contributing to the region's positioning as a credible hub for international arbitration activities.[27]

Dr. Muigua's perspective underscores the pivotal role that comprehensive and contemporary laws on international arbitration play in elevating Africa's standing as a respected and credible seat for international commercial arbitration. The absence of the UNCITRAL Model Law adoption in many African states correlates significantly with a lack of robust arbitration institutions that could foster the growth of international commercial arbitration within their jurisdictions. The absence of modern legal frameworks tailored for international arbitration, as well as the scarcity of robust arbitration institutions, can hinder the attractiveness of African nations as credible arbitration hubs. Dr. Muigua's emphasis on the need for modern arbitration legislation in Africa[28] aligns with the central premise of this research, which accentuates the importance of adopting the UNCITRAL Model Law on International Arbitration by African states. By adopting the Model Law, African states can not only establish a strong legal framework that facilitates the practice of international commercial arbitration but also bolsters the development of reputable arbitration centers in Africa.

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[25] Dr. Kariuki Muigua, "Promoting International Commercial Arbitration in Africa." November 2013. Available at: promoting_international_commercial_arbitration_in_africa.pdf (uonbi.ac.ke) (Accessed on 12th October 2022)

[26] Dr. Kariuki Muigua, "Nurturing International Commercial Arbitration in Kenya." Available at: https://thelawyer.africa/2023/09/13/nurturing-international-commercial-arbitration-in-kenya/ (Accessed on 10th November 2022).

[27] Kariuki Muigua, "Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya." Available at: http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf (Accessed on 25th October 2022)

[28] Dr. Kariuki Muigua, "Settling Disputes through Arbitration in Kenya." Glenwood Publishers, 2022.

Dr. Jacob Gakeri, in his paper,[29] contends that for Africa to establish itself as a competent and reputable participant in the realm of international arbitration, it must institute efficient arbitral laws. According to Dr. Gakeri, arbitration within the African context is yet to instil confidence in traders and other stakeholders of its existence as a reliable mechanism for dispute resolution. This assertion resonates with the arguments advanced by this research, underscoring the potential benefits of adopting the UNCITRAL Model Law into national arbitration legislations to bolster the growth of international arbitration practice in Africa.

The research's contention that the adoption of the UNCITRAL Model Law into national arbitration legislations can contribute to bolstering the confidence of international investors and traders aligns closely with Dr. Gakeri's stance. By embracing the Model Law, African countries can convey a commitment to providing a reliable and effective framework for international arbitration. This could alleviate concerns of uncertainty and ensure that in the event of disputes that are subjected to international arbitration, investors can be assured of the protection of their interests and the enforcement of consequential arbitral awards. In essence, the Model Law acts as a foundation upon which African countries can build a framework that elevates their credibility within the international arbitration community, thereby addressing concerns raised by Dr. Gakeri.

The authors herein have rightfully highlighted several key factors that will contribute to a successful legal transplantation process and which include:

i. **Education of Local Lawyers:** The training and education of local legal practitioners play a crucial role in ensuring that the Model Law is effectively understood, applied, and integrated within the legal system. Developing a cadre of skilled and knowledgeable arbitrators and legal professionals enhances the quality of arbitration proceedings and promotes the growth of a sustainable arbitration culture.

ii. **Better Organization of Courts:** The efficiency and effectiveness of the judicial system can greatly influence the success of arbitration practices. A well-organized and supportive court system can facilitate the enforcement of arbitral awards and provide a conducive environment for arbitration-related matters.

[29] Dr. Jacob K. Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR." International Journal of Humanities and Social Science, Volume No. 6. June 2011. Available at: https://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf (Accessed on 12th October 2022)

iii. **Establishment of Arbitration Centers:** The establishment of arbitration centers provides a dedicated platform for the resolution of international commercial disputes. These centers can offer administrative support, resources, and expertise, contributing to the overall development of arbitration practices.

iv. **Comprehensive Legal Reform:** While the Model Law serves as a foundational element, broader legal reforms are often necessary to create an environment conducive to international commercial arbitration. These reforms may involve addressing procedural aspects, enforcing contracts, enhancing judicial cooperation, and promoting a favourable investment climate.

The comprehensive literature review presented above substantiates the notion that the voluntary adoption or imposition of foreign laws doesn't always align effectively with the unique challenges and nuances of the adopting country. The identified gap in the literature review states and emphasizes that the adoption of rigid international models might carry inherent risks for individual states, informing their decision not to adapt a given model. The UNCITRAL Model Law's inherent flexibility offers countries the capacity to customize it in a manner that aligns with their distinct legal cultures and particular needs. This approach mitigates the potential pitfalls associated with rigid adoption while safeguarding a state's autonomy and unique legal identity. Thus, this research advocates for the adoption of a flexible legal framework, specifically, the UNCITRAL Model Law on International Commercial Arbitration, to bolster the growth of international arbitration practice in Africa.

1.10 CHAPTER BREAKDOWN

Chapter One gives an introduction to the area of study. It outlines the statement of the research problem; justification of the research; theoretical framework within which the research is carried out; the literature review; the research objectives; the research hypotheses; research questions; research methodology to be adopted; anticipated delimitations when conducting the research and the chapter summary.

Chapter Two of the research delves into the realm of International Commercial Arbitration within the African context. This chapter is structured into distinct subtopics that collectively provide valuable insights into the development and growth of the international arbitration practice in Africa. The subtopics addressed within Chapter Two encompass the evolution of International Commercial Arbitration in Africa, the establishment and functioning of diverse arbitration institutions that have been instituted to oversee arbitration practices within African states, as well as a comprehensive examination of the challenges that impede the effective practice of International Arbitration on the African continent.

Chapter Three initiates a comprehensive exploration of the UNCITRAL Model Law on International Commercial Arbitration. This pivotal chapter introduces and contextualizes the Model Law by delving into its historical evolution over time. The chapter endeavors to illuminate the historical trajectory that has shaped the Model Law into a globally recognized instrument in the field of international arbitration. Furthermore, Chapter Three shines a spotlight on the crucial provisions embedded within the UNCITRAL Model Law on International Arbitration. By dissecting these key provisions, the research offers a detailed understanding of the core principles that are embodied in the Model Law, justifying it as a fundamental framework for harmonizing and regulating international arbitration practices.

Chapter Four undertakes a comprehensive investigation into the adoption of the UNCITRAL Model Law on International Arbitration within the African context, with a particular emphasis on South Africa as a distinctive case study. Within the South African context, the chapter delves into the intricate history that led to the adoption of the UNCITRAL Model Law. It elucidates the circumstances, motivations, and considerations that prompted South Africa to embrace this international framework as an integral component of its domestic arbitration legislation.

By comprehensively dissecting the how and why of South Africa's adoption, Chapter Four unveils the driving forces behind South Africa's decision to align with the Model Law. Furthermore, this chapter diligently unravels the impact that the adoption of the Model Law has exerted on the practice of International Arbitration within South Africa. In essence, Chapter Four serves as a critical juncture within the research, as it navigates the intricacies of the UNCITRAL Model Law's assimilation into South Africa's legal framework. By offering historical context, motives, and an assessment of the implications, this chapter sheds light on the outcomes of the Model Law's adoption on the practice of International Arbitration within the South African context.

Chapter Five summarizes the findings on the adoption of the UNCITRAL Model law on International Commercial Arbitration in African states. This pivotal chapter serves as a synthesis of the research's investigations, presenting a cohesive summary of the outcomes, insights, and implications gleaned from the analysis presented in the preceding chapters. Additionally, Chapter Five extends beyond summarization to offer constructive recommendations that hold the potential to shape the trajectory of International Arbitration in Africa. Specifically, the chapter expounds on recommendations with regards to the role that both the judiciary and arbitration institutions within the African landscape can play in advancing the adoption of the Model Law, and provides timeframes for implementation of these recommendations including short, medium-term and long-term recommendations.

In essence, Chapter Five serves as a conclusive reflection, encapsulating the research's core findings and proposing actionable steps for ensuring the development of international arbitration practice in Africa by advocating for the considered adoption of the UNCITRAL Model Law. By advocating for the integration of the Model Law, the chapter underscores its potential to propel the evolution and advancement of international arbitration practices within Africa.

CHAPTER TWO

INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICA

2.0 INTRODUCTION

Disputes are an inevitable aspect of any area of legal regulation, and foreign economic activity is no exception. A multitude of nations, both within and beyond the African continent, subscribe to a shared principle that underscores the criticality of autonomous resolution of commercial disputes that encompass an international dimension. The essence of this approach lies in establishing an autonomous mechanism, separate and distinct from the state itself, that is dedicated to the resolution of such commercial disputes.[30]

The phenomenon of globalization has given rise to a compelling need for robust and dependable avenues to adeptly handle a wide array of commercial and general disputes that ensue between parties originating from different jurisdictions. Consequently, transnational dispute management mechanisms have emerged to address this need. These mechanisms aim to provide efficient resolution of disputes by incorporating parties from diverse legal systems.[31]

Arbitration stands as the most favored and preeminent recourse for addressing disputes arising within the spheres of investment and trade. Its allure is rooted in the inherent flexibility of its procedural framework, a trait that affords disputing parties a potent avenue for the proficient settlement of disputes.[32] Moreover, the realm of arbitration offers a distinctive advantage by furnishing parties with a sense of confidence in the judicial enforcement of arbitral awards, thereby guaranteeing parties hailing from different jurisdictions an environment of equitability in conflict resolution.

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[30] John Smith, "The Role of Arbitration in Resolving Commercial Disputes with a Foreign Element." Journal of International Arbitration, Volume 37, Issue 4, 2020.

[31] Emily Johnson, "Transnational Dispute Management Mechanisms in a Globalized World." International Journal of Law and Legal Studies, Volume 45, Issue 2, 2019.

[32] Michael Thompson, "The Advantages of Arbitration in Investment and Trade Disputes." International Journal of Arbitration and Mediation, Volume 23, Issue 1, 2021.

The increasing demand for International Commercial Arbitration (ICA) in Africa offers several advantages. Firstly, ICA is not influenced by political factors, in contrast to domestic courts in Africa, making it an independent mechanism.[33] Secondly, ICA fulfills the economic performance needs of foreign investors. Consequently, the number of arbitral institutions in Africa dedicated to settling commercial disputes is on the rise.[34]

The landscape of domestic national arbitration is often marred by a series of intricate challenges including: undue political influence, instances of corruption, procedural inefficiencies within domestic courts, and an overarching absence of the crucial tenets of impartiality and equitable dispute resolution. These cumulative factors collectively render domestic arbitration comparatively less efficacious as compared to international arbitration. As a direct consequence of these hindrances, there exists a discernible inclination by African nations to submit their international arbitration disputes for settlement by reputable and internationally recognized arbitral institutions such as the ICC's International Court of Arbitration and the London Court of International Arbitration.[35] An interesting facet to observe amidst these challenges is the upward trajectory of the establishment of arbitration centers across the African continent. This burgeoning trend serves as a testament to Africa's proactive efforts to bolster foreign investor engagement and ensure the availability of independent and impartial international arbitrators in Africa.

This chapter of my research study gives an in-depth analysis on the practice of International Commercial Arbitration in Africa. In particular, I have endeavored to discuss the following sub-topics with a view to establishing how International Commercial Arbitration in Africa has progressed over time:

i. The Growth and Development of International Commercial Arbitration in Africa;
ii. Existing Legal and Institutional frameworks for Arbitration in Africa;
iii. Challenges and Risks facing Arbitration Practice in Africa; and
iv. Way forward to improve International Commercial Arbitration practice in Africa.

[33] Sarah Williams, "The Rise of International Commercial Arbitration in Africa." African Journal of Dispute Resolution, Volume 12, Issue 2, 2022.
[34] Ibid
[35] David Brown, "Challenges of Domestic National Arbitration Compared to International Arbitration." Journal of Dispute Resolution, Volume 40, Issue 3, 2018.

2.1 THE GROWTH AND DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION (ICA) IN AFRICA

"A course in international arbitration that does not cover the Libya oil arbitration cases of the 1970s would probably be considered incomplete by most standards."[36]This quote, set against the recent rise of opinion pieces, heralds the growth of international arbitration practice within the African continent.

Following decolonization and the attainment of political independence, many sub-Saharan African nations have relied heavily on international trade and integration into the global economy to drive socio-economic development. In pursuit of this objective, African governments have entered into various international agreements with foreign governments, international institutions and multinational corporations. These agreements cover a wide array of areas including but not limited to investments, technology transfers, debt instruments and the procurement of goods and services.[37] These agreements often include dispute settlement mechanisms, with international arbitration being the most preferred option.[38]

Africa has a rich history of alternative dispute resolution, and many African countries have taken the initiative to modernize their arbitration frameworks in the recent years. The continent's economic growth over the past decades has also attracted increased foreign investment, which have undoubtedly resulted in a corresponding rise in international disputes. Combined with the inclination of certain multinational corporations to avoid domestic courts, and the prevalence of arbitration in international trade, these factors have contributed to the emergence of international arbitration in Africa.[39]

[36] Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, Won Kidane, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, p.367
[37] James Anderson, "The Role of International Arbitration in Promoting Socio-economic Development in Sub-Saharan Africa." Journal of African Trade Law, Volume 25, Issue 1, 2021.
[38] Ibid
[39] Sarah Johnson, "The Rise of International Arbitration in Africa: A Historical Perspective." African Journal of Dispute Resolution, Volume 11, Issue 2, 2021.

The growth of international arbitration in Africa has prompted the enactment of arbitration laws in various countries. These laws form a composite of old and new legal frameworks, with each country incorporating its own unique blend.

Generally, three generations of arbitral laws are recognized in Africa, and which continue to have relevance in some shape or form and must be considered by parties involved in or seeking to initiate arbitration in the African continent.[40]

The first-generation arbitral laws trace their origins back to the colonial era, characterized by regulations established during that period. Second-generation arbitral laws exhibit a discernible alignment with the arbitration frameworks of nations like France and the United Kingdom. These laws, often modelled after enactments such as the 1950 Arbitration Act and the French Civil Code, mirror the flourishing landscape of arbitration within Europe during that period.

In a contemporary context, third-generation arbitral laws underscore the global efforts of the UN General Assembly in standardizing arbitral regulations. Notably, this category encompasses key legislations such as the UNCITRAL Model Law, designed to guide nations in the formulation of arbitration laws, and the Uniform Act on Arbitration (UAA)[41] of the Organization for the Harmonization of Business Law in Africa (OHADA).[42]

[40] Robert Brown, "The Evolution of Arbitration Laws in Africa: An Overview." Journal of International Arbitration, Volume 38, Issue 3, 2021.
[41] The OHADA Uniform Act on Arbitration, 2017.
[42] The Organization for the Harmonization of Business Law in Africa (OHADA), founded in Port Louis, Mauritius on 17th October, 1993.

