UNIVERSITY OF NAIROBI

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

SCHOOL OF LAW

MAKING KENYA A HUB FOR ARBITRATION OF INTERNATIONAL FINANCIAL SERVICES DISPUTES

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF DEGREE OF

MASTER OF LAWS (LLM)

BY

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REG NO: G62/67465/2013

NOVEMBER, 2014

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DECLARATION

I **DAISY OWUOR AJIMA** do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any University.

SIGNED: ……..

DAISY OWUOR AJIMA

This Thesis is submitted for examination with my approval as University Supervisor

SIGNED: …….

DR. KARIUKI MUIGUA

ACKNOWLEDGEMENTS

I would like to acknowledge with thanks everyone that has been instrumental in my research. First, to God above for the strength and life to complete this thesis, my supervisor, Dr. Kariuki Muigua, for graciously agreeing to supervise this research and for all his meticulous comments and directions. I consider myself lucky to have worked with the best in the field and the current chair of the Chartered Institute of Arbitrators (Kenya Chapter).

I also appreciate my colleagues in the Banking sector who provided occasional insights and took time to fill out my questionnaires.

Thanks to my friends who were there for me to the end and a very special thank you to my family for their patience for all the long nights and absence from commitments, especially my mum Philista for her constant encouragement and to my little boy Gweth for reminding me to go to sleep.

DEDICATION

To my mother, Philista Akoth Ajima, for being a constant pillar of strength and for her prayers, always there. My Dad for watching over us from heaven for the last 20 years and my special boy Gweth Ajima whose face gives me daily joy.

TABLE OF ACRONYMS

AA	Association of Arbitrators
AASA	Association of Arbitrators of South Africa
AALCO	Asian-African Legal Consultative Organisation
ADR	Alternative Dispute Resolution
AFSA	Arbitration Foundation of South Africa
BFID	Banking Fraud Investigation Department
CBK	Central Bank of Kenya
CIArb	Chartered Institute of Arbitrators
CRB	Credit Reference Bureau
DRC	Dispute Resolution Centre
ICSID	International Centre for Settlement of Investment Disputes
ISDA	International Swaps and Derivatives Association
IAA	International Arbitration Act
LCIA	London Court of Arbitration
KLR	Kenya Law Report
LRCSCA	Lagos Regional Centre for International Commercial Arbitration

KLRCA	Kuala Lumpur Regional Center for Arbitration
MCCI	Mauritius Chambers of Commerce
NAFTA	North America Free Trade Agreement
NCIA	Nairobi Center for International Arbitration
MIARB	Malaysian Institute of Arbitration
NYC	New York Convention
OTC	Over the Counter
PCA	Permanent Court of Arbitration
SIAC	Singapore International Arbitration Centre
PwC	Price Waterhouse Coopers
TRAC	Tehran Regional Arbitration Centre

TABLE OF CASES

1. Alfred Wekesa Sambu & Ors v Mohammed Hatimy & Ors (2007) e KLR.
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3. Glencore Grain Limited v TSS Grain Millers Limited [2002] 1KLR 606.
4. Harbour Assurance Co. Ltd. V. Kansa General International Insurance Co. Ltd., [1992] 1 Lloyd's L.Rep. 81
5. NNPC v Lutin Investment Limited (2006) 25 NSCQR 77.
6. Rashid Moledina v. Hoima Ginners (1967) E.A.
7. World Duty Free v Republic of Kenya, ICSID Case No ARB/00/7.

LIST OF CONVENTIONS AND TREATIES

1. United Nations, *Charter of the United Nations,* 24 October 1945, 1 UNTS XVI.
2. UNCITRAL, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 UNTS 38, 21 UST 2517; 71LM 1046 (1968)
3. UNCITRAL *Model Law on International Commercial Arbitration*, 24 1LM 1302 (1985)

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1. Arbitration Act, Act No.4 of 1995, Laws of Kenya, (As amended in 2009)
2. Arbitration Act number 42 of 1965, Laws of South Africa.
3. Banking Act Cap 326 Laws of Kenya.
4. Central Bank of Kenya Act.
5. Civil Procedure Act, Cap 21, Laws of Kenya, Revised in 2010.
6. Constitution of Kenya, 2010.
7. English Arbitration Act 1996, Chapter 23.
8. German Arbitration Act of 1998.
9. International Arbitration Act (Cap 143A)
10. International Arbitration Act of 2008, Laws of Mauritius.
11. London Court of International Arbitration Rules.
12. Malaysian Act 646 Arbitration Act 2005 of the Laws of Malaysia
13. Nairobi Centre for International Arbitration Act 26 of 2013.

ABSTRACT

The evolution of international trade has seen more and more parties enter into international financing transactions. In every contractual relationship, disputes are inevitable and it is necessary to plan for disputes. Traditionally, disputes, commercial or otherwise have been resolved by litigation but due to delays, costs, publicity and technicalities associated with litigation, alternative dispute resolution (ADR) processes evolved. The specific objective of this study is to evaluate the legal regime regulating international commercial arbitration in particular in the Banking sector and ascertain to what extent Kenya's legal regime has advanced the cause.

The methodology adopted in researching into this topic is based on analysis of enactments, conventions, rules, reports, books, articles and journals. Also primary sources like interviews questionnaires and statutes have been used. The research seeks to critically analyse the arbitration regime in Kenya and highlight the gaps leading to Kenya not being preferred as an arbitration seat.

CHAPTER ONE

BACKGROUND OF THE RESEARCH

1.0 Introduction

Arbitration has been defined as a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choice.[1] In most instances, arbitration involves a final and binding decision, producing an award that is enforceable in national courts.[2] Arbitration is recognized as a form of Alternative Dispute Resolution (ADR), the mainstream dispute resolution mechanism being litigation.[3] The phrase "alternative dispute resolution" refers to all those dispute resolution processes other than litigation including but not limited to negotiation, inquiry, mediation, conciliation, expert determination, arbitration and others.[4] To some writers however the term "*alternative dispute resolution*" is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.[5]

Some of the advantages of litigation that are worth considering are that courts are public institutions and the court files are in most cases accessible to the public. Court sessions are also open to the public (unless held "in camera" pursuant to an order of the court). Arbitration and ADR proceedings on the other hand are conducted in private and are only open if the parties so agree.

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[1] K Muigua, S*ettling disputes through arbitration in Kenya*. (Glenwood Publishers, Nairobi, 2012)

[2]M L. Moses, *The Principles and Practices of International Commercial Arbitration*, (Cambridge University press,Mar 26, 2012)

[3]The exception where arbitration is not regarded as an Alternative Dispute Resolution mechanism is in International Business Transactions whereby due to continued use and custom, arbitration is the most commonly used mode of dispute resolution and as such not regarded as an alternative dispute resolution mechanism.

[4]K Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution.' Available at <http://www.kmco.co.ke/index.php/publications.html> (accessed 1 May 2014)

[5] P. Fenn, 'Introduction to Civil and Commercial Mediation', in Chartered Institute of Arbitrators, Workbook *on Mediation* (CIArb, London, 2002), pp. 50-52.

The parties further have a choice of the arbitral tribunal to hear the dispute. This instills confidence in the disputants especially where it involves complex agreements. Parties from different nationalities or jurisdictions are more comfortable in having a neutral forum for determination of the dispute than litigating in court.[6]

International arbitral awards are normally enforceable in any country as opposed to a foreign judgment seeking to be enforced in Kenya which is limited to the reciprocal enforcement provisions under the Foreign Judgments (Reciprocal Enforcement) Act.[7] There are of course disadvantages in Arbitration and ADR - the costs being a major factor. Jurisdictional issues also do at times arise but given the considerations above, these are dispute resolution processes that commend themselves even in a transformed judiciary.[8]

According to the 2013 judiciary report,[9] the bulk of the Judiciary's service delivery occurred in the Magistrates' and Kadhis' courts, where Kenyans first - and often last - interact with the Judiciary. In 2012/2013, the total case load in Magistrates' and Kadhis' courts was 652,683. Of these, 60,484 new cases were initiated in the Magistrates' courts, 163,132 cases were resolved and 485,976 were still pending by June 30, 2013.[10] From these statistics, it is evident that there is a clog in the court system.

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[6]Kaplan and Stratton, 'A Place for Alternative Dispute Resolution in a Transforming Judiciary' Legal Bulletin February 2013 Available at <http://www.kaplanstratton.com/wp-content/uploads/2014/07/Newsletter-Feb-2013.pdf> (accessed 6 November 2014)

[7]Cap 43 of the Laws of Kenya.