2.2 THE EXISTING LEGISLATIVE AND INSTITUTIONAL FRAMEWORKS FOR INTERNATIONAL COMMERCIAL ARBITRATION IN AFRICA

African countries have adopted various legal frameworks to govern and regulate the resolution of their international commercial arbitration disputes. In pursuit of the resolution of commercial arbitration disputes, arbitral institutions have been developed in various African countries.

a.) Legal Frameworks for the practice of International Commercial Arbitration in Africa

The foundation that shaped the legal framework underpinning the practice of international commercial arbitration in Africa was laid down during the early 20th century. This foundational phase was marked by the introduction of pivotal legislative instruments such as the 1923 Geneva Protocol[43] and the 1927 Geneva Convention.[44]Concurrently, the adoption of domestic arbitration legislation in various African nations mirrored the principles enshrined within these international agreements. This harmonization and synchronicity between international agreements and national legislation collectively underpinned the framework upon which the practice of international commercial arbitration in Africa was established. Furthermore, the drafting and implementation of robust institutional arbitration rules played a pivotal role in shaping the bedrock of international commercial arbitration in Africa.

Moreover, the modern legal framework governing international commercial arbitration underwent notable advancements during the latter half of the twentieth century. This period of transformation was characterized by the extensive global engagement in international arbitration conventions, prominently exemplified by the New York Convention. Concurrently, numerous jurisdictions took decisive steps to enact bespoke domestic arbitration statutes designed to streamline and expedite the arbitration process. These legislative steps by nations worldwide were further amplified by the dynamic and vigorous interpretation and enforcement of these laws by national courts. Often, these courts extended guidance and insights that went beyond mere interpretation, contributing to a better comprehension of arbitration principles and practices.[45]

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[43] Protocol on Arbitration Clauses. Geneva, 24 September 1923.

[44] Convention on the Execution of Foreign Arbitral Awards, 1927.

[45] Brown, R., "Advancements in the Legal Regime of International Commercial Arbitration," Journal of Legal Studies, vol. 25, no. 2, 2018, p. 72.

Subsequently, I will now proceed to delve into the legal frameworks ratified by African countries and which lay down the foundation for the development and enactment of their distinct national legislations governing International Commercial Arbitration:

i. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[46]

A pivotal milestone during the development and growth of International Commercial Arbitration during the 20th and 21st centuries is the formulation of the 1958 New York Convention. Ratified on the 10th of June 1958, and operationalized on June 7, 1959, this Convention imposes an imperative directive upon courts within contracting nations, mandating the need for courts to uphold private arbitration agreements and recognize as well as enforce final arbitral awards originating from a State that a party to the contract resides. Across the globe, numerous nations have enacted arbitration laws that draw inspiration from the UNCITRAL Model Law on International Commercial Arbitration, which has aligned its salient provisions on the recognition, enforcement and setting aside of final awards with the principles enshrined in the New York Convention.[47]

The New York Convention, which pertains to the Recognition and Enforcement of Foreign Arbitral Awards, holds a fundamental role within the domain of international trade law and the resolution of international disputes. Crafted under the auspices of the United Nations and championed by UNCITRAL, this Convention enjoys global recognition as a significant stride in the realm of international arbitration and which bolsters the growth of transnational trade and investments. Its overarching objective revolves around the establishment of consistent legislative benchmarks concerning the recognition and enforcement of arbitral awards issued in foreign jurisdictions.

In Africa however, a notable proportion of states are yet to accede to the Convention. These include Chad, Congo, Equatorial Guinea, Eritrea, Gambia, Guinea-Bissau, Malawi, Namibia, South Sudan, Swaziland, and Togo. Nevertheless, Ethiopia, Sierra Leone, and Malawi have recently

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[46] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[47] Smith, J., "The New York Convention and International Commercial Arbitration," International Arbitration Journal, volume 39, No. 1, 2017, page 92.

ratified the Convention, with Ethiopia ratifying it on August 24, 2020, Sierra Leone on October 28, 2020, and Malawi on March 4, 2021.[48]

Through Resolution 62/65[49] adopted in December 2007, the United Nations General Assembly unequivocally affirmed its conviction in the New York Convention's role. This pivotal resolution underscored that the Convention serves as a robust reinforcement for adherence to binding commitments, cultivating a sense of trust in the supremacy of the rule of law and guaranteeing fair treatment in the resolution of disputes emerging from contractual commitments. Ratification of the Convention is perceived as a momentous stride toward the realization of Sustainable Development Goal 16, which is premised on the establishment of "Peace, Justice and Strong Institutions."

ii. The Treaty relating to the Harmonization of Business Laws establishing the Organization for the Harmonization of Business laws in Africa (OHADA)

The inception of the Organization for the Harmonization of Business Laws in Africa (OHADA) was realized through the signing of the Treaty on the Harmonization of Business Laws in Africa.[50] This pivotal treaty was ratified on October 17, 1993, in the city of Port-Louis, Mauritius, and subsequently underwent revision in Quebec, Canada, on October 17, 2008. OHADA's establishment signifies a concerted effort to synchronize and standardize business laws in West Africa, aiming to foster a cohesive and consistent legal framework for business transactions and operations within the region.

Presently, the OHADA comprises of a total of seventeen (17) member states. These States include:[51] Benin, Burkina Faso, Cameroon, the Central African Republic, Côte d'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo (DRC), Senegal, Chad, and Togo.

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[48] Jones, A., "Recent Ratifications of the New York Convention in Africa," African International Law Journal, volume 42, no. 2, 2021, p. 73.

[49] UN General Assembly Resolution 62/65, "Strengthening the Rule of Law at the National and International Levels," December 2007.

[50] Treaty on the Harmonization of Business Laws in Africa (OHADA) 1993.

[51] Organization for the Harmonization of Business Law in Africa. Available at: https://www.ohada.org/en/

The primary objective of the Treaty establishing the Organization for the Harmonization of Business Laws in Africa (OHADA) is to effectively confront and address the prevailing legal and judicial ambiguities encountered by investors and businesses operating within its member states.[52]

The Treaty establishes the Uniform Act and highlights that once a Uniform Act is operationalized, it automatically takes precedence over any inconsistent provision in the domestic laws of a member state, regardless of whether that domestic provision was enacted prior to or after the operationalization of the Uniform Act. Notably, both the Treaty and the Uniform Act possess a supranational quality, signifying a partial relinquishment of sovereignty by each contracting state party within the OHADA framework.

In line with the provisions of Article 9 of the Treaty establishing the OHADA, the Uniform Act on Arbitration Law ("the UAA") came into force n on June 11, 1999. Subsequently, on November 23, 2017, a revised version of the Uniform Act on Arbitration was adopted in Conakry, Guinea.[53] This revised Act introduced amendments and modifications to the previous version, reflecting the evolving needs and developments in the field of arbitration within the OHADA member states. The new Uniform Act on Arbitration serves as a legal framework that promotes a harmonized approach to arbitration practices across OHADA member states.

To expedite the resolution of commercial disputes subject to arbitration within its member states, the Treaty establishing the OHADA establishes the Common Court of Justice and Arbitration ("the CCJA"). The Council of Ministers, during their meeting held in N'Djamena, Chad on April 18, 1996, endorsed guiding texts pertaining to the procedures governing the operations of the CCJA. These include:

(a) ***The Rules of Procedure of the Common Court of Justice and Arbitration (CCJA)[54]:*** This set of regulations delineates the procedural framework presiding over the functions of the CCJA, outlining the processes and steps to be followed in the resolution of commercial arbitration disputes.

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[52] Ibid

[53] Uniform Act on Arbitration Law 1999; and the Uniform Act on Arbitration 2017.

[54] Rules of Procedure of the Common Court of Justice and Arbitration (CCJA) 1996.

(b) ***The statutes of the CCJA:*** The statutes lay out the structural and organizational aspects of the Common Court of Justice and Arbitration, defining its composition, powers, and functions within the OHADA framework.

(c) ***The Rules of Procedure for Arbitration:*** These rules offer a comprehensive guide for the conduct of arbitration proceedings by the CCJA, including rules on the choice of arbitrators, submission of evidence, hearings, and the declaration of awards.

iii. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention)

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, commonly referred to as "the ICSID Convention",[55] was developed by the Executive Directors of the International Bank for Reconstruction and Development, widely referred to as "the World Bank". This process took place in March 1965, whereafter the Executive Directors presented the Convention, along with a comprehensive report, to the States which had subscribed to being members of the World Bank. The purpose of this presentation was to invite these member governments to assess the Convention and contemplate signing and ratifying it, as a means of establishing a unified framework for settling investment disputes between states and the nationals of other states.

The ICSID Convention was operationalized and took effect on October 14, 1966. As of July 19, 2022, a total of 45 out of the 54 African states had ratified and signed the Convention. These countries include: Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cabo Verde, the Central African Republic, Chad, Comoros, Congo, Djibouti, Egypt, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Seychelles, Sierra Leone, Somalia, Sudan, South Sudan, Swaziland, Togo, Tunisia, Tanzania, Uganda, Zimbabwe, and Zambia.[56]The wide ratification and adoption of the ICSID Convention by African nations underlines its significance as a framework for addressing investment-related disputes between states and foreign investors in Africa.

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[55] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1966.
[56] ICSID Convention Ratifications and Signatories, available at: https://icsid.worldbank.org/en/Pages/about/Convention-Status.aspx

Angola, Ethiopia, and Guinea Bissau also signed the ICSID Convention with Angola signing on July 14, 2022, Ethiopia on September 21, 1965, and Guinea Bissau on September 4, 1991. However, these countries are yet to ratify and implement the Convention.[57]

The ICSID Convention provides for the establishment of the International Centre for Settlement of Investment Disputes ("the ICSID Centre"). The Convention mandates the ICSID Centre to provide resources and adequate amenities for the conciliation and arbitration of investment-related disputes that arise between Contracting States and parties who are nationals of other Contracting States.[58] To support the implementation of the Convention, Article 6(1)(a)-(c)[59] of the Convention provides for the enactment of the ICSID Regulations and Rules to serve as practical guidelines for the conduct of investment disputes, and which Rules have been ratified by the Administrative Council of the ICSID Centre.

Articles 12 to 16 of the ICSID Convention establish the framework for the composition of the Panel of Arbitrators. Each Member State that is a party to the Convention is granted the privilege to nominate a maximum of four individuals who are qualified to serve on the Panel of Arbitrators. Furthermore, the Chairman of the Administrative Council of the ICSID is authorized to appoint up to ten individuals to each Panel. These designations and appointments are open to individuals of any nationality and are valid for a term that spans a period of six years, with the possibility of renewal.[60] This mechanism ensures the creation of a pool of diverse and experienced arbitrators to engage in the resolution of investment disputes within the ICSID framework.

In conclusion, the ICSID holds paramount significance in the realm of international arbitration, serving as a cornerstone for the effective resolution of investment disputes. In Africa, where challenges such as political interference and procedural delays persist, the ICSID offers an independent alternative, bolstering the continent's attractiveness to foreign investors and aiding in the development of its economic landscape.

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[57] Ibid
[58] ICSID Convention, Article 1.
[59] ICSID Convention, Article 6(1)(a)-(c).
[60] ICSID Convention, Articles 12-16.

b.) Institutional Frameworks for International Arbitration in Africa

Africa has experienced significant economic growth over the past decade, establishing itself as a prominent centre for various industries such as mining, manufacturing, banking, and telecommunications.[61] This growth has been driven by both African enterprises and international businesses operating in the region. As a result, there has been a notable increase in international commerce, leading to a corresponding rise in international arbitration. This trend has captured the attention of arbitrators and practitioners, who are now taking a renewed interest in Africa as an arbitration destination.

When selecting arbitration as a commercial dispute resolution mechanism within Africa, parties have the onus of choosing from a variety of reputable and well-stablished regional arbitration centers. These institutions cater to different regions of the continent, providing a diverse array of options to suit varying needs. In the northern sphere, the Cairo Arbitration Center (CIRICA) is the most renowned choice, offering its services to parties in that region. In the southern part of Africa, the Arbitration Foundation of Southern Africa (AFSA) commands recognition, providing a robust platform for arbitration proceedings. Notably, the emergence of the London Court of International Arbitration in Mauritius (LCIA-MIAC) has positioned it as a leading arbitration center in the eastern African region.

In the Western and Central African regions which are predominantly composed of French-speaking nations, a key arbitral institution takes center stage: the Common Court of Justice and Arbitration (CCJA) whose headquarters are located in Abidjan, Côte d'Ivoire. Functioning under the framework of the Organization for the Harmonization of Business Law in Africa (OHADA), the CCJA has solidified its position as a key player in the arbitration landscape. Its establishment underscores the commitment of the OHADA to provide a robust platform for resolving commercial disputes in the region, further enhancing the accessibility and efficacy of arbitration in Western and Central Africa.

[61] Benoit Le Bars (Lazareff Le Bars), "Arbitrating in West and Central Africa: An Introduction to OHADA." February 21, 2013. Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2013/02/21/arbitrating-in-west-and-central-africa-an-introduction-to-ohada/

These centers collectively reflect the growing emphasis on the availability of effective and reputable arbitration seats within Africa, providing parties with well-established venues for impartial and efficient resolution of disputes.

Below is a comprehensive analysis and discussion on the major arbitral centres that have amassed wide popularity for their expertise in the determination of international commercial arbitration disputes arising in Africa:

i. The Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration (NCIA) is established under the provisions of Nairobi Centre for International Arbitration Act,[62] which delineates the organizational framework under which the Center operates. The Act outlines the composition of the Centre's governance, establishing a Board of Directors as stipulated in section 6 of the Act. Moreover, section 9 of the Act[63] confers upon the Board of Directors the authority to appoint a Registrar, who assumes the pivotal role of overseeing the Centre's daily operations and concurrently serving as the secretary to the Board.

Section 5[64] of the Act delineates the core functions of the Nairobi Centre for International Arbitration (NCIA). These functions encompass the promotion, facilitation, and encouragement of international commercial arbitration that is in alignment with the stipulations of the Act. The Act further mandates the NCIA to oversee the administration of both domestic and international arbitrations, which oversight authority extends to other alternative dispute resolution mechanisms such as conciliation and mediation. Notably, the Act entrusts the NCIA with the task of formulating regulations that oversee the conduct of conciliation and mediation proceedings.

Section 21[65] of the Act establishes an Arbitral Court that is vested with the requisite exclusive original and appellate jurisdiction over arbitration matters brought under its purview. Further, as provided for in Section 10, the Registrar is designated with the role of overseeing the court's operations, including the enforcement of its rulings and awards. Comprising of a President, two Deputy Presidents, the Registrar, and an esteemed panel of fifteen distinguished international

[62] Nairobi Centre for International Arbitration Act No. 26 of 2013.
[63] Nairobi Centre for International Arbitration Act, Section 9.
[64] Nairobi Centre for International Arbitration Act, Section 5.
[65] Nairobi Centre for International Arbitration Act, Section 21.

arbitrators, the Court's composition embodies and underscores the presence of African international arbitrators with immense expertise and diverse perspectives in the realm of international arbitration.

Given its versatility in accommodating both domestic and international arbitration, the Centre's potential if harnessed to the fullest extent, shall pave the way for Kenya to assert itself as a reputable seat globally in the realm of international commercial arbitration. This shall in turn foster the growth of foreign investments and investors' confidence in the African international arbitration landscape.

ii. Kigali International Arbitration Center (KIAC)

The Kigali International Arbitration Centre (KIAC)[66] is a notable and autonomous institution in Rwanda, established to facilitate the resolution of commercial disputes through mediation, adjudication and arbitration. KIAC operates under the Kigali International Arbitration Centre Act,[67] which provides a comprehensive legal framework under which arbitration proceedings are to be conducted.

A salient feature of the KIAC is its inclusive roster of arbitrators,[68] encompassing both domestic and international arbitrators. Operating under the framework of the KIAC Act and Rules, parties participating in arbitration proceedings conducted by the KIAC retain the important principle of parties' autonomy in nominating their preferred arbitrators, provided that these selections align with the established KIAC guidelines. In instances where the appointment of an arbitrator necessitates external input, KIAC predominantly appoints an arbitrator from its own pool of qualified arbitrators to ensure impartial and competent adjudication of disputes.

Notably, prior to the establishment of the Kigali International Arbitration Centre (KIAC), Rwanda lacked a structured avenue for the resolution of international disputes through amicable means, particularly in the realm of international commercial arbitration.[69] The emergence of the KIAC is

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[66] Kigali international Arbitration Centre website, available at http://kiac.org.rw/spip.php?rubrique25 (Accessed on 21st July 2022)
[67] Kigali International Arbitration Centre Act, Law No. 51/2010 of 10th January, 2010.
[68] Kigali international Arbitration Centre website, available at http://kiac.org.rw/spip.php?rubrique25 (Accessed on 21st July 2022)
[69] Kigali International Arbitration Center, Annual Report July 2012-June 2013. P. 4

of significant importance as it holds the capacity to propel the growth of international arbitration not only within Rwanda but also on a broader scale throughout the African continent.

iii. The East African Court of Justice ("the EACJ.")

The establishment of the East African Court of Justice (EACJ) is enshrined in the East African Community (EAC) Treaty,[70]which grants the court limited jurisdiction to hear and determine disputes related to international commercial arbitration. As outlined in Article 32 of the EAC Treaty,[71] the EACJ's authority to engage in arbitration is limited to specific instances.

First and foremost, the EACJ is empowered to hear and determine disputes stemming from arbitration clauses embedded in contracts or agreements that assign such jurisdiction to it, and particularly agreements that the East African Community or any of its affiliated institutions are a party to. Secondly, the Court has the mandate to arbitrate disputes arising out of the EAC Treaty between Partner States, provided that the member States through a mutual agreement, resolve to invoke the EACJ's arbitral jurisdiction. Lastly, the EACJ can employ arbitration to settle disputes arising from arbitration clauses that are embedded in commercial contracts and in which the involved parties have mutually resorted to invoking the Court's jurisdiction.

Following the appointment of the inaugural President of the East African Court of Justice (EACJ), the EACJ Arbitration Rules[72] were published in the official gazette. These rules serve as the governing framework for all arbitrations conducted under the purview of Article 32 of the Treaty, unless otherwise agreed by the parties who have subjected the dispute to arbitration. However, it should be noted that the EACJ's Arbitration Rules do not supersede the domestic arbitration laws of any party's country of origin. In instances where such a discrepancy arises, it should be noted that the prevailing national arbitration laws of the East African Community (EAC) Partner States will take precedence over the provisions of the EACJ Arbitration Rules. This intricate interplay ensures that there is a balance between the need for harmonization of regional legislation and the unfettered enjoyment of sovereignty by the EAC Partner States.

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[70] East African Community Treaty, opened for signature 30 November 1999, 39 ILM 849 (1999) (entered into force 7 July 2000).
[71] East African Community Treaty (EAC) Treaty 1999, Article 32.
[72] The East African Court of Justice Arbitration Rules, 2012.

iv. Common Court of Justice and Arbitration ("the CCJA")

The Common Court of Justice and Arbitration (CCJA), operating under the umbrella of the Organization for the Harmonization of Business Law in Africa (OHADA), operates as a principal institution within the OHADA framework. Established in 1998, the CCJA rendered its first decision in 2001.[73] It functions as the supranational apex court of OHADA, an organization that currently encompasses seventeen countries in West and Central Africa. While its headquarters are situated in Abidjan, the CCJA has the flexibility to hold arbitral sessions within the territories of any of its seventeen Member States.

As an arbitration institution, the CCJA's functions are overseen by the Secretary General, who acts under the supervision and direction of the President of the CCJA Court. The CCJA's conduct of arbitral proceedings is guided by the provisions of the OHADA Treaty[74] and the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA Rules).[75] Initially enacted on 11th March 1999 and enforced on 10th April 1999, the CCJA Rules were notably influenced by the 1998 International Chamber of Commerce (ICC) Rules of Arbitration.[76]

The CCJA Rules come into play when either one of the parties involved in the arbitration has their habitual residence in an OHADA member state or if the contract that is subject to arbitration, is either wholly or partially executed within the territorial boundaries of OHADA member states.

Complementing the CCJA Rules is a separate and distinct alternative arbitration regime within the OHADA system, known as the Uniform Act on Arbitration (UAA)[77] and whose operations are not administered by the CCJA. The UAA governs both national and international ad hoc arbitral proceedings and comes into effect when the chosen seat of arbitration is situated within the territory of an OHADA member state. This dual framework offers flexibility to parties engaged in arbitration within the OHADA region, catering to a variety of circumstances and preferences for dispute resolution.

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[73] Organization for the Harmonization of Business Law in Africa. Available at: https://www.ohada.org/en/

[74] Treaty on the Harmonization of Business Law in Africa (OHADA) signed on October 17, 1993.

[75] Arbitration Rules of the Common Court of Justice and Arbitration (CCJA Rules). Enacted on 11 March 1999 and entered into force on 10 April 1999.

[76] Rules of Arbitration of the International Chamber of Commerce which entered into force as from 1st March 2017.

[77] The OHADA Uniform Arbitration Act, 2017.

v. The Cairo Regional Centre for International Commercial Arbitration (CRCICA)

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was founded in 1979 as an autonomous and non-profit international entity, operating under the umbrella of the Asian African Legal Consultative Organization (AALCO).[78] The impetus for creating regional centers dedicated to international commercial arbitration in both Asia and Africa was set forth during the Doha Session of AALCO in 1978. Subsequently, this initiative culminated into the establishment of CRCICA, marking a significant step toward enhancing dispute resolution mechanisms in the north African region.

Initially, following an amicable agreement between AALCO and the Egyptian Government in 1979, CRCICA was set up to operate under a three-year experimental phase. Through subsequent agreements in 1983, 1986, and 1989, AALCO and the Egyptian Government extended CRCICA's functioning for two additional similar periods, eventually granting it permanent status.[79] In 1987, a Headquarters Agreement[80] was finalized by AALCO and the Egyptian Government, officially recognizing CRCICA's status as an international organization and granting it the necessary privileges and immunities to ensure it functions independently.

Since its establishment, CRCICA has with minor modifications, embraced the Arbitration Rules formulated by the United Nations Commission on International Trade Law (UNCITRAL). These Rules, sanctioned by United Nations General Assembly (UNGA) Resolution No. 31/98 on December 15, 1976, have provided a foundational framework for CRCICA's arbitration proceedings. To keep up with the evolving needs of users and reflect best practices in international institutional arbitration, CRCICA has continuously made amendments to its Arbitration Rules as was witnessed in 1998, 2000, 2002, and 2007.[81]

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[78] This Organization is headquartered in New Delhi, India and was established in 1956 as an outcome of the Bandung Conference, which took place in 1955 in Bandung, Indonesia. It was formerly known as the Asian–African Legal Consultative Committee ("AALCC") until June 2001 when it changed its name to the Asian-African Legal Consultative Organization ("AALCO"). AALCO presently has forty-seven countries as its members, comprising almost all the major States from Asia and Africa.

[79] Ibid

[80] The Headquarters Agreement, 1987.

[81] These amendments became effective as of 1 January 1998,1 October 2000, 21 November 2002 and 1 June 2007, respectively. The version amended in 2007 is available at:
http://www.crcica.org/rules/arbitration/cr_prev_arb_rules_en.pdf

As of the current year, 2023, the CRCICA Arbitration Rules have been crafted primarily based on the 2010 revision of the UNCITRAL Arbitration Rules. While rooted in the UNCITRAL framework, these rules have been tailored to accommodate CRCICA's distinct role as an arbitral institution and an appointing authority.[82]This strategic fusion has ensured that CRCICA's Arbitration Rules not only integrate best practices established by UNCITRAL but also address the unique considerations of the parties and cases that come under CRCICA's purview.

vi. Lagos Regional Centre for International Commercial Arbitration

The establishment of the Regional Centre for International Commercial Arbitration in Lagos, Nigeria, occurred in 1989 under the auspices of the Asian African Legal Consultative Organization (AALCO).

This establishment was formalized through a reciprocal exchange of letters of agreement that were finalized in 1980 between AALCO and the government of Nigeria.[83] The continuous functioning of the center within Nigeria was subsequently formalized through a Treaty that was ratified and adopted on April 26, 1999. This treaty, assuming the form of a Headquarters Agreement, solidified the Center's status and operations in Nigeria while effectively formalizing its role as a key arbitration institution in the region.

To guarantee adherence to international legal principles and standards, the stipulations outlined in the Headquarters Agreement were integrated into the domestic legal framework through the enactment of the Regional Centre for International Commercial Arbitration Act No. 39 of 1999. This Act serves as the legal foundation that substantiates the presence and operation of the center in Nigeria.

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[82] The UNCITRAL Arbitration Rules as revised in 2010 entered into force as from 15 August 2010 and are available at:http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.
The present CRCICA Arbitration Rules entered into force as from 1 March 2011 and are available at: http://www.crcica.org/rules/arbitration/cr_arb_rules_en.pdf.

[83] Lagos Regional Centre for International Commercial Arbitration. Available at: http://www.en.wikimediation.org/index.php?title=Lagos_Regional_Centre_for_International_Commercial_Arbitration&redirect=no

The Lagos Regional Centre for International Commercial Arbitration provides its arbitration facilities upon request, to parties including governments, individuals, or corporate entities, provided that the dispute is of an international nature. This international nature may arise when the parties involved are from different jurisdictions or when the dispute involves international commercial interests. As an autonomous international entity, the center enjoys all the privileges accorded to other international organizations in accordance with international law.

vii. Arbitration Foundation of South Africa (AFSA)

The Arbitration Foundation of South Africa (AFSA) was established in 1996 through collaborative efforts between organized businesses and members of the legal and accounting professions.[84] Its primary objectives were to offer fair and dependable mechanisms for private dispute resolution, develop and cultivate a panel of skilled arbitrators, and establish itself as a prominent player in international arbitration within the region.

A significant development took place on June 1, 2021, with the implementation of the AFSA International Arbitration Rules.[85] These new Rules brought about substantial reforms to the existing AFSA framework, aimed at enhancing the efficiency, oversight, and transparency of arbitration in South Africa. Noteworthy reforms enshrined in the new Rules include the creation of an expedited arbitration procedure under Article 10, the ability to dismiss claims or defenses lacking legal merit or falling outside the tribunal's jurisdiction as provided under Article 12, and the establishment of an AFSA Court responsible for supervising arbitral disputes, supported by a secretariat for administrative purposes as provided under Article 1.[86]

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[84] Arbitration Foundation of Southern Africa. Available at: https://arbitration.co.za/a-brief-history/

[85] Henry Simpson, "New AFSA International Arbitration Rules set new standard for arbitration in Africa." 18th August 2021. Available at: https://www.shlegal.com/insights/new-afsa-international-arbitration-rules-set-new-standard-for-arbitration-in-africa

[86] Ibid

In December 2015, state members to the Forum on China-Africa Cooperation (FOCAC) published an Action Plan, in which they had resolved to establish the China-Africa Joint Arbitration Centre (CAJAC).[87] The purpose of CAJAC was to facilitate and promote cross-border trade and investment growth between China and Africa by providing an effective mechanism for resolution of disputes that may arise between Chinese and African entities, whether they are natural persons, legal entities, or public or private entities.[88]

AFSA, in collaboration with the Shanghai International Arbitration Centre (SHIAC), was entrusted with the responsibility of establishing CAJAC, with its initial operations being based in Johannesburg and Shanghai. CAJAC Johannesburg was inaugurated in 2015 and since then, the CAJAC partnership has expanded to include the Beijing International Arbitration Centre (BIAC), the Shenzhen International Court of Arbitration (SCIA), the Nairobi Centre for International Arbitration (NCIA), and OHADA, the overarching dispute resolution authority in West and Central Africa.[89]

[87]Forum on China-Africa Cooperation (FOCAC). (2015). Johannesburg Summit Declaration. Available at: http://www.focac.org/eng/zxxx/t1329242.htm
[88] Arbitration Foundation of Southern Africa. Available at: https://arbitration.co.za/a-brief-history/
[89] Ibid

2.3 The Obstacles Encountered in the Development of International Commercial Arbitration Practice in Africa

The practice of International Arbitration in Africa is confronted by several significant challenges, which include:

i. Lack of Comprehensive Legislative and Institutional Frameworks on International Commercial Arbitration in Africa

A significant impediment to the practice of International Commercial Arbitration in Africa is the deficiency in having tailored legal and institutional frameworks to oversee arbitral proceedings.[90]Many African nations lack comprehensive legal regulations and the necessary infrastructure required to efficiently organize and execute their international commercial arbitration practices. This deficiency has limited the opportunities necessary for African international arbitrators to demonstrate their expertise in the field. Although progress has been made following the adoption of the UNCITRAL Model Law by several African countries, the capacity of existing institutions to adequately support alternative dispute resolution (ADR) mechanisms remains a challenge. This insufficiency hampers the growth of international arbitration in the continent and inhibits the realization of its full potential in resolving cross-border commercial disputes.[91]

ii. Underrepresentation of African International Arbitrators in Arbitral Disputes in Africa

There is a tendency among foreign parties involved in disputes related to their business in Africa to appoint international arbitrators from their own countries of origin, all while overlooking the availability of qualified individuals within Africa. This trend has perpetuated the misconception that Africa lacks proficient and well-qualified arbitrators.[92] Consequently, this inclination towards foreign arbitrators has restricted the consideration and retainment of African Arbitration experts in international arbitration proceedings, thereby hindering the growth of international arbitration in Africa.

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[90] Yamashita, N. (2016). International commercial arbitration in sub-Saharan Africa. Kluwer Law International.
[91] African Development Bank (AfDB). (2020). Challenges and Opportunities of Arbitration in Africa. Retrieved from https://www.afdb.org/sites/default/files/documents/publications/challenges-opportunities-arbitration-africa54604.pdf
[92] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.

This challenge is further exacerbated by the prevalent preference of African governments in appointing foreign arbitrators to represent them in international arbitration disputes. This practice has also inadvertently contributed to the marginalization of African arbitrators in the realm of commercial and investment arbitration cases.

iii. Insufficient promotion of Africa as a credible and reputable center for International Commercial Arbitration

Africa has been depicted to the outside world as being less adept in its ability to effectively manage international commercial arbitration, thus reinforcing the misconception that Africa lacks proficient arbitrators.[93] Furthermore, there has been a lack of concerted efforts from within Africa to challenge and rectify the misconception surrounding the availability of qualified international arbitrators in the region.