[8]Peter Gachuhi, 'Kenya: A Place for Alternative Dispute Resolution in a Transformed Judiciary' Available at <http://www.mandaq.com/x/244910/Arbitration+Dispute+Resolution/A+Place+For+Alternative+Dispute+Resolution+In+A+Transforming> (accessed 8 November 2014)

[9]Available at <http://www.supremecourt.gov/.../2013year>(accessed 10 June 2014)

[10] ibid

There is increasing complexity in the nature of claims involving financial products. The disputes that are arising, for example, disagreements over the results produced by complex financial models and formulaic calculations, require a high level of understanding of both the financial products concerned and the financial markets. Decisions are also being taken by courts which impact on global markets, for example, decisions on the close-out mechanics of industry standard contracts such as the International Swaps and Derivatives Association (ISDA) Master Agreement. There is an increasing concern that not all national courts are capable of making these decisions.[11]

In 2013, the Central Bank of Kenya (CBK) revised the CBK Prudential Guidelines (the Guidelines) by addition of the CBK Consumer Protection Guidelines.[12] The Guidelines seek under its objectives to protect fair and equitable financial services practices by setting minimum standards for institutions in dealing with customers, increase transparency in order to inform and empower customers of financial products, foster confidence in the banking sector and provide efficient and effective mechanisms for handling complaints relating to provisions of financial products and services.[13] Part IV paragraph 4 of the Guidelines sets out provisions for Complaints Handling Consumer recourse. Although the Guidelines purports to provide a clear framework for protecting consumers against risk of fraud, loss of privacy, unfair practices and lack of full disclosures, they do not appear to offer the customer redress in event the financial service provider fails to comply with the Guidelines.[14]

[11]Ashurst LLP, 'Use of Arbitration in Financial Transactions' available on www.ashurst.com/doc.aspx?id_Resource=5418, accessed on May 5, 2014
[12]CBK/PG/22, made pursuant to section 33(4) of the Banking Act (Cap 488 Laws of Kenya).
[13]Ibid Part II, section 2.1 (a) to (d).
[14]P Aliker, 'A New Paradigm for Handling Alternative Dispute Resolution: Accessing Justice through ADR, Chartered Institute of Arbitrators.' CIARB, Kenya, Volume 1 Number 1, 2013 Journal.

Finally, Kenya has made notable strides towards promotion of International Commercial Arbitration with the establishment of the Nairobi Centre for International Arbitration established under the Nairobi Centre for International Arbitration Act.[15] The operationalisation of the law is an important step in moving the country towards being a hub for international arbitration. The board that will administer the centre has already been constituted.[16]

A hub is defined as an effective centre for an activity; region or network.[17] For example, Singapore has been particularly successful due to an efficient court system that is supportive of arbitration and institutional developments.[18] If Kenya is to be considered a hub of ICA, arbitration matters would be referred to Kenya even when none of the parties are Kenyan or part of their business is in Kenya.

1.2 Statement of the research problem.

The purpose of this study is to understand the arbitration process and practice in Kenya as compared to the arbitration process and practices in jurisdictions that are considered "hubs" of International Commercial Arbitration and to what extent Kenya can review its regime to ensure Kenya is considered as a hub of ICA.

[15]Act No. 26 of 2013.
[16]Ibid Section 6.
17'Oxford Dictionary.' Available at <http://www.oxforddictionaries.com/definition/english/hub.html> (accessed 18 May 2014)
18M Pryles 'Singapore: A Hub of Arbitration in Asia.' Available at <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia.html> (accessed 2 May 2014)

An ideal juridical seat of arbitration provides for neutrality, centralized forum, final and binding adjudication and a worldwide enforcement regime.[19] Generally, in any dispute a victory would be pyrrhic if one cannot enforce. Noting the ideal ICA regime as detailed above, however, currently in Kenya, though there are statutory provisions in support of arbitration, the enforcement mechanisms are not clear. The Consumer Protection Act (CPA),[20] together the Consumer Protection Guidelines[21] seek to protect Bank customers. However, the CPA does not offer an adjudicatory scheme for consumer complaints; customers still have to fall back on legal proceedings.

Section 88 of the CPA limits the use of arbitration and provides that any consumer agreement that requires or has the effect of requiring a dispute out of a consumer transaction be referred to arbitration is invalid in as so far as it prevents a consumer from the right to commence an action in the High Court for a right given by the Act. This section of the CPA in the author's view negates the provisions of the Arbitration Act and the principles of justice because a customer may elect not to go into arbitration despite an arbitration agreement but the Bank will be bound to submit to arbitration if the customer elects to go for arbitration.

In specific reference to Kenyan Banking sector, the Kenya Banking Association (KBA) is an umbrella body of all Banks in Kenya.[22] KBA has made efforts towards having a dispute

[19]Timothy Lindsay, Planning for Disputes in Cross-border Private Equity Deals: Managing Risk (and Getting some Benefits) with International Arbitration Available at <http://www.lexology.com/library/detail.aspx?g=5fe.9b5e8-05ea-43aa-848d-2d620a10745c> (accessed 8 November 2014)
[20]Act No. 46 of 2012
21CBK Consumer protection guidelines 2012.
22http://www.kba.co.ke/

resolution mechanism, one of the difficulties with specially trained arbitrators is that they might be seen to be trained and appointed by the KBA which is a "Trade Union" of Banks and therefore might not be seen as being independent.

1.3 Objectives of the Study.

The study has the following objectives:-

1. To highlight the benefits derivable from arbitration as an alternative dispute resolution mechanism and ascertain to what extent Kenya's legal regime has advanced this cause.
2. To discuss the current legal, institutional and policy framework for domestic arbitration and international arbitration in Kenya.
3. To review the best practices for international arbitration for financial services with selected case studies of jurisdictions with best practices.
4. To make proposals towards effective arbitration of financial services disputes in Kenya.

1.4 Research questions

The study seeks to answer the following questions:-

1. Do the current laws and regulation provide the proper forum for Kenya to be considered a hub of international commercial arbitration and in particular for disputes in the financial sector?
2. Will adoption of Arbitration in the financial sector hinder the Bankers from seeking conservatory orders such as appointment of receivers which ordinarily ADR mechanisms cannot offer?

3. What are the best practices taking from sample jurisdictions for handling international commercial arbitration?

1.5 Research Hypotheses

The study will test the following hypotheses:

1. The existing arbitration laws and practice do not promote Kenya to be a hub of international commercial arbitration for financial transactions.
2. In order for Kenya to be a preferred seat of arbitration for financial disputes, the internal mechanisms for resolution of domestic financial disputes through arbitration needs to be strengthened.
3. There is a knowledge gap of benefits of arbitration in Kenya and there is need for all key players in the financial industry, to embrace ADR and include in standard contracts to encourage ADR culture.

1.6 Literature review

This research analyzes texts on arbitration, articles, journals and online articles. The literature mostly gives an understanding of the Kenyan arbitration regime, international arbitration and selected jurisdiction arbitration regime, to give a comparative study.

This research gives a broad understanding of the Arbitration law and practice in Kenya. To understand Kenya regime, Dr. Kariuki Muigua[23] takes a critical look at the laws relating to Arbitration in Kenya. He discusses the basic definition of the Arbitration Act 1995, and the

[23]K Muigua, *Settling Disputes though Arbitration in Kenya*. (Glenwood Publishers Limited, Nairobi, 2012)

procedural law relating to arbitration in Kenya. He provides a comprehensive sample of case law in Kenya relating to arbitration to better understand arbitration in Kenya. He discusses arbitration right from the arbitration agreement, the preliminary matters, the hearing to the final award and the procedure of enforcement of the arbitral award. In his conclusion, the author looks at the arbitration profession in Kenya and the procedure of becoming an arbitrator in Kenya. He further confirms the hypothesis that the future of arbitration in Kenya is bright, arbitration being given constitutional confirmation and also other statutes giving provisions of arbitration.[24] On international arbitration, the author states that there has been a capital fight by investors who have relocated from Kenya due to protracted court battles that are the hallmark of any commercial dispute in Kenya.[25] This book does not provide a wide look at international arbitration and also a comparative analysis of arbitration which this study will seek to look at.

On the discussion on international arbitration, Margret L. Moses,[26] gives a comprehensive insight of ICA. She discusses arbitration from arbitration agreements, to the procedure and rules of award writing and finally enforcement of arbitral awards and also enforcement of foreign arbitral awards. The book does not provide a study of Kenya's Arbitral laws and this paper will link the practice of international arbitration with the domestic arbitration in Kenya and how Kenya can apply the principles of international arbitration to ensure it is a preferred choice of international commercial arbitration.

[24]For example the Civil Procedure Act.
[25]Muigua at p 224.
[26]M L Moses, *Principles and Practices of International Commercial Arbitration*. (Cambridge University Press)

For comparative study in UK practice of Arbitration, Sutton [27] analyses the practice of arbitration in UK and international arbitration. The book is based on English Arbitration Act of 1996.[28] The UK Act is not based wholly on the Model Law as is the case with the Kenya 1995 Act. Thus, this text will be used for comparative purposes and understanding of arbitration practice. For example, under section 68(3) of the UK Arbitration Act, the courts can, in certain circumstances, remit an award back to the arbitrator.[29] There is no such provision under the Kenyan Act.

Of particular relevance to this research is the collection of essays edited by Michael Hwang SC.[30] These essays were written by international arbitrators and scholars. The contributors critically evaluate the Model Law and analyse the various aspects from a comparative view point. Related topics like the New York Convention and the Washington Convention are also dealt with in these essays. There is no specific reference to Kenyan Arbitration practice. The author shall attempt to link the Kenyan experience to the cases provided.