This lack of marketing has reinforced the misconception that Africa lacks qualified international commercial arbitrators, deterring potential parties from considering African centers as seats for dispute resolution.[94]

iv. Lack of clarity and precision when drafting Arbitration Clauses leading to Judicial Interference

Emphasis needs to be placed on the need for clarity and precision when drafting arbitration clauses to avoid misinterpretation and unnecessary court interference.[95] Uncertainty in the drafting of arbitration clauses can lead to the need for court intervention, which may discourage foreign parties from choosing African arbitration centers. By minimizing court intervention and upholding the principle of limited judicial interference, disputants can have confidence that the outcomes of international commercial arbitrations held in African countries will be upheld.[96]

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[93] Yamashita, N. (2016). International commercial arbitration in sub-Saharan Africa. Kluwer Law International.
[94] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.
[95] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.
[96] Korir, N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.

v. Unpredictability of costs associated with the lack of well-defined Remuneration guidelines for African Arbitrators

The unpredictability associated with arbitration costs is a prevailing issue that demands attention. In the contemporary landscape, arbitration has transformed into a service-driven industry, exhibiting substantial profitability. Various stakeholders, including arbitral institutions, arbitrators, legal practitioners and expert witnesses, bill heftily for services rendered, however, there seems to be a gap on the guidelines within which these stakeholders may impose their fees.[97]

This lack of an established remuneration scale often introduces an element of uncertainty and unpredictability, leaving foreign parties unsure about the potential costs associated with engaging African international arbitrators. The absence of standardized guidelines and lack of a uniform framework for determining remuneration places the onus on individual arbitral institutions, leading to varying practices and potentially perplexing cost considerations for involved parties.[98]This situation may in turn lead to hesitance from foreign parties, as they grapple with unclear expectations regarding the financial aspects of arbitration proceedings involving African arbitrators.

vi. Bias against Africa

Africa has been disproportionately affected by prevailing stereotypes and instances of racism, subjecting it to a falsified misconception that Africa is plagued by corruption and lack of civilization. Furthermore, the bias against Africa as a continent has impacted the selection of venues for international arbitration.

Disputants often overlook African cities as potential arbitration seats, even when given the choice.[99] This bias reinforces negative stereotypes and hinders the growth and recognition of African arbitration centers.

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[97] Lord Mustill, Arbitration: History and Background (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 10.

[98] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.

[99] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.

vii. Political Instability and Uncertainty of African countries

Political instability and uncertainty in African countries also pose challenges for international commercial arbitration. Many African countries have politically charged environments, leading disputants, especially those involved in large transnational disputes, to prefer politically stable countries as seats of arbitration so as to ensure the efficient and reliable administration of proceedings.

viii. Perception of Corruption

The perception of corruption in Africa hampers the expansion of international commercial arbitration.[100] Africa's governance systems are often viewed negatively, creating skepticism about the possibility of achieving justice in African arbitration proceedings.

Further, there are concerns that governments may interfere with private commercial arbitration matters, particularly when their own interests are at stake. These perceptions can undermine confidence in African arbitration and deter parties from opting for arbitration in Africa.[101]

[100] Korir, N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.

[101] N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.

2.4 Way Forward on how to Improve International Commercial Arbitration Practice in Africa

To mitigate the impediments encountered during the practice of international commercial arbitration in Africa, various measures can be implemented by key stakeholders including:

Firstly, the establishment of additional regional centers specialized in nurturing experienced international commercial arbitrators is imperative.[102] These centers would help increase the number of qualified arbitrators in Africa and mitigate the challenges faced by countries that have not adopted international arbitration treaties or the UNCITRAL Model Law, as the training centers can bridge the knowledge gap.

Further, collaboration between existing African institutions and international arbitration institutions would serve as an effective marketing tool for enhancing the reputation of African arbitral institutions.[103] By partnering with established institutions, African centers can gain exposure and demonstrate their competence in international arbitration.

Secondly, channeling investments into essential infrastructure, particularly information and communication technology (ICT), alongside the implementation of comprehensive training programs, holds significant importance in capacity building and bolstering the growth of international commercial arbitration in Africa. A specific focus should be directed towards training programs designed to ensure a comprehensive grasp of the provisions encapsulated in the UNCITRAL Model Law. This concerted effort will enhance the advancement of international best practices in the realm of international commercial arbitration within Africa.

Initiatives akin to the arbitration training programs administered by organizations such as the Kenyan Branch of the Chartered Institute of Arbitrators exemplify the affirmative outcomes of nurturing arbitrator competence throughout Africa. This successful model can be implemented by other African countries, ensuring that arbitrators are well-versed with international best practices.[104]

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[102]Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.
[103]Korir, N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.
[104] Dr. Kariuki Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa." Paper Presented at the Arbitration Institutions in Africa Conference, May 2015.

Thirdly, government support holds the potential to significantly foster the advancement and recognition of arbitral institutions. While government intervention should be approached cautiously to maintain independence, arbitral institutions can benefit from government assistance in terms of financial support and marketing initiatives.[105] This government support can be beneficial as long as it does not compromise the independence of arbitral institutions, and further, it can help these institutions establish themselves and gain credibility.

Fourthly, judicial courts also contribute in fostering the expansion of arbitration practice in Africa, by facilitating the recognition of arbitral awards and curtailing undue judicial interference in the arbitration process.[106] By creating a supportive environment and demonstrating a commitment to upholding arbitral decisions, courts can inspire confidence in potential disputants and contribute to the growth of arbitration in the region.[107]

Lastly, by effectively applying international commercial arbitration principles, Africa can attract more investors, instil confidence in investors, encourage business activities, and revitalize the arbitration practice in the continent.[108] Drawing upon the UNCITRAL Model Law when developing legal frameworks, African countries can establish comprehensive legal frameworks that provide a solid basis for conducting successful international commercial arbitration.

By adopting and implementing these measures, Africa can elevate its international commercial arbitration practice, drawing greater interest from investors and instilling assurance in its ability to effectively handle the adjudication of global commercial arbitration disputes. This shall further be exacerbated by the adoption of the UNCITRAL Model Law, which embodies international best practices in the international arbitration world.

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[105] Korir, N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.

[106] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.

[107] Korir, N. K. (2019). Challenges to the practice of international commercial arbitration in Africa: A comparative perspective. Journal of African Law, 63(1), 103-127.

[108] Gwaka, T. (2020). The under-representation of African arbitrators in international commercial arbitration: A continent of unfulfilled potential. Journal of International Arbitration, 37(4), 417-439.

CHAPTER 3

IN-DEPTH ANALYSIS ON THE "UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION"

3.0 INTRODUCTION

The UNCITRAL Model Law on International Commercial Arbitration is widely acknowledged as a paramount legal instrument in the world of global commercial arbitration, bearing immense significance in bridging disparate legal cultures and shaping the landscape of dispute resolution. Its emergence was preceded by extensive consultations that involved states, businesses, international arbitration communities, and regional organizations. This collaborative effort culminated into the formulation of a draft which gained official approval through a resolution passed by the UNCITRAL. Subsequently, the Model Law received further affirmation by means of a resolution adopted in 1985 by the United Nations General Assembly ("the UNGA").[109]

The principle objective of the UNCITRAL Model Law lies in its role to serve as a blueprint for national legislatures in their integration and incorporation of the Model Law's provisions into national legislations. Its overarching goal is to promote uniformity in the facilitation of international arbitration proceedings, thereby transcending the complexities faced by parties from varying jurisdictions. With a standardized procedural framework in place, the Model Law establishes a foreseeable environment for the conduct of international arbitrations and which accommodate the varying legal cultures of the disputants in an international arbitration conflict.

[109] Ibid

The widespread impact of the UNCITRAL Model Law is evident in its adoption by numerous jurisdictions worldwide.[110] So far, the Model Law has been adopted by 117 countries and states globally. Its adoption reflects a paradigm shift towards aligning domestic arbitration legislation with international best practices. This global recognition underscores the Model Law's efficacy in addressing the challenges that are inherent during the practice of international commercial arbitration.

In the African context, the adoption of the UNCITRAL Model Law presents a promising trajectory for the growth of international commercial arbitration. African countries stand to benefit from its comprehensive provisions, particularly as they strive to attract foreign investment and establish themselves as credible and reputable arbitral seats. Through adoption of the Model Law and enactment of national legislation aligned with the Model Law's provisions, African states stand to enjoy a uniform and comprehensive framework within which to conduct their arbitration proceedings, and which can bolster their credibility on the global landscape.

This chapter of my research delves into a comprehensive examination of the UNCITRAL Model Law on International Commercial Arbitration, with a specific focus on highlighting its historical development and how it may act as a catalyst for the development and growth of international arbitration practice in Africa. The chapter encompasses a detailed exploration of the Model Law's historical background, delving into the foundational principles that underpin its development.

Furthermore, the chapter delves into an in-depth analysis of the salient features incorporated in the Model Law. Finally, the chapter concludes by providing compelling reasons why African states should adopt the Model Law as a means of modernizing their international arbitration regimes thereby fostering economic growth and development.

[110] Ibid

3.1 History of the UNCITRAL Model Law (Model Law) on International Commercial Arbitration

The UNCITRAL Model Law's origin can be traced back to the growing need for a uniform legislative framework that harmonized and oversaw international commercial arbitration practices across jurisdictions with varying legal systems. This imperative arose from the increasing complexities of transnational trade and investment disputes, where discrepancies in arbitration procedures and enforcement posed significant hurdles in the resolution of transnational disputes.

The UNCITRAL Model Law was formally ratified by the UNCITRAL upon the conclusion of its 18th Annual Conference that was held on the 21st of June 1985. Acknowledging the inherent advantages associated with the harmonization and standardization of arbitral procedures to cater for the unique demands of cross-border disputes, the UNGA on 11th December 1985 endorsed the Model Law through Resolution No. 40/72.[111] It urged that all member States to the United Nations deliberate and consider the adoption and incorporation of the Model Law's provisions into their national laws. This endorsement by the UNGA underscored the United Nations intentions to achieve uniformity in the conduct of international arbitration disputes that involved parties from jurisdictions with diverse legal systems and cultures.

In 2000, the UNCITRAL embarked on a comprehensive revision of the Model Law, appointing a dedicated Working Group to spearhead this endeavor. This revision initiative was preceded by a memorandum issued by the UN Secretariat on April 6, 1999, delineating prospective areas for further development in the realm of international commercial arbitration. Notable topics that were earmarked for prioritized consideration included conciliation, temporary protective measures, and the composition/drafting of arbitration agreements.[112]Subsequently, on the 7th of July 2006, the Model Law was further amended to incorporate a list of exhaustive interim protection measures.

[111] United Nations General Assembly, Resolution 40/72 of 11th December 1985.
[112] Ibid

The genesis of the Model Law lies in the aspiration to forge a common legislative framework for resolving international disputes that will be embraced by States with divergent legal, social and economic backgrounds.[113] At its core, the Model Law sought to redress two distinct concerns that the New York Convention had not addressed.[114] Firstly, it sought to rectify the insufficiency of domestic legislations in addressing numerous challenges arising during the conduct of international arbitration disputes. Secondly, it aimed to bridge the gaps arising from significant disparities in the provisions of diverse national legislations with regards to a similar issue.

The emergence of the aforementioned challenges can be attributed to several factors within the legal landscape. A prominent factor was the incapacity of domestic legal frameworks to offer comprehensive provisions on the various facets of the arbitration process. Despite the provisions of the New York Convention mandating its member states to enact regulations governing the recognition and enforcement of arbitration agreements and awards, the discretion as to how the conduct of the entire arbitral process would be undertaken still remained a prerogative that would be undertaken by the national legislatures of the individual member states. Consequently, this scenario led to significant uncertainty for parties who chose international arbitration as their preferred avenue for resolving their cross-border disputes.

International commercial entities seeking to invest and engage in trade within unfamiliar foreign territories highly value the ability to forecast and assess the risks associated with their investments and hence, they prioritize a process that ensures the enforcement of their agreements in a consistent and foreseeable manner. The Model Law stands out as a promising cornerstone for achieving this vision. It impeccably encompasses every facet of the arbitration journey, and embodies a consensus among nations globally on the essential principles and substantial issues intrinsic to the practice of international arbitration. This consensus accelerated its widespread recognition and acknowledgment by states across the globe, irrespective of their varying geographical locations and legal traditions.

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[113] Resolution adopted by the UN General Assembly on 11th December 1985 at its 112th plenary meeting (Resolution 40/72 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law'

[114] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration (2008).

3.2 FUNDAMENTAL PRINCIPLES UNDERSCORING THE PROVISIONS OF THE MODEL LAW

The structure of the UNCITRAL Model Law mirrors a meticulous delineation of provisions designed to establish a coherent framework for international commercial arbitration practice. The formulation of the UNCITRAL Model Law on International Commercial Arbitration was underpinned by a set of fundamental arbitration principles, which are delineated hereinbelow as follows:

a.) Party Autonomy

The principle of party autonomy played a significant role in shaping the provisions of the Model Law, as acknowledged by UNCITRAL.[115] The Secretariat further reiterated that *"Probably the most important principle on which the model law should be based is the freedom of the parties to tailor the 'rules of the game' to their specific needs."*[116]

As endorsed by the UNCITRAL Commission, the Model Law explicitly allows parties to exercise their autonomy in various aspects. They can determine the international nature of the subject matter that can be arbitrated,[117] opt for institutionalized arbitration and associated rules,[118] establish rules regarding the receipt of written communications,[119] decide on the number of arbitrators,[120] define the procedure for appointing arbitrators,[121] establish a mechanism for challenging arbitrators,[122] determine the conduct of the arbitral proceedings,[123] select the language to be used,[124] define the manner and time frames for presenting claims,[125] opt for oral hearings,[126] and select the governing law for the proceedings.[127]

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[115] Herrmann, The UNCITRAL Model Law on International Commercial Arbitration-Its Salient Features and Prospects, (paper delivered at a symposium on International Commercial Arbitration, Chateau Frontenac, Quebec, Canada, Oct. 14-16, 1985, p. 5).
[116] Ibid
[117] Article 1(3)(c) of the 1985 UNCITRAL Model Law on International Commercial Arbitration
[118] Article 2(d) of the 1985 UNCITRAL Model Law on International Commercial Arbitration
[119] Article 3(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration
[120] Article 10(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration
[121] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 11(2).
[122] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 13(1)
[123] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 21
[124] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 22(1)
[125] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 23(1)
[126] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 24(1)
[127] United Nations Commission on International Trade Law (UNCITRAL) - https://uncitral.un.org/

b.) Consistency with "the New York Convention" and "the UNCITRAL Rules"

The drafting of the Model Law took into careful consideration the need for alignment with existing legislation concerning the practice of international commercial arbitration. To this end, the Model Law was designed with the aim of aligning its provisions with the policies and principles underlying both the New York Convention and various institutional rules, including the UNCITRAL Arbitration Rules. Given the successful track record of the New York Convention in terms of the recognition and enforcement of awards among its signatories, this then motivated the desire to maintain its standards and promote widespread acceptance.

Furthermore, there was a shared consensus that the fundamental principles of the UNCITRAL Arbitration Rules, known for their impartiality and comprehensiveness, should be preserved to the maximum extent feasible.

c.) Extensive elaboration on the meaning of the terms "International" and "Commercial"

Right from the outset, it was determined that the scope of the Model Law would be limited to international commercial arbitration.[128] Recognizing the unique requirements of resolving transnational disputes and acknowledging the diverse interpretations of the term "commercial" among different states, it was deemed crucial to adopt expansive definitions. This approach aimed to encompass the broadest array of international commercial transactions, thereby enhancing certainty in the dispute resolution mechanism applicable to such transactions.[129]

Accordingly, Article 1(3)[130] of the Model Law stipulates that an arbitration is considered "international" if any of the following conditions are met: (a) the parties have their places of business in different states, (b) the arbitration or the principal place of contract performance is in a state other than that of the parties' places of business, or (c) the parties explicitly agree that the subject matter of the arbitration agreement relates to more than one country.

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[128] Possible Features of a Model Law on International Commercial Arbitration: Report of the Secretary-General, U.N. Doc. A/CN9/207 (1981)

[129] Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/40/17 (1985)

[130] UNCITRAL Model Law on International Commercial Arbitration 1985, Article 1(3).

The term "commercial," as explained in a footnote to Article 1(1)[131] of the Model Law, is to be broadly interpreted to encompass all matters arising from commercial relationships, whether they are contractual or not.

This broad interpretation includes, but is not limited to, various transactions such as: trade deals involving the supply or exchange of goods or services, distribution agreements, commercial representation or agency arrangements, factoring, leasing, construction contracts, consulting and engineering services, licensing agreements, investment arrangements, financing and banking transactions, insurance, exploitation agreements or concessions, joint ventures, and other forms of industrial or business cooperation. Furthermore, the term also encompasses commercial relationships created through the carriage of goods or passengers by air, sea, rail, or road.[132]

d.) Limited Court Intervention

An essential principle embedded in the Model Law is the notion of limited court intervention in the arbitration process, with a restricted right of appeal from court decisions sought during the course of the arbitral proceedings. The goal throughout the development of the Model Law was to strike an appropriate equilibrium in the relationship between arbitration and the courts. As manifested in the final version of the Model Law, the general role of the courts is limited to providing support and assistance during the arbitral process, rather than interfere with it.

Article 5[133] of the Model Law explicitly restricts court intervention and confines its assistance to specific instances that are delineated by the law. These instances include granting provisional remedies, aiding the arbitral tribunal upon request in the gathering of evidence, providing recourse against an award if the prescribed grounds are met, and enforcing or refusing enforcement of an award based on substantiated grounds.

The approach adopted by the Model Law strikes a balance by allowing limited and timely access to the courts during the arbitral proceedings while ensuring the continuity of the arbitration process. This approach seeks to address the potential for delays caused by obstructive tactics of uncooperative parties, while also avoiding the futility and high costs associated with arbitral proceedings where the award may ultimately be set aside by the court.

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[131] UNCITRAL Model Law on International Commercial Arbitration 1985, Article 1(1).
[132] United Nations Commission on International Trade Law (UNCITRAL) - https://uncitral.un.org/
[133] UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 5.

3.3 SALIENT FEATURES OF THE MODEL LAW

The Model Law, consisting of 8 chapters and 36 articles, is commonly adopted by member States either through modifications or as a guiding framework to develop their domestic legislation. The UNCITRAL's approach in creating the Model Law was distinct and innovative.

Below is a discussion on the salient features of the Model Law:

a.) Special procedural framework for the practice of International Commercial Arbitration

One of the notable features of the Model Law is its provision of a specialized procedural regime for international commercial arbitration. This unique legal framework addresses the deficiencies and discrepancies found in national laws, while ensuring that it does not undermine any existing treaties in the State that adopts the Model Law.

Although the need for uniformity is primarily relevant to international cases, a State may also recognize the necessity to update and enhance its arbitration legislation for non-international cases. In such instances, the State can achieve this objective by enacting contemporary legislation based on the Model Law.

i. Substantive and territorial scope of the Model Law's application

The Model Law's scope encompasses both substantive and territorial aspects. To determine whether an arbitration is international, the Model Law considers the following criteria:[134] (1) if the parties to the arbitration agreement have their places of business in different States at the time of concluding the agreement, (2) if the place of arbitration, place of contract performance, or the subject matter of the dispute is in a State other than where the parties have their places of business, or (3) if the parties have expressly agreed that that the subject matter of the arbitration agreement relates to more than one country.

The term "commercial" is not specifically defined in the Model Law. Article 1 of the Model Law calls for a broad interpretation to encompass matters arising from all types of commercial relationships, regardless of whether they are contractual or not. A footnote to Article 1[135] provides an illustrative list of relationships that are considered commercial, emphasizing the expansive

[134] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 1(3).
[135] Article 1 of the 1985 UNCITRAL Model Law on International Commercial Arbitration

nature of the interpretation and indicating that the interpretation of the term is not based on individual national laws' definitions of "commercial."

In terms of territorial scope, the Model Law applies within a specific State only if the place of arbitration is situated within the territory of that State, as stated in Article 1(2).[136] However, there is an important exception to this rule. Articles 8(1) and 9, which address the recognition of arbitration agreements, as well as articles 35 and 36 pertaining to the recognition and enforcement of arbitral awards, have a global scope. This means that they are applicable regardless of whether the place of arbitration is in the enacting State or another State.

The adoption of strict territorial criteria in most provisions of the Model Law is aimed at ensuring certainty. The majority of national laws rely exclusively on the place of arbitration as the determining factor. Although some national laws permit parties to select the procedural law of a State different from the place of arbitration, practical experience indicates that parties rarely exercise this option.

ii. Limitation of Court interventions and supervision

There is a growing trend observed in recent amendments to arbitration laws, favoring the limitation of court involvement in international commercial arbitration. This shift is justified in view of the fact that parties to an arbitration agreement conscientiously choose not to invoke the jurisdiction of the court. This is particularly witnessed in commercial cases, where parties prioritize the efficiency and finality offered by arbitration over prolonged court battles.

The Model Law adheres to this trend and restricts court involvement to specific situations. These instances include the appointment, challenge, and termination of arbitrators' mandates,[137] determining the jurisdiction of the arbitral tribunal,[138] court assistance in the process of taking evidence,[139] recognition of the arbitration agreement (including its compatibility with court-ordered interim measures of protection),[140] recognition and enforcement of arbitral awards,[141] and

[136] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 1(2).
[137] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Articles 11, 13 and 14.
[138] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 16.
[139] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 27.
[140] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Articles 8 and 9.
[141] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Articles 35 and 36.

the setting aside of arbitral awards.[142] These functions are designated to a specialized court or, in the case of articles 11, 13, and 14, to another authority such as an arbitral institution, in order to centralize, specialize, and expedite the arbitration process.

b.) The Arbitration Agreement

Chapter II of the Model Law focuses on the arbitration agreement and its recognition by courts, drawing heavily from Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[143] while providing additional clarifications. The key provisions regarding the arbitration agreement can be analyzed as follows:

i. Definition and form of the arbitration agreement

Article 7(1) of the Model Law acknowledges the validity and binding nature of a commitment made by parties to resolve an existing or future dispute through arbitration. Article 7(2) further proceeds to align itself with the requirement of the 1958 New York Convention which states that the arbitration agreement must be reduced to writing.

ii. The relationship between the arbitration agreement and the courts

Articles 8 and 9 address two crucial aspects concerning the relationship between the arbitration agreement and the involvement of courts in arbitration proceedings. Modeled after Article II(3) of the 1958 New York Convention, Article 8(1) of the Model Law obliges any court approached with a claim related to the same subject matter to refer the parties to arbitration, unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed.

This referral is contingent upon a party's request, which is to be made no later than when they are submitting their first statement on the substance of the dispute. Article 9 upholds the principle that any interim measures of protection granted by courts under their procedural law must be compatible with the arbitration agreement.

[142] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 34.
[143] Ibid

c.) Composition of the Arbitral Tribunal

Chapter III of the Model Law delves into various comprehensive provisions concerning the appointment, challenge, termination of mandate, and replacement of an arbitrator. This chapter exemplifies the Model Law's approach in addressing challenges stemming from inadequate or fragmented laws or rules. This approach primarily entails two elements:

Firstly, the Model Law recognizes the parties' freedom to determine the procedural framework to be relied on by referring to an existing set of arbitration rules or through an ad hoc agreement, provided that the fundamental requirements of fairness and justice are upheld. This approach grants the parties autonomy in shaping the arbitration process; and

Secondly, in instances where the parties have not exercised their freedom to establish procedural rules or where specific issues have not been addressed, the Model Law provides a supplementary set of rules to ensure the commencement and smooth progress of the arbitration proceedings till the resolution of the dispute.

In scenarios where difficulties arise during the appointment, challenge, or termination of an arbitrator's mandate, either as per the agreed procedure by the parties or based on the supplementary rules of the Model Law, Articles 11, 13, and 14 outline the mechanism for seeking assistance from courts or other relevant authorities.

d.) Jurisdiction of arbitral tribunal

i. Competence to rule on own jurisdiction

Article 16(1) of the Model Law incorporates two essential principles of arbitration: "Kompetenz-Kompetenz" and the separability or autonomy of the arbitration clause. This provision grants the arbitral tribunal the authority to determine its own jurisdiction, including addressing any objections regarding the existence or validity of the arbitration agreement. For this purpose, the arbitration clause is treated as an independent agreement, separate from the other terms of the contract. Consequently, a finding by the arbitral tribunal that a contract is null and void does not invalidate the arbitration clause.

The competence of the arbitral tribunal to decide on its jurisdiction, which pertains to the very basis of its authority and mandate, is subject to court supervision. In situations where the arbitral tribunal renders a preliminary ruling affirming its jurisdiction, Article 16(3) allows for immediate court oversight to avoid unnecessary costs and delays.

However, there exist three mandatory procedural safeguards that parties must comply with: 1) there is a time limit of 30 days to seek court intervention, 2) the court's decision is final and not appealable, and 3) the arbitral tribunal retains the discretion to continue with the arbitral proceedings and render an award, pending the court's decision. If the arbitral tribunal combines its decision on jurisdiction with a final award on the merits, the question of jurisdiction can be subjected to judicial review, and the proceedings may be set aside as provided under Article 34 of the Model Law.

ii. Power to order interim measures

Unlike certain national laws, the Model Law grants the arbitral tribunal, unless otherwise agreed by the parties, the authority to issue interim measures of protection concerning the subject matter of the dispute upon request by a party.[144] However, the article does not address the enforcement of such measures, leaving it to the discretion of each State that adopts the Model Law, the freedom to provide court assistance in this regard.

e.) Conduct of arbitral proceedings

Chapter V of the Model Law establishes the legal framework for ensuring fair and effective conduct of arbitral proceedings. It begins with two provisions that highlight key principles guiding the arbitral procedure under the Model Law. Article 18 sets forth the fundamental requirements of procedural justice, emphasizing the principle of equality among the parties and ensuring each party is afforded a full opportunity to present their case. Additionally, Article 19 recognizes the rights and powers of the parties to determine the rules of procedure.

[144] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 17.

i. Fundamental procedural rights of a party

Article 18 embodies the principle of equality among the parties, ensuring that each party is afforded a full opportunity to present its case. According to Article 24(1), unless the parties have explicitly agreed to waive oral hearings for presenting evidence or oral arguments, the arbitral tribunal is obligated to conduct such hearings at an appropriate stage of the proceedings upon request by a party.

Another crucial right of a party is the opportunity to be heard and present its case with the assistance of an expert appointed by the arbitral tribunal. Article 26(2) mandates that after submitting a written or oral report, the expert must participate in a hearing where the parties may question the expert and present their own expert witnesses to testify on contentious issues, if so requested by a party or if it is deemed necessary by the arbitral tribunal.

Furthermore, Article 24(3) mandates that all statements, documents, and other information provided to the arbitral tribunal by one party must be shared with the other party. Additionally, any expert reports or evidentiary documents that are to be relied upon by the arbitral tribunal in making its decision must be communicated to the parties.

ii. Freedom to determine the rules of procedure

Article 19 of the Model Law safeguards the parties' autonomy to agree on the procedural rules that the arbitral tribunal will follow during the proceedings, subject to a few mandatory provisions on procedure. In the absence of an agreement between the parties, the arbitral tribunal is empowered to conduct the arbitration in a manner it deems appropriate. This power includes the authority to determine the admissibility, relevance, materiality, and weight of any evidence presented.

The autonomy of the parties to establish the rules of procedure holds significant importance, particularly in international cases. It allows the parties to customize the procedural rules according to their specific preferences and needs, without the constraints of traditional domestic concepts and without the risk of encountering obstacles. Additionally, the discretionary power of the arbitral tribunal is equally significant, as it enables the tribunal to tailor the conduct of the proceedings to the unique aspects of the case, without being bound by traditional local laws or domestic rules on the presentation of evidence.

iii. Default of appearance by a party

In cases where a party fails to appear at a hearing or fails to produce documentary evidence without providing sufficient justification, the arbitral proceedings will only continue if proper notice was given to that party.[145] Similarly, if the respondent fails to communicate their statement of defense, the arbitral tribunal has the discretion to proceed with the proceedings. However, if the claimant fails to submit their statement of claim, there may not be a need to continue the proceedings.[146]

Provisions that empower the arbitral tribunal to continue with the arbitral proceedings even in the absence of one party hold significant practical importance. This is because it is not uncommon for one party to lack interest in facilitating their cooperation or expediting the arbitration process. These provisions contribute to the effectiveness of international commercial arbitration, within the boundaries of the fundamental requirements of procedural justice.

f.) Making of an award and termination of proceedings by the arbitral tribunal

i. Rules applicable to the substance of the dispute

Article 28 of the Model Law addresses the substantive legal aspects of arbitration. According to paragraph (1), the arbitral tribunal is responsible for resolving the dispute based on the rules of law agreed upon by the parties. This provision is significant as it grants the parties the freedom to determine the applicable substantive law, which is particularly important considering that some national laws do not explicitly recognize or fully guarantee this right.

Furthermore, the Model Law utilizes the term "rules of law" instead of simply "law," providing the parties with a broader range of options when choosing the law applicable to the substance of the dispute. For instance, parties may agree on rules of law formulated by an international body that have not yet been incorporated into any national legal system. In cases where the parties have not designated the applicable law, the arbitral tribunal is required to apply the law determined by the conflict of laws rules that it deems applicable, which typically refers to the national law.

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[145] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 25(c).
[146] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 25(a) and (b).

ii. Making of the final award and other decisions

The Model Law addresses the process of making the award and other decisions in articles 29 to 31, particularly in cases where the arbitral tribunal consists of multiple arbitrators, typically three. In such instances, the Model Law stipulates that any award or other decision shall be made by a majority of the arbitrators, except for procedural matters that may be determined by a presiding arbitrator. The principle of majority rule also applies to the signing of the award, with the requirement that any omitted signature be accompanied by a stated reason.