For purposes of specific reference to arbitration in the financial sector, apart from the Arbitration Act, CBK Prudential Guidelines and various statutory enactments including the supreme law, it would seem that this field of law is neglected in terms of literature. Indeed there was no standard Kenyan academic text touching on arbitration in the financial sector in particular. This paper

[27]Sutton, David St. John et al, A: 21st Ed., (London: Sweet & Maxwell, 1997).
[28]'English Arbitration Act.' Available at <http://www.legistlation.gov.uk/ukpga/1996/23/contents> (accessed 5 May 2014)
[29]Section 68 (3) provides that an award may be challenged on the basis of irregularity such as the tribunal exceeding its authority, failure to deal with matters forwarded to it, award obtained by fraud, irregular conduct of proceedings, failure to comply to rules of form *inter alia* the court may remit the award back to the tribunal for reconsideration.
[30]M Hwang SC, 'Selected Essays on International Arbitration.' Available at <http://www.transnational-dispute-management.com/downloads/MH_Selected-Essays_on_IA.pdf> (accessed 30 April 2014).

shall endeavour to provide some answers. The literature reviewed above which are critical to this study have given an in-depth analysis and understanding of the arbitration environment, including the arbitral tribunals in Kenya and beyond. The literature reviewed also looks at the regulatory environment.

1.7 Theoretical framework

This research is based on the Justice principle, in accessing a fair trial. Justice is simply fairness. Fairness is the predominant theme in all theories of justice stretching from the classical to modern. The classical perspective of justice advanced by Plato and Aristotle[31] was "giving equals their equal share".[32] Both saw justice as a virtue of all virtues that applies to the entire spectrum of human interaction.

John Rawls[33] was the first scholar to define justice in a detailed and concise manner.[34] He advanced a libertarian theory of priority of liberty and priority of justice over efficiency and welfare. Out of his *Theory of Justice* came into being critics who developed other theories. Rawls sets out two principles of justice; distribution of liberty and distribution of social and economic rights. The first principle maintains that each person has an equal right to the most extensive basic liberty compatible with a similar liberty for others. Secondly, social and economic inequalities are to be arranged so that they are both, (a) to be the greatest benefit of the

[31]Aristotle wrote 'when men are friends they have no need of justice.' See. J.Barnes (ed.) *Nicomachean Ethics* Book VIII, 1:1155a. Also cited in *The Complete Work of Aristotle*, Vol. 2 Princeton University Press, Princeton, 1984) , P.1825
[32]Ibid
[33]1921-2002
[34]John Rawls, *A Theory of Justice.* (Harvard University Press, Cambridge 1971)

least advantaged and (b) attached to offices and positions open to all under conditions of fair equality and opportunity.[35] This research looks at distribution of liberties.

1.8 Conceptual framework.

It can be argued that the preference is supported by a number of facts for example; for a long time there have been well established legal judicial channels that have been the key players in resolving commercial disputes arising from financial transactions. These said channels are well established and the procedures for such actions are well established. Additionally, the players in the financial sector are well versed with the legal regime. Also important to note is that precedents and decisions have well be set making it easy to determine and predict the outcome of cases and there is a clear enforcement mechanism.

Arbitration, though not commonly used can be a better mechanism for the resolution of commercial disputes. This can be attributed to factors such as the speedy hearing and determination of cases and lack of a backlog. Arbitration can go an extra mile not only to resolve the dispute in question but also restore severed relationships between the parties in question. This is greatly beneficial especially for a bank- customer relationship. Currently as it stands, the Kenyan legal regime is inadequate in ensuring the promotion of arbitration as part of the mechanism to ensure the disputes and in particular in the banking sector.

1.9 Research Methodology

This research engages both primary and secondary methods. It is based on research on various written texts and internet sources. Both primary and secondary sources of materials were used.

[35]Ibid p 302

Legislative enactments, rules, conventions and protocols constitute the primary source, while textbooks, journals, magazines, articles and related reports will form the secondary sources. Businessmen and practitioners experienced in arbitration were interviewed through questionnaires as well as staff from various banks.

1.10 Limitations

One of the advantages of Arbitration is confidentiality and ability to keep the arbitral procedure and the award confidential.[36]The fact of confidentiality in arbitration might make it difficult to get case law of procedures of actual arbitration for purposes of case study.

The general dispute scenario is wide and the paper seeking to also look at the international market is wide. This paper is limited to selected jurisdiction at the author's discretion to get a comparative analysis.

1.11 Chapter breakdown

Chapter one introduces the study and gives an overview of the whole paper and the theoretical framework, conceptual framework, the literature review, limitations and justification of the study.

Chapter two examines arbitration law and practice in Kenya. It assess the procedure of arbitration, from the arbitration agreement, commencement of arbitration, the hearing, and the award, the enforcement of the arbitral award and also enforcement of foreign arbitral award. The

[36]Margret L. Moses, at p 3

chapter concludes by highlighting shortfalls in the arbitration process in Kenya and makes brief recommendations thereto.

Chapter three is a brief study of international commercial arbitration. It looks at arbitration laws and practice in selected jurisdictions and how financial disputes are resolved in selected jurisdictions. It further analyses various national and international arbitral bodies and in addition institutions such as PRIME Finance and ISDA.

Chapter four is an analysis of the actual findings on current status of arbitration in the banking sector and gives details of findings from the research.

Chapter five is on summary of the research findings, conclusion and recommendations on how to improve on Kenya's arbitration regime especially in resolving financial disputes

CHAPTER TWO

OVERVIEW OF ARBITRATION LAWS IN KENYA

2.1 Historical development of Arbitration in Kenya

2.1.1 Traditional dispute resolution in Kenya

Arbitration in its simplest sense is a process that can be used to resolve disputes between parties without going through a formal court system. The most common use of international arbitration today is the resolution of commercial disputes.[1]

Khan[2] defines arbitration as a private consensual process where parties in a dispute agree to present their grievances to a third party for resolution. In considering whether arbitration existed in African customary law, the operative words are "consensual" and "agree to present their disputes to a third party". Therefore, the issue of consent and willingness challenges the assumption that this form of dispute resolution was arbitration. However, it was a form of dispute resolution closer to litigation because the parties had no choice of the person to resolve the dispute. Though Kenya has adopted modern methods of arbitration, traditional dispute resolution is still being used in Kenya.

2.2.1 Modern arbitration in Kenya

The current legal framework for arbitration is set out in the Constitution of Kenya,[3] the Investment Disputes Convention Act,[4] the Arbitration Act as amended in 2009[5] and the

[1]Dynalex, 'A Brief History of Commercial Arbitration.' Available at <https://dynalex.wordpress.com/2012/12/28/a-brief-history-of-commercial-arbitration> (accessed 1 June 2014)
[2]R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworth's, London, 1998), p.123
[3]Article 159.
[4] Chapter 522 Laws of Kenya
[5]Act No. 4 of 1995

Arbitration Rules.[6] Additional provisions may also be found in the Civil Procedure Act[7] and the Civil Procedure Rules[8] and the Nairobi Centre for International Arbitration Act.[9]

The earliest arbitration laws were in 1914 when the Arbitration Ordinance[10] was enacted. The Arbitration Ordinance, 1914 was a reproduction of the English Arbitration Act, 1889. The principal attribute of this Ordinance is that it accorded courts ultimate control over the arbitration process in Kenya.[11] The Arbitration Act Cap 49 Laws of Kenya[12] was a mirror image of the English Arbitration Act, 1950. The Preamble of the Act[13] was emphatic that it was 'An Act of Parliament to make provision in relation to the settlement of differences by arbitration.' The Act defined an arbitration agreement as a written agreement to refer present or future differences to arbitration.

The current Arbitration Act, (Act No. 4 of 1995), was assented to on 10th August, 1995 and came to force on 2nd January, 1996. The Act is based on the Model Law.[14] Subsequently, the 1995 Act has been amended via the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010.

[6]Legal Notice, No. 58 of 1997.
[7]Cap 21 Laws of Kenya
[8]IbidSection59.
[9]Act No. 23 of 2013.
[10]The Arbitration Ordinance, 1914 (1914 to 1968)
[11] J Tugee, '*Overview of Arbitration in Kenya*.' Available at <http://www.academia.edu/3057430/Overview_Of_Arbitration_In_Kenya.html> (accessed 26 May 2014)
[12]Enacted in 1968.
[13]Ibid Section 2.
[14]UNCITRAL Model Law on International Commercial Arbitration, (United Nations Document A/40/17, Annex 17), as adopted by the United Nations Commission on trade and law on June 21, 1985.

2.2.2 International framework

Kenya acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) on the 10th of February, 1989 with a reciprocity reservation. The Convention was domesticated by virtue of section 36(2) of the Arbitration Act[15] which provides for recognition of awards made in accordance with other Conventions that Kenya is a signatory and relating to arbitral awards.