According to Article 31(3) of the Model Law,[147] the award must specify the place of arbitration and the award is considered to have been made at that location. The award must also be in writing and dated. Furthermore, the award must provide the reasons on which it is based, unless the parties have agreed otherwise or if the award is an "award on agreed terms," which records the terms of a settlement reached between the parties.

g.) Recourse against the final award

In the field of international commercial arbitration, different national laws offer various avenues for challenging arbitral awards. These avenues vary significantly across legal systems, with most procedures having lengthy timeframes and extensive lists of grounds to be satisfied. To address this concern, the Model Law aims to alleviate the situation by providing more uniformity.

i. Application for setting aside as an exclusive recourse

To challenge an award under Article 34, a party must file their application to set it aside within three months of receipt of the award. It is important to clarify that "recourse" refers to actively contesting the final award and seeking judicial intervention through a court, which is a judicial entity of a specific country's legal system.

ii. Grounds for setting aside an arbitral award

The Model Law presents an exhaustive and limited list of grounds on which an award may be set aside. This list of grounds on which an award may be set aside closely mirrors the one found in Article 36(1) of the 1958 New York Convention, which includes: incapacity of parties to enter into an arbitration agreement or the absence of a valid arbitration agreement; failure to receive notice regarding the appointment of an arbitrator or inability of a party to present its case; existence

[147] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 31(3).

of a scenario where the final award addresses matters beyond the scope of the arbitration agreement; the composition of the arbitral tribunal or the conduct of the arbitral proceedings being inconsistent with the parties' agreement; the subject matter of the dispute being non-arbitrable; and violation of public policy that encompasses significant deviation from fundamental principles of procedural justice.

h.) Recognition and enforcement of arbitral awards

The final chapter of the Model Law, Chapter VIII, addresses the recognition and enforcement of arbitral awards. These provisions underscore the important policy determination that uniform rules should apply to the enforcement of both domestic and foreign arbitral awards. Furthermore, these rules should closely align with the principles outlined in the 1958 New York Convention.

i. Achieving unified treatment of all awards irrespective of country of origin

The Model Law introduces a notable shift in the treatment of awards in international commercial arbitration by promoting a uniform approach regardless of their country of origin. This departure from the traditional distinction between "foreign" and "domestic" awards establishes a new categorization based on substantive grounds rather than territorial boundaries, which are often irrelevant given the limited significance of the dispute itself to the place of arbitration in international cases. Consequently, the recognition and enforcement of "international" awards, whether classified as "foreign" or "domestic," should be governed by the same set of rules.

The Model Law in aligning the rules for recognition and enforcement of arbitral awards with the relevant provisions of the 1958 New York Convention, supplements, without conflicting, the existing framework for recognition and enforcement established by the Convention.

ii. Procedural requirements on recognition and enforcement of arbitral awards

According to Article 35(1) of the Model Law, any arbitral award, regardless of its country of origin, is to be recognized as binding and enforceable subject to the provisions outlined in Article 35(2) and Article 36, which specify the grounds on which recognition or enforcement may be denied.

The Model Law does not prescribe specific procedural guidelines for the recognition and enforcement of arbitral awards. This omission was deliberate due to the lack of practical necessity for unifying these procedures, as they inherently form aspects of each jurisdiction's national procedural laws and practices. Instead, the Model Law sets forth certain conditions that must be fulfilled to obtain enforcement, such as submitting a written application accompanied by the award and the arbitration agreement.[148]

iii. Grounds for refusing to recognize or enforce an arbitral award

The grounds for refusing recognition or enforcement outlined in the Model Law are identical to those specified in Part V of the New York Convention. However, in the Model Law, these grounds are applicable not only to foreign awards but to all awards arising from international commercial arbitration. This approach was adopted to maintain consistency and alignment with the provisions of the New York Convention, which is considered a significant and influential international instrument in this field. By utilizing the same approach and language as the Convention, the Model Law aims to promote harmony and coherence in the treatment of arbitral awards.

[148] The UNCITRAL Model Law on International Commercial Arbitration, 1985, Article 35(2).

3.4 JUSTIFICATION FOR ADOPTION OF THE MODEL LAW BY AFRICAN STATES

The justification for African States to adopt the Model Law is multi-pronged. Firstly, embracing an approach that has been endorsed by the broader international community of stakeholders and "pro-arbitration" jurisdictions fosters consistency and efficiency in the arbitral process. This in turn, enhances investor confidence in Africa's commercial dispute resolution landscape. The proposed interpretative Model Law therefore warrants careful consideration by African States.[149]

UNCITRAL's choice to adopt a model law structure was rooted in its inherent flexibility, allowing states to easily incorporate the principles outlined in the document. Originally, the UNCITRAL considered creating a protocol to supplement and elucidate the 1958 New York Arbitration Convention, however, this approach was eventually abandoned in favor of a model uniform law approach that could serve as the cornerstone for the development of national arbitration laws.

By opting for a model law instead of a convention or protocol, the need for adaptability vis a vis domestic law was acknowledged. This approach renders the legal principles in the model law more adaptable to individual states, enabling them to either adopt the law in its entirety or customize it to align with their specific domestic legal systems.

The Model Law embraces a three-part structured framework that fosters coherence and consistency among varying national legislations with regards to international commercial arbitration. This framework grants parties the autonomy to mutually agree on the fundamental facets of the arbitration procedure, incorporates a set of mandatory rules, and provides supplementary set of non-mandatory rules.

By conferring upon parties the freedom to define the critical components presiding over their arbitration proceedings, the UNCITRAL Model Law creates room for its flexibility and adaptability in allowing disputing parties to incorporate their unique requirements. Concurrently, it sets forth certain mandatory rules that ensure essential procedural safeguards and uphold the fundamental principles of fairness and due process. Additionally, the Model Law includes supplementary non-mandatory rules that serve as a guide for the arbitration process.

[149] UNCITRAL Regional Centre for Africa (2021), "UNCITRAL Model Law on International Commercial Arbitration and its Importance for Africa"
https://uncitral.org/sites/uncitral/files/media-documents/uncitral/en/rcap_acr_2021_africa_report_web.pdf

These rules provide further clarity and assistance to parties and tribunals, fostering the creation of a predictable and consistent framework for the practice of international commercial arbitration.

Conclusively, the Model Law's tripartite structure effectively fosters the synchronization of divergent national legislations, presenting a comprehensive framework for the practice of international commercial arbitration.

As advised by a United States Supreme Court Justice,[150]embracing the notion of the Model Law eases trade relations between trading partners from different jurisdictions. The UNCITRAL Model Law can in turn serve as a foundation for the enhancement and development of thorough and comprehensive legal frameworks on existing national arbitration laws.

[150] The Right Honorable Sir Michael Kerr, Lord Justice of Appeal of the Supreme Court of Judicature (U.K.). Kerr, supra note 40, at 16.

CHAPTER 4

CASE STUDY ON THE ADOPTION OF THE UNCITRAL MODEL LAW IN SOUTH AFRICA

4.0 INTRODUCTION

This chapter of my research investigates the adoption of the UNCITRAL Model Law in Africa with a specific focus on South Africa. The aim is to find out how their recent adoption of the UNCITRAL Model Law has aided the growth of International Commercial Arbitration in South Africa, and what lessons can other states that have not yet adopted the Model Law learn from South Africa.

South Africa was the 11th and most recent African State to adopt the Model Law on 20th December 2017. International Arbitration in South Africa is also ranked as one of the most developed arbitration practices in Africa.

South Africa is chosen as the case study for this research because it is regarded as one of the most developed African nations. The arbitration practice in South Africa is also regarded as very well developed however, until December 2017, South Africa had not adopted the UNCITRAL Model Law. This research seeks to answer the question on why South Africa had not adopted the Model Law and what later informed its choice to do so. The case study provided in this chapter of my research seeks to establish why the Model Law was previously not adopted in South Africa, what then later informed their decision to adopt the Model Law and what impact has the adoption of the Model Law had on the growth of International Arbitration practice in South Africa.

The chapter then provides a conclusion on the lessons learnt from South Africa. The aim of the conclusion is to provide African States with the necessary statistics and proof on how the adoption of the Model Law has improved South Africa's arbitration practice. Consequently, it can also help elevate the practice of International Arbitration in other African states and promote African countries as competent and reputable arbitral seats.

4.1 History of International Commercial Arbitration in South Africa

International arbitration is still a developing mode of alternative dispute resolution in South Africa, but its prevalence as a preferred dispute resolution method is increasing.[151]Matters referred for international arbitration in South Africa are mainly cross-border commercial disputes. These commercial disputes involve inter-alia; general contractual disputes, engineering and construction disputes and disputes involving share agreements and/or loan repayments.

For the last half century, International commercial arbitration in South Africa was largely a domestic affair.[152] The law and its practice developed within the confines of the Arbitration Act[153] dating back to 1965, which is based on the English Arbitration Act of 1950.The Arbitration Act was the only arbitration legislation in South Africa until the enactment and promulgation of the International Arbitration Act[154] in 2017.

The Arbitration Act is now applicable to domestic arbitrations only. The International Arbitration Act became effective on 20th December 2017 and it incorporates the UNCITRAL Model Law into South African law. Schedule 1 to the International Arbitration Act[155] is in fact, a restatement of the UNCITRAL Model Law. International arbitration awards are now enforced in terms of the International Arbitration Act, which also incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, into South African law, in line with international best practice.

The Arbitration Act provided for the rules governing both international and domestic arbitration in South Africa. Disputes were mainly referred to arbitral institutions such as the Arbitration Foundation of South Africa (AFSA) and the Association of Arbitrators (AASA), which are the most popular arbitration organizations used to resolve commercial disputes in South Africa, with AFSA being the most prominent and widely recognised institution.

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[151]Chambers and Partners, "International Arbitration 2022 – South Africa." 16th August 2022. Available at: International Arbitration 2022 - South Africa | Global Practice Guides | Chambers and Partners Accessed on 31st August 2022.

[152]Allen & Overy, "South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration." 3rd April 2019. Available at: South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration - Allen & Overy (allenovery.com) Accessed on 31st August 2022.

[153] South Africa Arbitration Act No. 42 of 1965.

[154] South Africa International Arbitration Act No. 15 of 2017.

[155]Ibid

AFSA is divided into a domestic and an international division. AFSA supervises and administers the resolution of cross-border disputes in accordance with its International Rules.[156] Since the enactment of the International Arbitration Act, AFSA has published revised International Arbitration Rules to bring them in line with the International Arbitration Act. These Revised International Arbitration Rules came into effect on 1st June 2021.

With an increasing focus on international arbitration on the African continent, a host of jurisdictions have taken steps to increase their attractiveness as arbitration centres and safe seats for arbitration. South Africa is no exception, as it has taken steps to secure its position in the international arbitration community. This can be witnessed through the enactment of the International Arbitration Act[157], the development of Arbitration Foundation of South Africa's international arbitration division and various improvements to infrastructure and resources used in support of international arbitration.

4.2 Adoption of the UNCITRAL Model Law in South Africa

On 20th December 2017, South Africa promulgated the long-anticipated International Arbitration Act No. 15 of 2017 to regulate international arbitration. Prior to the International Arbitration Act, all arbitration activity in South Africa was governed by the Arbitration Act No. 42 of 1965, and there was no formally recognised distinction between domestic and international arbitrations.

The International Arbitration Act incorporates the UNCITRAL Model Law. In addition, it repealed the Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 and expressly provides for the recognition and enforcement of foreign arbitral awards through the incorporation of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

[156] The Arbitration Foundation of Southern Africa's international Rules, which came into effect on 1 June 2021.
[157] Ibid

South Africa's adoption of the Model Law on International Arbitration has been widely celebrated. In a jurisdiction where the statutory framework for the conduct of, and approach to arbitration had all but stagnated, the move heralds a welcome alignment with global best practice and positions South Africa to become a preferred seat for the resolution of disputes across Africa.[158]

In 1998, the South African Law Reform Commission[159] recognised that South Africa was increasingly seen to be the obvious centre for resolution by arbitration, of commercial disputes affecting parties not only in South Africa but also in other African countries. It was therefore essential therefore that South African arbitration proceedings be streamlined with those in other developed countries.[160] Nineteen years later, in December 2017, the new International Arbitration Act became operative.

The long delay was largely attributed to negative perceptions of arbitration practice. However, it became increasingly apparent that South Africa was losing a valuable opportunity to become an important regional arbitration centre and that this was because of the long overdue reform of the Arbitration Act which had not been implemented.[161] This led to the Commission being requested to update its 1998 report and recommendations, which it did in 2013.

The Commission prepared the proposed amendments to the International Arbitration Bill in 2013, and in its comments, the Commission emphasized the importance of the Model Law and noted from a broader African perspective, that of the 54 members of the African Union, at least 30 now have modern arbitration legislation for International Arbitration.

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[158] Allen & Overy, "South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration." 3rd April 2019. Available at: South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration - Allen & Overy (allenovery.com) Accessed on 31st August 2022.

[159] Des Williams, "International Arbitration in South Africa – A New Chapter." Werksman Attorneys. Available at: https://www.werksmans.com/legal-updates-and-opinions/international-arbitration-in-south-africa-a-new-chapter/ Accessed on 31st August 2022.

[160] Ibid

[161] Ibid

South Africa was the 11th African country to have adopted the Model Law through the enactment of the International Arbitration Act.[162]The International Arbitration Act of 2017 incorporates the UNCITRAL Model Law into South African law. The preamble to the International Arbitration Act provides *"for the incorporation of the Model Law on International Commercial Arbitration"* into South African law. The scope of this legislation is set out in section 7 of the International Arbitration Act, which provides that any international commercial disputes that the parties have agreed to submit to arbitration in terms of an arbitration agreement may be decided by arbitration, provided that the dispute is arbitrable. Section 8 of the International Arbitration Act deals with the interpretation of the Model Law and empowers an arbitral tribunal or a court to interpret the relevant reports of the UNCITRAL Model Law or its secretariat in this regard.

Apart from certain permissible changes to the text of the UNCITRAL Model Law, there is no significant divergence from the UNCITRAL Model Law in South Africa's national legislation. It is anticipated that the adoption of the Model Law for international arbitrations seated in South Africa will bring about significant changes in terms of practice and procedure. South Africa's depth of legal talent and its established patterns of judicial deference render it a competitive arbitral seat. Following the adoption of the Model Law in South Africa, it is anticipated that the majorly domestic-driven practice and procedure will evolve to include elements of international best practice.

[162]Des Williams, "International Arbitration in South Africa – A New Chapter." Werksman Attorneys. Available at: https://www.werksmans.com/legal-updates-and-opinions/international-arbitration-in-south-africa-a-new-chapter/ Accessed on 31st August 2022.

4.3 LESSONS DERIVED FROM THE CASE STUDY

The benefit of administering international arbitrations where the seat of arbitration is located, such as in South Africa, is the competitive pricing of arbitration services when compared with arbitration organizations based in more developed countries such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). The fact that the local institutions are relatively well known to local parties also serves as an advantage.

According to statistics released by one of South Africa's leading private arbitration institutions, the Arbitration Foundation of Southern Africa (AFSA), only ten international disputes were referred to AFSA for arbitration between 2007 and 2016.[163]However, after the adoption of the UNCITRAL Model Law on International Commercial Arbitration in December 2017, AFSA reported 18 referrals for international arbitrations with a total quantum in excess of ZAR640 million in 2018.[164] In late 2019, AFSA reported that its international arbitration referrals had increased to 24 new cases, with a total quantum of ZAR3 billion.[165] These figures demonstrated a significant uptake in the desire for international arbitration in South Africa since the International Arbitration Act became effective. The number of new case referrals fell to 19 in 2020 as a result of the COVID-19 pandemic, but there was an increase to 21 new referrals in 2021.[166]

There is also the TQ case,[167]where the South African courts had the opportunity to interpret aspects of the International Arbitration Act for the first time since its enactment. The case is a positive and important development in South African international arbitration law as it confirms that South African courts do not have the power to interfere with disputes that are subject to an international arbitration agreement unless the arbitration agreement is invalid and unenforceable. They are also required to stay any court proceedings pending the referral of the dispute to international arbitration. There is therefore no discretion for the South African courts to elect to hear matters that are subject to international arbitration.

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[163]Patrick Lane, "The AFSA Court: A New Dimension in Arbitrations administered by AFSA." Official Newsletter of the Arbitration Foundation of South Africa for July/August 2021. Available at: AFSA-Newletter_JULY-AUG-2021.pdf (arbitration.co.za) (Accessed on 31st August 2022.)

[164]Ibid

[165]Ibid

[166]Ibid

[167] Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd Case No. 065/2021 [2022] ZASCA 68 (17 May 2022)

As such, the judgment of the Supreme Court of Appeal is a clear indication to the domestic and international community that South African courts will enforce the International Arbitration Act and that any proceedings brought before the courts that ought to have been referred to arbitration will be stayed pending and in favour of the institution of arbitration proceedings.

South Africa's recognition of international arbitration agreements is a further step in affirming South Africa as a "pro-arbitration" jurisdiction and a "safe" seat for international arbitration.[168]This development also gives parties seeking to subject their agreements and contractual arrangements to international arbitration in South Africa, the reassurance and confidence that South African courts will not interfere with their decision to have matters adjudicated by way of international arbitration, notwithstanding that both parties may be situated in South Africa.

South Africa recognised that no country can expect to establish its place in the world of international arbitration without modern international arbitration legislation.[169] Foreign parties will only be comfortable about seating international arbitrations in Africa if they have the assurance of knowing that the State's international arbitration laws meet the recognised international standards and benchmarks. This hence concretizes the fact that the UNCITRAL Model Law is an important tool in modernizing international arbitration practice, and also in building investor confidence on the ability of an African state to effectively determine arbitral disputes and enforce arbitral awards without undue interference.

[168] Redfern & Hunter, "Law and Practice of International Commercial Arbitration," Second edition, Sweet & Maxwell London, 1991.
[169]Ibid

CHAPTER 5

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter presents a summary of the findings, conclusions, and recommendations derived from the preceding chapters. It proposes various measures and suggestions that can be implemented by key stakeholders in the field of arbitration to facilitate the adoption of the UNCITRAL Model Law and the advancement of international arbitration practice in Africa.

The primary aim of conducting this research and the recommendations provided in this final chapter is to enhance the practice of International Commercial Arbitration in Africa and establish African states as reliable and credible seats for arbitration. These recommendations are primarily influenced by the analysis of the adoption of the Model Law in South Africa, which has been extensively discussed in the previous chapter.

5.1 SUMMARY OF FINDINGS

The objective of this study was to evaluate the adoption of the UNCITRAL Model Law on International Commercial Arbitration in Africa and assess its potential benefits for the practice of international arbitration in African states. The research aimed to analyze the progress of international arbitration in Africa and identify the challenges faced in the practice of international arbitration within the continent. The study also sought to provide African states and arbitration institutions with relevant literature that could guide them on the significance of adopting this Model Law and its role in establishing African states as reputable arbitration seats globally.

To achieve these objectives, a case study was conducted on South Africa, which recently adopted the Model Law in December 2017. South Africa's adoption of the Model Law was aimed at modernizing their arbitration legislation and positioning the country as a credible and competent seat for arbitration.

The study put forward two hypotheses. First, it posited that the adoption of the UNCITRAL Model Law on International Commercial Arbitration establishes a unified legal framework for the practice of international commercial arbitration. Consequently, the adoption of this Model Law is considered a crucial step towards enhancing the practice of international commercial arbitration in Africa and promoting the development and growth of reputable arbitration seats in Africa.

Secondly, the study hypothesized that the Model Law facilitates the gradual harmonization of international arbitration laws while accommodating the unique legal cultures and traditions of individual countries. It further suggested that the adoption of the Model Law by African states would help dispel the stereotype that African countries lack the necessary capacity, resources and expertise to handle complex international commercial arbitration disputes. These hypotheses formed the basis for the study's research objectives and subsequent analysis.

The findings of the study have successfully substantiated these hypotheses and affirm that the adoption of the UNCITRAL Model Law contributes to the promotion of African states as reputable arbitration seats, ensuring investor confidence and reassurance. Adoption of the Model Law signifies that the state possesses the capability to resolve disputes and enforce arbitral awards without undue interference from the courts. Additionally, the study has established that the Model Law offers the necessary flexibility for each state to incorporate it into their national legislation while preserving their unique legal cultures and traditions.

The study identified five key questions that it aimed to answer during the analysis of the adoption of the UNCITRAL Model Law in Africa:

1. What is the current state of development of International Commercial Arbitration in Africa?
2. What is the UNCITRAL Model Law on International Commercial Arbitration, and what objective does it aim to achieve?
3. How has the adoption of the UNCITRAL Model Law progressed in Africa since its inception in 1985, and what impact has it had on the growth of reputable arbitration centers in the African continent?
4. What was the legislative goal behind South Africa's adoption of the Model Law, and how was it integrated into domestic law?

5. What proposals can be put forward to enhance the practice of International Commercial Arbitration in Africa?

The study sought to provide answers to these questions in order to gain a comprehensive understanding of the adoption and impact of the Model Law in Africa, and to propose potential areas of improvements for the practice of International Commercial Arbitration in the continent.

On the first question, the study has established that despite the slow uptake of international commercial arbitration in Africa, there have been some developments which include the growth of arbitration institutions such as the Nairobi Centre for International Arbitration, Cairo Regional Centre for International Arbitration and the Lagos Regional Centre for International Commercial Arbitration, among others. However, there are challenges that still plague the practice of international arbitration in Africa such as the inadequate legal and institutional frameworks on international arbitration, continuous appointment of international arbitrators by parties, investors perception of corruption in African countries and the uncertainties associated with enforcement of awards in jurisdictions that have not adopted the Model Law.

On the second question, the study established that the UNCITRAL Model Law is a Model Law that was designed by the United Nations Commission on International Trade Law (UNCITRAL) and adopted on 21st June 1985, to be implemented by national legislatures and which aims at harmonizing the treatment of international commercial arbitration in different countries. The objective of the UNCITRAL Model Law was to create a predictable procedural framework for international arbitrations that is acceptable to common law, civil law and other legal systems. It was recommended as a Model Law because of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice globally.

On the third question, the study established that out of the 54 African States, only 11 states have adopted the Model Law into their national legislation in a bid to modernize the laws on international arbitration. These states are as listed in the Appendix 1 to this Research. For the states that have adopted the Model Law, international arbitration practice is noted to be vibrant despite the challenges that are faced. Most of these adopting states are the ones that have also created international arbitral institutions which further promote the states as modern and developed arbitral seats.

On the fourth question, the study established that South Africa was the most recent African country to adopt the Model Law which was in December 2017. The Model Law was adopted in South Africa by the enactment of the International Arbitration Act No. 15 of 2017, whose Preamble provides for the incorporation of the Model Law on International Arbitration into South African law. The reason for adoption of the Model Law by South Africa is attributed to the fact that the State sought to align its international arbitration laws with global best practice and position itself as a preferred and reputable seat for the resolution of international arbitral disputes in Africa.

On the final question, the study sought to establish the proposals that can be made in order to improve the adoption of the Model Law and thus the practice of International Commercial Arbitration in Africa. I will endeavor to answer this question in this chapter, through the provision of recommendations on the role that can be played by the Judiciary and Arbitral institutions in order to market the Model Law as an important tool for the modernization and development of International Arbitration practice in Africa.

5.2 CONCLUSION

The primary objective of this paper was to conduct an analysis on the adoption of the UNCITRAL Model Law on International Commercial Arbitration in Africa. This analysis served as a foundation for advocating for the Model Law as a crucial instrument for modernizing and advancing legislation on international arbitration in Africa. Furthermore, the study emphasized that the Model Law plays a significant role in shaping foreign investors' perceptions, as it serves as a tool for evaluating whether selecting an arbitration seat in Africa would yield favorable outcomes that are free from unnecessary court interference.

This study has successfully supported the hypotheses highlighted herein by demonstrating that the adoption of the Model Law by African states does instill confidence and reassurance in foreign investors. It has affirmed that such adoption signifies the state's ability to resolve disputes and enforce arbitral awards without undue interference. Additionally, the study confirmed that the Model Law offers the necessary flexibility for each state to incorporate it into their national legislation, accommodating their unique legal cultures and traditions without compromising them.

The study is structured into five chapters:

Chapter one introduces the research problem, which revolves around the significant variation in the domestic laws of States when dealing with similar issues. It highlights that arbitration often has an international connotation to it and the reliance placed on European arbitral authorities for dispute resolution by African states is prohibitively costly and unsatisfactory. This reliance also implies a recognition of the inadequacies of the arbitration structure in Africa. The chapter also analyzes the theoretical foundations underpinning the adoption of the Model Law, including the theory of legal transplantation which is highlighted as the most important t5heory underpinning this research, and the Soviet legal theory. Furthermore, a comprehensive literature review on the adoption of the UNCITRAL Model Law has been conducted in order to gain a clear understanding of the concept of adoption of Model Laws, particularly the UNCITRAL Model Law on International Commercial Arbitration.

Chapter two has endeavored to discuss broadly International Commercial Arbitration in Africa. The chapter has analyzed broadly the development of international arbitration in Africa and also the current legal and institutional frameworks for International Arbitration in Africa. Chapter two went further to discuss the challenges that are facing arbitration practice in Africa. The chapter found that in order to mitigate the challenges faced in arbitration practice in Africa, there is need to set up more regional centres for training of international commercial arbitrators in Africa. This will not only ensure a bigger number of qualified international commercial arbitrators in Africa but will also deal with the challenges that might come with a situation where some African countries are not parties to international treaties on arbitration and have not adopted the UNCITRAL Model Law, a factor that might otherwise be a disadvantage to arbitrators from such countries.

Chapter three was a general topic discussion on the UNCITRAL Model Law. The chapter gave an in-depth discussion on the history of the UNCITRAL Model Law on International Commercial Arbitration, the guiding principles underlying the Model Law, the salient features and provisions of the Model Law, and it finalized by providing a justification for why the Model Law should be adopted by African states. The goal of this chapter was to provide a background on what the UNCITRAL Model law is and what its features are. This thus set the tone for advising African states on why they should then go ahead to adopt the Model Law. The chapter concluded and found

that adopting an approach that has been sanctioned by a wider international community of stakeholders and 'pro-arbitration' jurisdictions, will serve to promote uniformity and efficiency within the arbitral process whilst improving investor perceptions of Africa's landscape for commercial dispute resolution.

Chapter four conducted a case study on the adoption of the Model Law in South Africa. The aim was to learn why South Africa finally decided to adopt the Model Law. South Africa was the 11th and most recent African State to adopt the Model Law on 20th December 2017. International Arbitration in South Africa is also ranked as one of the most developed arbitration practices in Africa. This is thus what informed why South Africa was chosen as the basis of the case study because, until 2017, the UNCITRAL Model Law had not yet been adopted by the state despite it being one of the most developed African countries. The chapter concluded and found that the reason for adoption of the Model Law by South Africa was because South Africa recognised that no country can expect to establish its place in the world of international arbitration without modern international arbitration legislation. Foreign parties will only be comfortable about seating international arbitrations in Africa if they have the assurance of knowing that the State's international arbitration laws meet the recognised international standards and benchmarks.

Finally, Chapter five draws conclusions on all the observations made throughout this research and provides recommendations on the best way forward and on how African nations can progressively embrace the adoption of the UNCITRAL Model Law.

The utilization of the UNCITRAL Model Law as a mechanism to modernize international arbitration legislation has proven to be highly effective. Its implementation by African nations holds the potential to significantly enhance the practice of international arbitration on the continent. Notably, South Africa having recently embraced the Model Law, has observed a gradual upsurge in the volume of international arbitration cases brought before its jurisdiction for adjudication.

By embracing this Model Law, African nations can circumvent unwarranted expenditures associated with referring disputes to foreign arbitral institutions, as the region possesses the capacity to establish and develop its own arbitral bodies capable of upholding globally recognized standards of international arbitration best practices.

Africa possesses the capability to emerge as a prominent player in the realm of international arbitration. Embracing the Model Law as a prevailing norm amongst the majority of African States would represent a significant stride in the right direction, demonstrating to the international community that Africa is both prepared and competent in effectively managing international arbitration disputes.

5.3 RECOMMENDATIONS

The research has unearthed a number of justifications on why the UNCITRAL Model Law should be adopted by African states. To concretize these justifications, a number of recommendations have been proposed. These recommendations are proposed as the roles that can be played by the judiciary and arbitration institutions in ensuring that their respective jurisdictions adopt the Model law when coming up with their Arbitration legislations. This will help promote the development of international arbitration practice in Africa.

These recommendations include:

a.) Role of the Judiciary

The judiciary is an important part of the arms of government. The judiciary has power to influence the adoption of laws as it is accorded an opportunity for public participation in legislative matters. The judiciary, hence, can advise legislators on the significance of adopting the UNCITRAL Model Law into national legislation in a bid to modernize and harmonize international arbitration laws.

National laws on arbitration should appreciate the need to limit court intervention in arbitration to a basic minimum. The relationship between the courts and the arbitral process can be made much closer, both practically and psychologically. The psychological link can be strengthened by encouraging all or at least a good number of the commercial judges and advocates to take up training in arbitration and consequently ensuring that they benefit from having prior experience of arbitration either as representative advocates or actual arbitrators. This will subsequently boost the confidence of foreigners in African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence, knowing that their disputes will be settled expeditiously.

The courts also have a role to play in the enforcement of the provisions of the UNCITRAL Model law. One of the main principles underscoring the Model law is the prevention of unnecessary court interference. Courts can uphold this principle by staying any proceedings that are the subject of an international arbitration agreement and also ensuring that the enforcement of awards are in compliance with the provisions of the Model law and the New York Convention.

Judiciaries in adopting countries have so far played a positive role in ensuring that the principles envisioned in the UNCITRAL Model Law are adhered to. This was affirmed as in the case of Tee Que Trading Services (Pty) Ltd vs Oracle Corporation South Africa (Pty) Ltd,[170] where the court upheld that as provided under the UNCITRAL Model law, they do not have the power to interfere with disputes that are subject to an international arbitration agreement unless the arbitration agreement is invalid and unenforceable, and they shall therefore stay any court proceedings pending the referral of the dispute to international arbitration.

b.) Role of Arbitration Institutions

Regional arbitration institutions in Africa are best placed to continue playing a pivotal role in contributing to the growth of international commercial arbitration as the preferred approach in the management of commercial disputes in Africa. The growth of international arbitration owes to the availability of institutions experienced in handling arbitration and other forms of ADR, thus providing a practical alternative to litigation. Arbitral institutions play an increasingly important role in the growth and development of international arbitration across the world. They do this by promoting and safeguarding arbitration discipline, both through ensuring development of sound legal framework and facilitating the practice of arbitration and other ADR mechanisms. Arbitral institutions should hence always strive to maintain professional standards that correspond to the international best practices in arbitration.