Kenya is also a contracting party to the Washington Convention or the Convention on the Settlement of Investment Disputes between states and nationals of other states (ICSID convention). Kenya signed the convention on 24th May, 1966. The Investment Disputes Convention Act[16] domesticates this convention. This Convention establishes the International Centre for Settlement of Investment Disputes (ICSID), and provisions enable private entities sue a state.

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21st June, 1985 at the commissions' 18th annual session. The General Assembly, in its resolution 40/72 of 11th December 1985, recommended that all state parties give due consideration to the model law in order to achieve uniformity of the law of arbitral procedures and specific needs of international commercial practice.[17]

Therefore, the main rationale for ratification of these Conventions is first, to have international uniformity in dispute settlement procedures and practice desired because of the inadequacy and

[15]Ibid.
[16]Chapter 522 of the Laws of Kenya.
[17]UNCITRAL secretariat explanation of model law.

inappropriateness of most of the partner states' national laws and to provide clear enforcement mechanism in Kenya noting enforcement risk in any arbitration.

2.3 Overview of the 1995 Arbitration Act

The Arbitration Act, 1995 defines arbitration to mean, any arbitration whether or not administered by a permanent arbitral institution.[18] This is not very elaborate and regard has to be had on other sources. The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations. The Kenya Arbitration Act is tailored from the Model Law.

2.4 Arbitration under the Civil Procedure Act

Section 59 of the Civil Procedure Act[19] provides that; all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules.

The Civil Procedure Rules[20] provides, inter alia, that; where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

2.5 Role of courts in arbitration in Kenya

The general approach on the role and intervention of the court in arbitration is provided under section 10 of the Arbitration Act 1995. The section provides that "*Except as provided in this Act,*

[18]Section 2 1995 Arbitration Act.
[19]Cap 21 Laws of Kenya.
[20]Order 46.

no court shall intervene in matters governed by this Act." The section, clearly in mandatory terms, restricts the jurisdiction of the court to matters provided for by the Arbitration Act.[21] This section epitomizes the recognition of the policy of parties' autonomy which underlies the arbitration generally and in particular the Arbitration Act. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.

The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. Though steps have been made to make Kenya conducive for arbitration, parties to contracts and other economic undertakings prefer ordinary courts in dispute resolution.[22] Therefore, the courts' diaries are perpetually clogged and cases take far too long to conclude. On average, civil cases take between four and eight years to conclude. Land disputes may take as long as twenty years.[23]

It is believed that when arbitration is fully embraced as an alternative solution to resolving intriguing commercial disputes, a great deal of workload in the judiciary will be eased.[24] Against

[21]K Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention before, Pending and after Arbitration in Kenya.' Available at <http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf> (accessed on 9 June 2014)

[22]J K. Gakeri, 'PlacingKenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR. Vol 1, No 6, June 2011International Journal of Humanities and Social Sciences Available at <http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> (Accessed 1 June 2014)

[23]George Njau Maichibu v Mungai Maichibu & Joseph Kimani Waithimu, (2007) eKLR which was filed in 1981 but was not concluded until 2008

[24]B Wambugu, 'Kenya: Arbitration Cuts Backlog in Courts.' Available at <http://allafrica.com/stories/200806231977.html>

this background, the centrality and importance of arbitration in dispute resolution cannot be gainsaid.[25]

Courts have not been instrumental in the popularization and promotion of arbitration as a dispute resolution mechanism. Although the Court of Appeal for Eastern Africa appeared to have recognized the role of arbitration in the 1960s,[26] courts have not been proactive in encouraging and enabling litigants appreciate the benefits of arbitration yet it is expressly provided for by the Civil Procedure Rules.[27]

For any jurisdiction to be considered to be a hub of ICA, court interference in Arbitration has to be minimized. As Justice Visram in the case of **Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors**[28] observed:

> *"Where members of an organization have chosen, by virtue of their very membership, to settle their disputes through arbitration, I see absolutely no reason why the courts should interfere in that process. It is not in the public interest…The courts should encourage as far as possible settlement of disputes outside of the court process. Arbitration is one of several methods of alternate dispute resolution and is certainly less expensive, expeditious, informal and less intimidating than the formal court system. This court will certainly encourage the use of alternate dispute resolution where it is appropriate to do so."*

[25]Ibid 22

[26]Duffus J A in Rashid Moledina v. Hoima Ginners (1967) E.A. 645 at 650 quoting Nauman v. Nathan (1930) 37 Lloyds Rep. 250

[27]Order XLV

[28]Alfred Wekesa Sambu & Ors v. Mohammed Hatimy & Ors (2007) eKLR

2.5 Arbitration in banking sector

Banks and financial institutions traditionally have favoured litigation over arbitration as the means of resolving international disputes. The reasons often given include: (i) financial disputes typically involve straightforward payment claims and do not involve complex legal questions or fact finding, with the latter more suited for arbitration; (ii) arbitration does not provide for the possibility of default judgments or summary judgments, and as a result arbitration is not as efficient and cost effective as court proceedings; (iii) disputes about the tribunal's jurisdiction may lead to unnecessary delays; (iv) arbitrators tend to render more equitable decisions than judges; (v) the flexibility of the arbitral process creates legal uncertainty; (vi) banks appreciate control of decisions by higher courts on appeal; (vii) arbitration can permit unnecessarily extensive document production (particularly compared with civil law courts); (viii) arbitration is problematic in multi-party disputes; (ix) arbitral confidentiality means that proceedings cause less embarrassment to the debtor; and (x) awards have limited precedential value.[29]

Although the arbitral process has several shortcomings and is unsuitable in circumstances in which the dispute involves many parties, it is commonly a perfect substitute for litigation. It does not deny the parties the right to seek judicial redress if they so desire and more importantly, if a party is dissatisfied with the arbitral award, it is entitled to challenge the award in the High Court which has jurisdiction to set the award aside, as limited in the Act and not on the merits of the case.[30]

[29]A Sheppard and C Chance, 'Arbitration of International Financial Disputes.' Available at <http://kluwerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/> (accessed 25 May 2014)
[30]Section 35 of the Arbitration Act

In November 2012, the KBA launched an ADR process.[31] According to KBA, banking disputes take an average of two to three years before reaching settlement; commercial banks in Kenya have agreed to set up an alternative settlement mechanism with its customers.[32] KBA said the new mechanism is likely to be implemented in 2013 and will aim for a more efficient and faster way of resolving disputes between banks and its customers. KBA stated that the industry's umbrella organization is already in talks with its partners in order to set up the arbitration system.

Though this was noble at the beginning and Banks initially embraced the ADR mechanism, as at the beginning of 2014, the mechanism was used mostly to solve dispute between Banks. Banks referred disputes relating to clearing disputes between Banks,[33] disputes relating to forex exchange rates for interbank rates, disputes of overnight lending amongst others. Most Bank customers did not embrace the dispute resolution mechanism and most of them preferred to refer to the courts system for resolution.

Further steps were made by the KBA by passing the KBA Consumer guide[34] **"**Dispute Resolution (Complaint Handling)." Customers were always encouraged to establish a direct and long term relationship with their financial service provider. This was especially helpful should an issue arise. Recognising that from time to time, disputes may arise between a customer and their

[31]C Canoza, 'Kenyan Banks Agree on Faster, Efficient Process of Resolving Disputes.' Available at <http://www.bizrika.com/featured/kenyan-banks-agree-on-faster-efficient-process-of-resolving-disputes/> (accessed 30 May 2014)
[32]www.kba.co.ke, accessed on May 30, 2014.
[33]Author reviewed several cases for instance a case between once privately owned bank and a new Bank in the market that was not authorized to join the clearing house. The dispute arose of charges levied on the new bank. The KBA arbitrators held that the Bank refunds excess amounts charged. The award was accepted with no appeal.
[34]<http://www.kba.co.ke/consumer%20guide/consumerresource.html> (accessed 8 May 2014)

Bank, the Kenya Bankers Association advocates an internal process through which the bank and the customer can reach an amicable agreement.

A customer's first port of call, as per the Guide[35] in any dispute should be their bank relationship manager, branch manager or bank customer service department. External dispute resolution support (arbitration) can be sought by the customer/bank once all internal efforts have been exhausted. According to the CBK Prudential Guidelines,[36] a bank on receiving a complaint shall provide the complainant with a prompt written acknowledgement[37] that it has received the complaint and is addressing the issue. Therefore customers should be familiar with the resolution process and allow their bank this window to review and respond to the issue.

2.6 Arbitrability of Banking Disputes

Before proceeding to discuss the nature of banking disputes in Kenya, the scope of Banking under Kenyan law gives a clearer picture. Banking services have been defined under the Banking Act[38] which defines a Bank as a company which carries on, or proposes to carry on, banking business in Kenya.[39] The Act further defines Banking business as either the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; the accepting from members of the public of money on current account and payment on and acceptance of cheques;[40] and the employing of money held on deposit or on

[35]Ibid.
[36]CBK/PG/22.
[37]At least within seven days of receipt of the complaint.
[38]Cap 485 Laws of Kenya.
[39]Ibid Section 2.
[40]The enactment of the Micro Finance Act, 2009, expanded the definition of banking services to include micro finance.

current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.[41]

"Arbitrability" on the other hand refers to whether or not arbitrators have the authority to rule on a dispute.[42] Arbitrability involves the determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts.[43]It refers to whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.[44]

Article 159 of the Constitution of Kenya 2010 requires that the courts and tribunals, in exercising judicial authority be guided by *inter alia* the principles of alternative forms of dispute resolution.[45]

The Act merely provides that the High Court may set aside an arbitral award if the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya.[46] An arbitral award may also be set aside when the award is contrary to the public policy of Kenya.[47] Section 35 (2) is a mirror of Article V of the 1958 New York Convention which also indicates

[41]Ibid Section 2.
[42]D Zaslowsky and G Hanessian, 'Who Decides Arbitrability?'Available at <http://www.lexology.com/library/detail.aspx?g=c4a9dadf-8b80-4ed5-81f4-c9ba50a35d21.html> (accessed 10 May 2014)
[43]F Kariuki, 'Redefining 'Arbitrability': Assessment of Articles 159 and 189 (4) of the Constitution of Kenya.' Vol. 1 Issue 1 (2013), Alternative Dispute Resolution Journal
[44]L Shore 'Defining 'Arbitrability' – The United States –vs - the rest of the world' (2009). New York Law Journal.
[45]These include reconciliation, mediation, arbitration and traditional dispute resolution mechanism provided that traditional dispute resolution mechanisms shall not be used in a way that it contravenes the Bill of Rights, repugnant to justice and morality or is inconsistent with the Constitution.
[46]Section 35 (2) (b) (i) Cap 49.
[47]Section 35 (2) (b) (ii) Cap 49

that recognition and enforcement of an arbitral award can be set aside on the above mentioned grounds.

For arbitration to be considered in Banking transactions, one must be able to look at all the elements of a credit dispute,[48] being; first, Independence – determination should be impartial and be clearly independent of industry regulators, government and industry; secondly, free to consumers – consumers should not have to pay to access the scheme; thirdly prompt – consumers should be entitled to have cases heard promptly and efficiently.[49]

Arbitration should not be binding on consumers, the ADR should be a genuine alternative to the court system; Firms should be encouraged to resolve disputes in house, fair and reasonable determinations should be based on what is fair and reasonable in the circumstances; any ADR scheme must be credible both to consumers and business in order to derive support.

Looking further at the Consumer Protection Act of Kenya, the Act compliments the role of ADR as it seeks to promote and advance the social and economic welfare of consumers in Kenya by providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[50]

2.7 Current position in relation to arbitration of banking disputes

Based on the history above of customers not using the arbitration system, the KBA in collaboration with the Strathmore Law School, established a pilot alternative resolution centre on

[48]'Kenya Banking Association, Regional Credit Reporting Conference Kenya.' Available at <http://ciskenya.co.ke/wp-content/uploads/2013/03/Ombudsman-Presentation-to-Kenya.pdf> (accessed on 5 June 2014)

[49] ibid

[50]Section 4 (g) of the Consumer Protection Act, sub-clause (h) further seeks to provide for an accessible, consistent, harmonized, effective and efficient system of redress for consumers

June 3, 2014. The pilot project is pioneered by five Banks.[51] This however, only covers mediation and not arbitration.

Considering the structure of the sessions, according to the KBA, the cases suitable for mediation would mainly be transactional and credit cases that meet the criteria of (i)Transaction Case**,** disputes pertaining to service delivery, including channels such as electronic payments and cheque clearing, and when there has been no resolution in over 30 days. (ii) Loan & Other Credit Cases; disputes pertaining to loan repayments, and when the debt is 130 days past due and negotiations have reached an impasse. The goal is to prevent such cases being referred to auctioneers; and also to prevent litigation initiated by either party. (iii) Case in Court; such cases, are particularly for nominal amounts and when there is no benefit in pursuing a lengthy legal process are also suitable for mediation, provided that both parties are willing to discuss an alternative agreement outside of court.[52]

The pilot considers the following cases not Suitable for arbitration, (i) Fraud or Misconduct Cases, such cases have an element of investigation by the Kenya Police and CBK Banking Fraud Investigation Department (BFID), and ATM Fraud Transactions, Such cases follow Visa/MasterCard rules and regulations on charge backs and dispute resolution.[53]

[51]Barclays; Equity Bank; Family Bank; Housing Finance; and Gulf African Bank
[52]'Banking Industry Mediation Center Pilot at Strathmore Law School Offers Complimentary Services in an Effort to Promote Alternative Dispute Resolution Practices' Available at <http://www.kba.co.ke/component/content/article/92-latest-news/290-banking-industry-mediation-center-pilot-at-strathmore-law-school-offers-complementary-services-in-an-effort-to-promote-alternative-dispute-resolution-practices> (accessed 5 November 2014)
[53]Ibid

Whilst the pilot is running, regard is to be had to the success of the pilot program. It will determine if Kenya's role on resolving domestic financial disputes will reflect on Kenya's ability to handle international disputes.

2.8 Institutional arbitration in Kenya

A number of institutions are in existence in the field of arbitration in Kenya apart from the Nairobi Centre for International Arbitration, which was established in 2013. There is the Chartered Institute of Arbitrators Kenya Branch, which was established in 1984, among the branches of Chartered Institute of Arbitrators which was formed in 1915 with headquarters in London.[54] Additionally, the Law Society of Kenya is in the process of establishing an International Arbitration Centre, whoever this is still being challenged by members of the society due to the cost of the project.[55]

The Centre of Dispute Resolution (CDR), was founded in 1997 in response to an increasing need in East Africa for a new dimension in resolving disputes, by seeking non-adversarial means of settlement, promoting reconciliation and cutting the cost of conflict in terms of both time and money.[56]

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[54]Chartered Institute of Arbitrators Available at <http://www.ciarbkenya.org/About_Us.html> (accessed 8 November 2014)

[55] Brian Wasuna, Lawyers claim fraud in Sh1.2bn LSK arbitration center, http://www.businessdailyafrica.com/Lawyers-cite-fraud-in-LSK-arbitration-centre/-/539546/2487730/-/120iwap/-/index.html, accessed on November 15, 2014

[56]http://www.disputeresolutionkenya.org/

2.9 Challenges facing International Commercial Arbitration in Kenya

2.9.1 Perception of National Courts interference

Ideally, for a state to be a preferred arbitration there should be little or no court interference. Professor Githu posits that the court's intervention in arbitration matters is substantially circumscribed, and in any event is not to be invoked where it would result in unnecessary delay and expense so thus, as a general rule, the object of intervention by courts should be to guarantee fair and impartial resolution of disputes by arbitral tribunals.[57] Interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on such disputes.

2.9.2 Perception of Corruption/ Government Interference

In Kenya, it is at times considered corruption and interference from the Government affects fair trial. Kenya has had cases where instances of corruption had been inferred at the international arena. For instance, In the ICSID case of **World Duty Free v Republic of Kenya**,[58] a case of a claim of enforcement of a contract by World Duty Free who claimed to have bribed the former President of the Republic of Kenya Daniel Arap Moi. The claimant investor argued that the alleged US$2m bribe to the former Kenyan president was made under the "Harambee" system of "mobilizing resources through private donations for public purposes" and was therefore legally justified. The ICSID was of the opinion that in light of domestic laws and international conventions relating to corruption, the tribunal was convinced that corruption is contrary to public policy in most jurisdictions. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by the arbitral tribunal.

[57]Githu Muigai *Arbitration Law and Practice in Kenya* (Law Africa Publishing, Nairobi 2011)
[58]World Duty Free v Republic of Kenya ICSID Case No ARB/00/7 (4 October 2006)

2.10 Institutional capacity

The Nairobi Centre for International Arbitration was established in 2013. Additionally, in Kenya, most Chartered Arbitrators are lawyers thereby lacking expertise to handle specialized matters, in particular banking sector, there exists a challenge on the capacity of existing institutions to meet the demands for ADR mechanisms introduced by the constitution as well as handling the commercial arbitration matters.[59] Whilst notable progress has been made on institutional arbitration, the structure needs to be entrenched, to enhance their capacity in terms of their number, adequate staff and finances to ensure that they are up to task in facilitation of ADR. It suffices to note that as it stands currently, there is no regional body governing arbitration in the East African Community.

2.11 Conclusion

In view of the foregoing, Banking transactions and disputes arising therein can be said to be falling within the purview of international commercial matters and so the disputes emerging can also be settled through ICA. Kenya has made notable strides on promoting ICA, with the amendment of the Arbitration Act, which now provides positive provisions that promote ICA. Whilst the KBA has made notable strides by establishment of an arbitration mechanism in 2012 and the eventual establishment of the Mediation Centre together with Strathmore University, arbitration is still to gain popularity. For Kenya to be considered a hub of ICA, steps have to be made to promote domestic arbitration.