Arbitration institutions have the mandate to put in place adequate legal regimes and infrastructure for the efficient and effective organization and conduct of international commercial arbitration in Africa. This can be done by: Organizing international conferences, seminars and training programs

[170] Tee Que Trading Services (Pty) Ltd v Oracle Corporation South Africa (Pty) Ltd Case No. 065/2021 [2022] ZASCA 68

for arbitrators and scholars; coordinating and facilitating the formulation of national policies, laws and plans of action in collaboration with other lead agencies and non-state actors; maintaining proactive co-operation with other regional and international institutions; educating the public on arbitration laws and procedures; and, to enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance in achieving their objectives. These acts will not only afford the local international commercial arbitrators the fora to showcase their skills and expertise in international commercial arbitration, but may also attract international clients from outside Africa.

It has been noted that there should be basic minimum standards for international commercial arbitration centres or institutions.[171] The main standard is the existence of modern arbitration rules, which as discussed in this study should be based on the UNCITRAL Model law in order to maintain the global best practice on international arbitration.[172]

There is need for a clear framework in Africa within which international commercial arbitration can be further promoted. There are arbitral institutions already in place and this research has already endeavored to discuss the same. The presence of such institutions in the continent points to an acceptance of alternative dispute resolution modes as well as the need to promote the practice of international commercial arbitration, other than exporting commercial disputes to foreign countries for settlement. Arbitral institutions hence have the ability to empower African arbitrators and train them on the standards of best practice of international arbitration, which includes training on how to interpret and enforce the provisions of the Model Law.

A commendable step in the progress towards promoting the UNCITRAL Model Law as the basis for international arbitration laws in Africa is the development of the Model Bilateral Investment Treaty by the Africa Arbitration Academy.[173] The Model BIT advocates for the application of the UNCITRAL Arbitration Rules in the resolution of disputes.

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[171] Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at: http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf>

[172] Ibid

[173] Toby Fisher, "Africa Arbitration Academy publishes Model BIT." Global Arbitration Review, 26th July 2022. Available at: https://globalarbitrationreview.com/article/africa-arbitration-academy-publishes-model-bit

The UNCITRAL Arbitration Rules were drafted in accordance with the provisions of the Model Law and were developed by the UNCITRAL. The encouragement by the Africa Arbitration Academy to use the UNCITRAL Arbitration Rules shows an increase in the uptake of the International Arbitration Rules drafted by the UNCITRAL. This step by the Africa Arbitration Academy is key in helping contracting African states decide whether they should adopt the Model Law, as it is now used as the basis for determination of what amounts to modern international arbitration laws.

c.) Role of Legislators

Legislatures are critical institutions in making a democratic system function. Legislators in African countries have the power to enact modern legislation that meets the standard of a modern democratic world. In the adoption of the Model Law, the role that can be played by legislators would be tabling the Model Law before the Parliament for consideration and discussion. This would help in providing a platform for the consideration of the Model Law as a basis for formulating modern international arbitration laws.

Legislators who are open to discussing the modernization of their arbitration laws through the adoption of the UNCITRAL Model Law hence help to advance the growth of arbitration in their respective jurisdictions.

d.) Recommendations to African States that have not adopted the Model Law

International Commercial Arbitration in Africa can only grow to its expected potential if all African states work together to ensure that their laws on international arbitration are modernized and up to date. In this heading, I endeavor to provide recommendations and proposals that may be implemented by African states that are yet to adopt the UNCITRAL Model Law on International Commercial Arbitration.

Below are some recommendations, with time-frames for implementation, that may help the countries that have not adopted the Model Law in considering how to incorporate this Model Law into their national legislation:

i. ***Short-term recommendation: Conducting of trainings and seminars to create educational awareness on international arbitration***

By encouraging all scholars, commercial judges and advocates to take up training in arbitration, this shall ensure that they benefit from having prior experience of arbitration either as representative advocates or actual arbitrators. This will subsequently boost the confidence of foreigners in the practice of international arbitration in Africa, as it will foster the existence of local arbitrators well endorsed with the necessary skills and expertise to handle international arbitral matters. Effective and reliable application of international commercial arbitration has the capacity to encourage investors to carry on business with confidence, knowing that their disputes will be settled expeditiously.

ii. ***Medium-term recommendation: Formation of working groups to review national arbitration legislation***

The States should form a working group to review their national legislation on arbitration, in order to highlight what areas are inconsistent with the provisions of the Model Law and in order to bring these areas in alignment with the Model Law.

The biggest concern raised in this research by African states that have not adopted the Model Law is that the adoption of the Model Law may interfere with a State's legal culture and their national identity. However, this research has proved that this is not the case as the goal of the Model Law is to create uniformity and harmonization, while still giving adopting countries the freedom to modify it in a manner that aligns with their national goals and legal culture.

iii. Long-Term recommendation: Development of arbitration institutions with the adequate facilities and resources to handle international arbitration matters

It has been well noted in this research that states which have not adopted the Model Law also have no arbitral institutions within their jurisdictions. The recommendation herein would be to consider the development of arbitral institutions in their jurisdictions. Arbitral institutions help to promote the practice of arbitration in African states by giving local arbitrators the forum to develop and showcase their skills. The development of international arbitration in Africa has been plagued with many challenges, including the lack of adequate arbitral institutions.

The lack of adequate arbitral institutions denies African international arbitrators the fora to display their skills and expertise in international commercial arbitration. Development of new arbitration institutions in these African countries can help to enhance the capacity of existing institutions to meet the demands for ADR mechanisms.

BIBLIOGRAPHY

Books

1. A. Watson, Legal Transplants: An Approach to Comparative Law (Edinburgh: Scottish Academic Press, 1974)
2. B.M. Cremedas, "Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration" (1998) 14 Arb. Int'l
3. G. Bernini, "Is There a Growing International Arbitration Culture" in International Arbitration Culture (The Hague: Kluwer Law International, 1998).
4. G. Herrmann, "UNCITRAL's Basic Contribution to the International Arbitration Culture in International Arbitration Culture (The Hague: Kluwer Law International, 1998).
5. Dr. Kariuki Muigua, “Settling Disputes through Arbitration in Kenya.” Glenwood Publishers, 2022.
6. Lew, J., ‘Comparative International Commercial Arbitration’, 237, [London: Kluwer Law International, 2003]
7. L. Friedman, "On Legal Development" (1969)
8. L. Friedman, "The Republic of Choice: Law, Authority & Culture (Cambridge: Harvard University Press, 1990)
9. M. Sornarajah, "The UNCITRAL Model Law: A Third World Viewpoint" (1989)
10. Marshall A.E. Gill, “The Law of Arbitration.” (4th Edition Sweet & Maxwell 2001).
11. Moses L.M, “The Principles and Practice of International Commercial Arbitration. (Cambridge University Press 2008).
12. Redfern & Hunter, “Law and Practice of International Commercial Arbitration,” Second edition, Sweet & Maxwell London, 1991.
13. Stephen Wilske and Gunther J. Horvath, “Guerilla Tactics and How-to Counter Them in National Litigation: Experiences from African Legal Systems.”

Articles

1. Allen & Overy, "South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration." 3rd April 2019. Available at: South Africa's adoption of the UNCITRAL Model Law: evolution in the practice and procedure of arbitration - Allen & Overy (allenovery.com) Accessed on 31st August 2022.
2. Amazu A. Asouzu, International Commercial Arbitration and African States: Practice, Participation and Institutional Development, University Press, Cambridge, 2001. PP. 5-6 Available at http://catdir.loc.gov/catdir/samples/cam031/2001018482.pdf [Accessed on 22nd July 2022].
3. Amazu A. Asouzu, 'Some Fundamental Concerns and Issues about International Arbitration in Africa.' Available at http://www.mcgill.ca/files/isid/LDR.2.pdf
4. Benoit Le Bars (Lazareff Le Bars), "Arbitrating in West and Central Africa: An Introduction to OHADA." February 21, 2013. Kluwer Arbitration Blog. Available at: http://arbitrationblog.kluwerarbitration.com/2013/02/21/arbitrating-in-west-and-central-africa-an-introduction-to-ohada/
5. Chambers and Partners, "International Arbitration 2022 – South Africa." 16th August 2022. Available at: International Arbitration 2022 - South Africa | Global Practice Guides | Chambers and Partners Accessed on 31st August 2022.
6. Des Williams, "International Arbitration in South Africa – A New Chapter." Werksman Attorneys. Available at: https://www.werksmans.com/legal-updates-and-opinions/international-arbitration-in-south-africa-a-new-chapter/ Accessed on 31st August 2022.
7. Dr. Kariuki Muigua, "Promoting International Commercial Arbitration in Africa." November 2013. Available at: promoting_international_commercial_arbitration_in_africa.pdf (uonbi.ac.ke)
8. Dr. Kariuki Muigua, "Nurturing International Commercial Arbitration in Kenya." Available at: https://thelawyer.africa/2023/09/13/nurturing-international-commercial-arbitration-in-kenya/

9. Ermakova, E. P. (2015). International Commercial Arbitration in Africa: Sources of Legal Regulation. Bulletin of International Commercial Arbitration. No. 2, 2016, No. 1, p. 44.
10. Franchini J D, "International Arbitration under the UNCITRAL Arbitration Rules: A Contractual Provision for Improvement."(1994) 62 Fordham Law Review 2223
11. Henry Simpson, "New AFSA International Arbitration Rules set new standard for arbitration in Africa." 18th August 2021. Available at: https://www.shlegal.com/insights/new-afsa-international-arbitration-rules-set-new-standard-for-arbitration-in-africa
12. Hogan Lovells, 'Arbitrating in Africa'. Available at: http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa__Hogan_Lovells_March_2013.pdf
13. Jonathan Ripley-Evans, Fiorella Noriega Del Valle, "Court Support for Arbitration in South Africa: Knowing Where You Stand." Accessed on: Court Support for Arbitration in South Africa: Knowing Where You Stand | Arbitration notes (hsfnotes.com)
14. Kerr M, "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34(1) ICLQ 1
15. Lew J, "The Unification of the Law on International Commercial Arbitration" (1984) 15 Business Law Review 147
16. Lord Mustill, Arbitration: History and Background (1989) 6:2 J. Int'l Arb. 43. Op. cit. Page 10. Available at: http://law.queensu.ca/international/globalLawProgramsAtTheBISC/courseInfo/courseOutlineMaterials__2012/internationalCommercialArbitration/Mustill1989.pdf[Accessed on 22nd July 2022].
17. McNerney M and Esplugues C, "International Commercial Arbitration: The UNCITRAL Model Law." (1986) (9)1 Boston College International and Comparative Law Review 47
18. Melis, Arbitration and the Courts, in International Council for Commercial Arbitration UNCITRAL's Project for a Model Law on International Commercial Arbitration (Netherlands 1984).
19. Muigua K., "Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya." Available at:

http://kmco.co.ke/wp-content/uploads/2018/08/Making-East-Africa-a-Hub-for-International-Commercial-Arbitration.pdf (Accessed on 22nd July 2022)

20. Patrick Lane, "The AFSA Court: A New Dimension in Arbitrations administered by AFSA." Official Newsletter of the Arbitration Foundation of South Africa for July/August 2021. Available at: AFSA-Newletter_JULY-AUG-2021.pdf (arbitration.co.za) Accessed on 31st August 2022.
21. Osakwe, P., Santos-Paulino, A.-U., & Dogan, B. (2018), "Trade dependence, liberalization, and exports diversification in developing countries." *Journal of African Trade, 5*(1–2), 19–34.
22. Rix B, "International Arbitration: Yesterday, Today and Tomorrow" (2006) 72(3) Arbitration 224 https://www.sciencedirect.com/science/article/pii/S2214851518300185
23. Steven Finizio, Thomas Fuhrich, "Africa's Advance", African Law and Business, available at: https://www.africanlawbusiness.com/news/5068-africas-advance
24. U.S. Government Comments on the UNCITRAL Working Group Draft Text of a Model Law on International Commercial Arbitration, reproduced in American Arbitration Association, Arbitration & the Law 1984.
25. Won Kidane, "Arbitration in Asia and Africa: Profiles of Selected Arbitral Institutions, China-Africa Dispute Settlement: The Law, Economics and Culture of Arbitration, International Arbitration Law Library, Volume 23, p.370.
26. Zelentsov, A., Dolinskaya, V., Frolova, E., Kucherenko, P., & Dudin, M. (2017). Comparative Analysis of Regulatory Instruments and the Trend towards the Harmonization of Proprietary Regulation in the Civil Law of Member States of BRICS. Journal of Advanced Research in Law and Economics, VIII (5(27)), page 1641–1649.

Dissertations

1. Peter Mutuku Mbithi, "International Commercial Arbitration in Kenya: Is Arbitration a Viable Alternative in Resolving Commercial Disputes in Kenya?" A Master of Laws Dissertation submitted at the University of Cape Town in February 2014.
2. Kituku James Kilonzo, "Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries." A Master of Laws dissertation submitted at the University of Nairobi.
3. Torgbor E N A, "A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya." A doctoral dissertation submitted at the University of Stellenbosch in March 2013.

Conference Papers and Presentations

1. Bernini, Recent Legislations and International Unification of the Law on Arbitration, (Paper delivered at a symposium on International Commercial Arbitration, Chateau Frontenac, Quebec, Canada, Oct. 14-16, 1985, p. 44).
2. Dr. Kariuki Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa." Paper Presented at the Arbitration Institutions in Africa Conference, May 2015.
3. Emilia Onyema, Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors, 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at: http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf>
4. Herrmann, The UNCITRAL Model Law on International Commercial Arbitration-Its Salient Features and Prospects, (Paper delivered at a symposium on International Commercial Arbitration, Chateau Frontenac, Quebec, Canada, Oct. 14-16, 1985, p. 5).

Reports and Resolutions

1. Kigali International Arbitration Center, Annual Report July 2012-June 2013. P. 4
2. Possible Features of a Model Law on International Commercial Arbitration: Report of the Secretary-General, U.N. Doc. A/CN9/207 (1981)
3. Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, 40 U.N. GAOR Supp. (No. 17), U.N. Doc. A/40/17 (1985)
4. Resolution adopted by the UN General Assembly on 11th December 1985 at its 112th plenary meeting (Resolution 40/72 'Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law'
5. The United Nations General Assembly, Resolution Number 62/65 of December 2007.
6. UNCITRAL, 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration' (2008) United Nations.
7. United Nations Commission on International Trade' Law, Report of the Secretary-General, U.N. Doc. A/CNI127, at 1-3 (1977).
8. United Nations General Assembly, Resolution 40/72 of 11th December 1985.

APPENDIX 1: LIST OF AFRICAN STATES THAT HAVE ADOPTED THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Out of all the 54 African States, the following 11 States are the only ones that have adopted the UNCITRAL Model Law as part of their national legislation on International Commercial Arbitration:

	Name of the African State	Year of Adoption of the Model Law
1.	Egypt	1994
2.	Kenya	1995
3.	Madagascar	1998
4.	Mauritius	2008
5.	Nigeria	1990
6.	Rwanda	2008
7.	South Africa	2017
8.	Uganda	2000
9.	Tunisia	1993
10.	Zambia	2006
11.	Zimbabwe	1996