[59]K Muigua, 'Promoting International Commercial Arbitration in Africa' Available at <http://www.kmco.co.ke/index.php/publications/119-promoting-international-commercial-arbitration-in-africa> (accessed 8 November 2014)

CHAPTER THREE

INTERNATIONAL COMMERCIAL ARBITRATION IN SELECTED JURISDICTIONS

3.0. Introduction.

This chapter gives a brief study of international commercial arbitration, and looks at the arbitration laws in selected jurisdictions and how financial disputes are resolved. The study first looks at international arbitration and international bodies governing the same, namely the ISDA and PRIME Finance. Among the jurisdictions to be looked at include Singapore, London, South Africa and Germany, Mauritius and Malaysia. The choice of these jurisdictions was dictated by the various achievements and developments in the said jurisdictions more so in the field of arbitration.

London was selected because of its development in arbitration both historically and at present and further for its use of both the UNCITRAL Model law coupled with common law principles and other law in the field of arbitration. Mauritius offers a good example of a system of arbitration that has and continues to receive much government support. Singapore was studied because of its fast growth in the field of arbitration and its previous achievement in the year 2010 for being crowned as the regional leader in Asia for the seat of arbitration by the International Arbitration Survey. South Africa offers a good example of a country that has developed institutional arbitration and partnered with a number of neighboring countries through the forming of institutions in the field of arbitration, including regional integration in arbitration. Germany on the other hand was selected owing to its rich historical development in arbitration spanning over several years and Malaysia was selected owing to its developed institutional

framework in the field of arbitration. For instance it has combined with other Asian and African countries to establish an Asian-African Legal Consultative Organization.

This chapter further examines how domestic arbitration laws link with International Arbitration Laws in various countries. More specifically, the chapter looks at the extent to which international arbitration laws have affected domestic arbitration laws and what Kenya can borrow so as to become a hub for international commercial arbitration taking the examples.

3.1 International commercial arbitration.

International commercial arbitration is arbitration in which has significant international elements exist such as, the head offices of the disputants are situated in different countries or the performance of the underlying contracts is in a foreign state.[60] For centuries, arbitration has been accepted by the commercial world as a preferred or at least an appropriate system for dispute resolution of international trade disputes.[61]Although international commercial arbitration has long been the preferred means of resolving cross-border disputes, the international corporate community has become increasingly concerned about increasing costs, delays and procedural

[60]Lloyd Duhaime, 'The Legal Definition of International Commercial Arbitration.' Available at <http://www.duhaime.org/LegalDictionary/i/InternationalCommercialArbitration.aspx> (accessed 26 June 2014). See also, Article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration which reaffirms the above definition.

[61]Julian D M Lew, *Comparative International Commercial Arbitration*. (Kluwer Law International Publisher, Netherlands 2003). See also Andrew and Jeff who argue that arbitration has become the preferred dispute settlement method in international commercial transactions. It offers parties the effective international enforcement provided by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, such party autonomy is not without limits, as private commercial behavior will invariably be subject to various national rules and policies. In Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration.' (2005) Melbourne Journal of International Law Available at <http://www.cclsr.law.unimelb.edu.au/files/dmfile/downloadebccl.pdf> (accessed 30 June 2014)

formalities. As a result parties are looking for other means of resolving cross-border business disputes.[62]

3.2 Arbitration under ISDA

The **International Swaps and Derivatives Association** (**ISDA**) is a trade organization of participants in the market for over-the-counter derivatives. It is headquartered in New York, and has created a standardized contract (the *ISDA Master Agreement*) to enter into derivatives transactions.[63] ISDA has more than 820 members in 57 countries; its membership consists of derivatives dealers, service providers and end user.

Historically, international financial transactions were documented under agreements governed by English or New York law and which contain jurisdiction clauses conferring jurisdiction on the English or New York courts.[64] The courts of both these jurisdictions were generally considered to have a reputation for probity and experience of resolving disputes arising out of derivative transactions, and they can generally be relied upon to do so with reasonable dispatch. Today, however, many parties to such transactions are based in emerging jurisdictions in which it is difficult (or sometimes impossible) to enforce a foreign judgment and further, succeeding on the

[62]S L. Strong, 'Beyond International Commercial Arbitration? The Promise of International Commercial Mediation' 42 (2014)Washington University Journal of Law and Policy, Forthcoming University of Missouri School of Law Legal Studies Research Paper No. 2013-21. Available at <http://www.papers.ssrn.com/so13/paperscfm?abstract_id=2363149.html> (accessed 29 June 2014)

[63]It is defined as a financial instrument whose characteristics and value depend upon the characteristics and value of an underlie, typically a commodity, bond or equity. Available at <www.m.investorwords.com/1421/derivative.html> (accessed 28July 2014)

[64]These are options provided for in Section 13 of the 1992 and 2002 ISDA Agreements. The ISDA/IIFM Tahawwut Master Agreement published jointly by ISDA and the International Islamic Finance Market provides for English or New York courts or (if the parties so specify in the Schedule) for arbitration under the ICC Rules or such other rules as may be specified in the Schedule.

merits of a dispute may prove to be a pyrrhic victory if it is not possible to enforce the resulting judgment.[65]

Due to globalization and increased use of arbitration, this prompted ISDA to consult as to the steps ISDA could take to assist in the use of arbitration. A short consultation paper was produced in November 2011 on the use of arbitration in the ISDA Master Agreement.[66] In that, ISDA sought views as to what form any optional arbitration clauses in the Master Agreement should take. The main issue ISDA sought consultation on is (1) drafting of arbitration clauses, wherein a number of avoidable difficulties arose where defective or otherwise poorly thought-out arbitration clauses have been inserted in ISDA. These difficulties arose often in practice and arose from a lack of necessary technical knowledge by those drafting the agreement and/or lack of sufficient attention being paid by the parties to the arbitration clause, perhaps under the mistaken impression that the clause is mere "boilerplate"; and (2) availability of appropriately qualified arbitrators: there are relatively few international arbitrators with significant experience of derivative transactions and related documentation.

Consequently, and after discussions and meetings in New York, Singapore and London, a guide to arbitration and sample clauses for use in both the 1992 and 2002 Master Agreements was published.[67]

[65]ISDA,'2013ISDAArbitrationGuideFinal' Available at <www.Arbitration_Guide_Final_09.09.13.pdf&ei=i4cjVMmgEIvW7QaaroDABA&usg> (accessed 1 June 2014).
[66]<http://www.isda.org/functional-areas/public-policy/financial-law-reform/> (accessed 20 July 2014)
[67]2013 ISDA Arbitration Guidelines ibid 6

The guide provides options for arbitration in the following seats: London, New York, Paris, Hong Kong, Singapore, Zurich or Geneva and The Hague, and under the following institution's rules: ICC, LCIA, SIAC, HKIAC, AAA-ICDR, Swiss Rules and P.R.I.M.E Finance.[68]

However, parties may amend these provisions by including an arbitration clause in the schedule to the Master Agreement. This is advantageous as it encourages the use of arbitration. Kenya can therefore easily include arbitration clauses in such agreements. The ISDA's seeks to assist ISDA'S members by providing model arbitration clauses tailored to the ISDA Master Agreements.[69] In addition to the Model Clauses, ISDA's Arbitration guide provides a general introduction to arbitration, including an explanation of key concepts such as the seat of arbitration and the role of arbitral institutions.

Some of the model clauses include neutrality.[70] This applies in instances where neither party is willing to submit to the jurisdiction, arbitration in a third party State may be acceptable.

In addition, finality is also provided for in relation to arbitration decisions that have been settled by the arbitration tribunal. Arbitration decisions are not subject to appeal on merits of the case as compared to court decisions. Appeal is only allowed on procedural matters and not on the merit of the case. These are matters that relate to the arbitration procedure such as the number of arbitrators, location of the arbitral court and the arbitration procedure. In addition to the above,

[68]Ibid
[69]This is a standard agreement used in over –the- counter derivatives transactions. The ISDA Master agreement, published by the International Swaps and Derivatives Association (ISDA) is a document that outlines the terms applied to derivatives transactions between two parties. See Investopedia. Available at <http://www.investopedia.com/terms/i/isda-master-agreement.asp> (accessed 1 July 2014)
[70]ISDA Arbitration Guidelines

parties may also be granted the discretion on the arbitration process on matters such as qualifications of arbitrators, location of the arbitral tribunal and the language of the arbitral court. The arbitral process and decisions that are reached afterwards are confidential. Parties have the discretion not to disclose any information regarding the arbitration to third parties.[71]

3.3 Arbitration under Panel of Recognized Market Experts in Finance (PRIME)

The Panel of Recognized Market Experts in Finance (PRIME), established on 16 January 2012, based in Hague, focuses on financial disputes. PRIME's procedural rules provide for certain types of expedited proceedings and an experienced panel of approved arbitrators may prove appealing as a venue for financial institutions.[72] The centre offers mediation, arbitration and other dispute resolution services to the finance sector and has its own arbitration rules which have been adapted to meet the needs of the financial markets. It also has its own panel of experts and arbitrators which includes representatives from both mature and developing markets, dealers and end-users, legal experts and market experts.[73]

The PRIME Finance Arbitration Rules are inspired by, and very closely follow the UNCITRAL Rules 2010. PRIME has kept deviations from the original UNCITRAL text to a minimum, both with a view to the role of the Permanent Court of Arbitration and in order to ensure that, in the case of any ambiguities, reference could easily be made to the commentaries on the UNCITRAL Arbitration Rules 2010. The Rules have been tailored to the needs of arbitration in the financial

[71]Ibid
[72]See <http://www.primefinancedisputes.org/> for more information about PRIME Finance
[73]Additionally, they are made to reflect the fact that they provide for an arbitration institute that will administer the arbitral proceedings (PRIME Finance), whereas the UNCITRAL Rules have been written for ad hoc arbitration. See. Ashurst, 'Use of Arbitration in Financial Transactions.' Available at <http://www.ashurst.com/doc.aspx%3Fid_Resources%3D5418> (accessed 4 July 2014)

markets. They are also distinct from other arbitration rules in particular that awards may be made public with the consent of all parties.[74]

PRIME Finance may also publish an award or an order in its entirety, in anonymised form, so long as no party objects to the publication within one month after receipt of the award. These provisions are aimed at supporting the overall goal of PRIME Finance; namely to increase legal certainty through creating a significant body of case law in the area of complex financial products.[75] The PRIME Finance Arbitral Rules are a modified version of the 2010 UNCITRAL Arbitration Rules, which ensures that parties can rely on the available commentaries of the UNCITRAL Arbitration Rules and use of these Rules in arbitral proceedings throughout the world.[76]

3.4 Arbitration in selected jurisdictions

3.4.1 Singapore

In 2010, Singapore was named the regional leader in Asia for the seat of arbitration by the International Arbitration Survey.[77] The Academy of Singapore in its paper, gives an insight of the arbitration system of Singapore.[78] It posits that arbitration in Singapore is well supported by various institutions, expert arbiters and infrastructure to ensure that the arbitration process is seamless, efficient and professional. Some of the institutions include; The Singapore

[74]Article 34 (5) of the UNCITRAL Arbitration Rules 2010
[75]Ibid
[76]Hogan Lovells, 'Global Currents: Trends in Complex Cross Border Disputes.' Available at <http://www.hoganlovells.com/Custom/Global%20Currents_Trends_in_Complex_Cross-Border_Disputes.pdf> (accessed 6 July 2014)
[77]Mohan Pillay, 'The Rise of Asia-based International Arbitration' Available at <http://kluerconstructionblog.com/2010/11/23/the/rise/of/asia/based/international/arbitration/> (accessed 3 July 2014)
[78]Singapore Academy of Law, 'Alternative Dispute Resolution in Singapore' Available at <http://www.singaporelaw.sg/Sglaw/arbitration-adr/arbitration-adr-in-singapore.html> (accessed 24 June 2014)

International Arbitration Academy which was set up in 2012 by the Centre for International Law and the Faculty of Law at the National University of Singapore, to develop practitioners arbitration knowledge and skills. Other bodies include the Singapore International Arbitration Centre (SIAC) and the Singapore Chamber of Maritime Arbitration. These are two local non-institutional organizations that promote arbitration with their own panel of arbitrators and rules.

There are two separate legal regimes that govern the conduct of arbitration in Singapore: The International Arbitration Act (Cap 143A) which applies both to international and non-international arbitrations and the Arbitration Act. Institutional arbitration is led by the SIAC. It maintains a panel of Accredited Arbitrators of local as well as international experts from which most appointments are made for arbitrations administered by it. SIAC also appoints arbitrators for ad hoc arbitration as the default statutory appointing authority.[79]

Any person who has the capacity to enter into a commercial contract will have the capacity to enter into an arbitration agreement. This indicates the discretion granted to every individual who wishes to utilize the option of arbitration. Also of interest to note is that apart from specific requirements imposed by the parties, there are no special qualifications (other than independence and impartiality) required of any arbitrator.[80] The IAA further adds that the arbitrator may be of any nationality.[81]

[79]In adopting a dual regime approach, legislatures have also given parties to arbitration held in Singapore the choice of whether they wish to 'opt in' or 'opt out' of either of the regimes. The choice is best expressed by parties in the arbitration clause by making specific reference to either the IAA or the Arbitration Act. Lawrence G S Bod 'The Law and Practice of Arbitration in Singapore' Available at <http://www.aseanlawassociation.org/docs/W4_sing/pdf> (accessed 1 July 2014)
[80]Article 12(2) IAA and Section 14 (3) (b) Arbitration Act.
[81]Article 11(1) IAA.

Arbitrators in Singapore are not bound by judicial rules of evidence.[82] Parties in arbitration proceedings may also be represented by any person of their choice and such persons need not be lawyers. Foreign lawyers are also permitted to represent parties including appearing at hearings in the arbitration where the applicable law is not Singapore law. Where however the issues in dispute involve Singapore law, foreign lawyers appearing at the arbitration hearing must do so jointly with a Singapore lawyer who has in force a practicing certificate, or with a legal officer.

3.4.2 Arbitration in England

Financial institutions have in the past relied primarily on litigation- typically in New York and London - to enforce contracts, they are increasingly turning to international arbitration.[83] According to a 2013 survey by PwC (Price Waterhouse Coopers) and the University of London, a significant majority of in-house counsel at financial services institutions expressed the belief that international arbitration was well-suited for disputes in their sector.[84] With the continued spread of English as the language of international business, and the development of London as an international financial and business center, promises continued growth in England's importance as an arbitral center.[85]

[82]The power to determine the admissibility, relevance, materiality and weight of any evidence lies with the arbitral tribunal. Article 19(2) of the IAA Section 23(3) Arbitration Act

[83]Latham and Watkins, 'Litigation or Arbitration: How Best to Resolve Cross-Border Disputes in the Financial Sector.' Available at <http://www.lw.com/thoughtleadership/LW-arbitration-primer-financial-sector.pdf> (accessed 22 June 2014)

[84]PwC and Queen Mary, University of London, Corporate Choices in International Arbitration: Industry Practices.(PwC Survey)

[85]K Noussia 'Confidentiality in commercial Arbitration.' Available at <http://www.aspenpublishers.com/%5CAspenU/%5CS.com> (accessed 4 July 2014)

An arbitration under the auspices of a foreign international institution (e.g. ICC) may have its seat in London, whilst institutional arbitration (International Chamber of Commerce, London Court of International Arbitration, London Maritime Arbitrators Association, various trade associations) may be contractually required to appropriate, ad hoc arbitrations by a tribunal appointed by a body such as the Chartered Institute of Arbitrators and operating under UNCITRAL Rules or the English Arbitration Act 1996.[86]

Both international and domestic arbitration seated in England, Wales or Northern Ireland is governed by the English Arbitration Act 1996, which provides a detailed (110 separate sections) statement of English arbitration law. The Act has produced somewhat anomalous results specifically that the cradle of common law jurisprudence now boasts a substantially longer, more detailed statutory statement of international arbitration law than any civil law jurisdiction.[87]

The Arbitration Act came into force on 31 January 1997. It consolidated and updated existing legislation on arbitration, codified legal rules and principles established by case law, brought English law more into line with internationally recognized principles of arbitration law and sought to make arbitration in England more attractive both to domestic and international users. It is worth noting that the Act limits judicial intervention in the arbitration process while preserving

[86]J Bellamy, 'International Commercial Arbitration in London in the Credit Crunch.' Available at <http://www.39essex.com/docs/articles/Int%20Comm%20Arbon%20(London)%Moscow%20140709%20-%20JB.pdf> (accessed 27 June 2014)

[87]'Introduction to International Arbitration' (Aspen Publishers.) Available at. <www.aspenpublishers.com/%5CAspenUI%5CsamplechaptersPDF%5C625.pdf> (accessed 4 July)

the courts' powers to provide assistance where this is necessary to make arbitration a fair and efficient dispute resolution procedure.[88]

Most commercial disputes are capable of being arbitrated if the parties agree on that form of dispute resolution. The courts have not considered the circumstances in which disputes cannot be arbitrated. They further add that, where this issue is brought before the courts, however, only limited public policy considerations normally apply.[89] It is worth noting that in the early seventies, the British government initiated the Departmental Advisory Committee to consider whether the UK should adopt the UNCITRAL Model Law. The Committee while rejecting the Model Law gave various reasons for instance, that the law would lead to England divorcing its arbitral regimes, removing its existing powers of the English Courts to correct errors of law and further that the Model did not resemble a typical English statute amongst other reasons.[90]

3.4.2.1 The London Court of International Arbitration (LCIA)

The main institution overseeing arbitration in London is The London Court of International Arbitration (LCIA) which has provided Rules that govern the arbitration process.[91] Interestingly, the rules operate to parties where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules or by the Court of the LCIA.

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[88]Guy Pendel and David Bridge, 'Arbitration in England and Wales' Available at <http://www.eguidesCmslegal.com/pdf/arbitration_Volume_I/CMS%20GtA_Vol%201_England%20WALES.pdf> (accessed 29 June 2014)

[89]Ibid

[90]Departmental Advisory Committee on Arbitration Law, 'A Report on the UNCITRAL Model Law on International Commercial Arbitration (HMSO, 1989) Chaired by Lord Justice Mustill cited in Sara Lembo, 'The 1996 UK Arbitration Act and the UNCITRAL Model Law: A Contemporary Analysis' Available at <http://www.eprints.luiss.it/694/1/lembo-20100713.pdf> (accessed 8 November 2014)

[91]See, The London Court of International Arbitration Rules. Available at <http://www.Icia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx> (accessed 2 July 2014)

Any party wishing to commence arbitration under the Rules sends to the Registrar of the LCIA Court a written request for arbitration.[92] The LCIA Court conducts its functions through Tribunals. The Court appoints a Tribunal as soon as practicable after receipt by the Registrar of the Response or after the expiry of 30 days following service of the request upon the Respondent. If no response is received by the Registrar (or such lesser period fixed by the LCIA Court). The LCIA Court may proceed[93] with the formation of the Arbitral Tribunal notwithstanding that the request is incomplete or the response is missing, late or incomplete. A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three- member tribunal is appropriate. This is in line with the UNCITRAL Model Law.

Where the parties are of different nationalities, a sole arbitrator or chairman of the Arbitral Tribunal shall not have the same nationality as any party unless the parties who are not of the same nationality as the proposed appointee all agree in writing otherwise.

The Rules also provide for the option of revoking an Arbitrator's appointment,[94]the seat of the arbitration which failing such a choice, the seat of arbitration shall be London, unless and until

[92]Article 1 of the LCIA Arbitration Rules It further provides that the request must be accompanied by the names and addresses of the parties to the arbitration and of their legal representatives. In addition, a copy of the written arbitration clause or separate written arbitration agreement invoked by the Claimant, together with a copy of the contractual documentation in which the arbitration clause is contained or in respect of which the arbitration arises.

[93]The LCIA Court alone is empowered to appoint arbitrators. This is done with due regard for any particular method or criteria of selection agreed in writing by the parties. In the case of a three-member Arbitral Tribunal, the chairman (who will not be a party-nominated arbitrator) shall be appointed by the LCIA Court. See Article 6 of the Rules. See Article 5.

[94]See Article 10.

the LCIA Court determines in view of all the circumstances, and after having the parties an opportunity to make written comment, that another seat is more appropriate.[95]

Any party may be represented by legal practitioners or any other representatives.[96] Moreover, the costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the LCIA Court in accordance with the Schedule of Costs [97]and the Rules mandate that the parties undertake as a general principle, to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain , save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.[98] The LCIA is an ideal court that Kenya can emulate to have.

3.4.3 Arbitration in South Africa

Arbitration in South Africa is governed by the Arbitration Act number 42 of 1965.[99] It sets out various rules and guidelines for the application and enforcement of arbitration laws in South Africa. The main aim of the Act is to provide for the settlement of disputes and the enforcement of awards by arbitral tribunals. However, in order for this Act to apply, the contract in question must involve a written arbitration agreement. This basically means that the parties must have agreed to follow such action in the instance of an occurrence of a dispute between them.

[95]See Article 16.
[96]See Article 18.
[97]See Article 28, which further provides that the parties shall be jointly and severally liable to the Arbitral Tribunal and the LCIA for such arbitration costs.
[98]See Article 30. Article 30 (30.3) further provides that the LCIA Court does not publish any award or any part of an award without the prior written consent of all parties and the Arbitral Tribunal.
[99]The Arbitration Act Number 42 of 1965

The only matters that the Act does not apply to are matters of status and matrimonial causes.[100] This provides leeway for Arbitration to be applied as a form of disputes resolution in all matters of a financial and commercial nature and in particular matters of banking which is the main scope of this research. In addition, Article 3 to 8 provide for the binding effect of arbitration agreements and the position of the South African Courts in this matter. The courts have the power on application by a party to the arbitration proceedings, to set aside arbitration agreements, to order a dispute referred to arbitration be retracted or it may also give an order to the effect that the arbitral award ceases to have effect.

The fact that the courts have overriding powers over the arbitral awards ensures that the arbitration tribunals are accountable and they enforce the decisions based on the principles of fairness and justice that are the basis of the court system.

This however, may go a step to undermine the authority of the arbitration tribunals as parties to an arbitration agreement may seek recourse in the courts. In particular, for decisions that they do not agree with or those that seem unfair to them.

Arbitration laws in South Africa are mainly derived from domestic sources and various arbitration institutions discussed below. South Africa restrained itself from adopting the Model law for various reasons: for instance that positive contributions have been made by the national Arbitration legal regime to the development of South African Law and so replacing the South African Law on arbitration would undermine legal certainty among those involved in domestic arbitration until it is seen how the Model Law will be interpreted and applied by courts. Further that the powers of the courts are wider under their laws than under the Model Law, also that the

[100] As set under Article 2 of the Act

Model law requires adherence as closely as possible to the English law and therefore the text is not necessarily easy for South African lawyers to interpret and apply without the aid of the *travaux preparatories* and lastly that the urgent need to take remedial measures regarding the type of procedure often used in more complex arbitrations, particularly in the construction industry.[101]

3.4.3.1 The Arbitration Foundation of South Africa

It was established on 22nd June 1996 as a mass action of various stakeholders in the commercial market at the time. This was done in line with the international trend of incorporating arbitration as a form of dispute resolution.[102]

Its founding membership includes its subsidiary ADRASA, all Bar Associations, twenty five legal firms, the eight major accounting firms, SACOB (South Africa College of Business), the Corporate Lawyers Association of South Africa and the Association of Arbitrators. The head office is in Sandston and the intention was to extend arbitration services to Namibia, Botswana., Zimbabwe, Lesotho and Swaziland. This in total formed forty one founding members who were subscribed into seventy three units.[103]

In continuation, the foundation has set out three main aims; it seeks to ensure the resolution of disputes, this covers a wide array of areas but the foundation mainly handles matters of a commercial nature. Second, it seeks to promote the involvement of foreign players in commerce by ensuring they are comforted by the application and involvement of arbitration clauses in

[101]South African Law Commission, Project 94, Domestic Arbitration Report 2001 Available at <http://www.justice.gov.za/salrc/reports/r_prj94_dom2001.pdf> (accessed 8 November 2014)
[102]'AFSA' Available at <http://www.arbitration.co.za> (accessed 30 July 2014)
[103]'Formation of AFSA- The Arbitration Foundation of South Africa' Available at <www.sabar.co.za/law-journals/1996/November-vol009_no2_ppl124-125.pdf> (accessed 20 June 2014)

international agreements. This promotes and ensures the development of international trade. Lastly, it serves the broader community with cost effective service in comparison to civil litigation.[104]

However, it is key to note that in relation to arbitration and the banking sector in South Africa, no banks or financial institutions form part of the founding members of the foundation. It is mainly comprised of auditing firms, law firms and institutions of higher learning. This inhibits the adoption of the foundations aims and objectives as the financial institutions do not hold a key position in the foundation.[105]

The operations of AFSA are based on set rules that determine how various commercial disputes are settled. In addition, there are also set out clauses that are tailor made to be adopted into various agreements and contracts.[106] These said clauses specify what action should be taken by the parties to an agreement in the case of a breach or a disagreement.

Therefore, AFSA has indeed played a critical role in ensuring the adoption and development of arbitration as a means of dispute resolution in South Africa.

3.4.3.1 Africa ADR

This is a subsidiary of the Arbitration Foundation of Southern Africa. It is a non-profit, dispute resolution administering authority, which is neutral and independent. It provides comprehensive and complete administrative services in the resolution of regional and international disputes whether by way of arbitration, mediation or conciliation.[107] Its main role at enactment was to

[104]Ibid
[105]Ibid
[106]See. AFSA Available at <www.arbitration.co.za/pages/rules.aspx> (accessed 4 July 2014)
[107]Available at <www.africa.adr.com/index.php?a=r/home/2> (accessed 6 July 2014)

provide with immediate effect comprehensive dispute resolution services throughout Africa at approved venues. Unlike AFSA, Africa ADR is not only focused on the Southern Region of Africa.

Currently, it is comprised of four founding countries. First is South Africa through AFSA, next is Mauritius through The Mauritian Chamber of Commerce and Industry, Mozambique through the *Centro de ArbitragemConcilliacao e Medicao* and lastly the Democratic Republic of Congo via the *Centre d'Arbitage Du Congo.*[108]

Parties seeking to incorporate the Africa ADR as part of their dispute resolution must adopt their clauses as part of their contract or agreement. It is interesting that Africa ADR is only popular in South Africa and its founding countries. It is mainly used to settle commercial and bank disputes in South Africa.

3.4.3.3 The Association of Arbitrators (South Africa)

It is the first Arbitral body to be established in South Africa. The Association of Arbitrators (South Africa) was formed in 1979 to constitute an organization to promote arbitration as a means of resolving disputes, to assist arbitrators and ADR specialists in the efficient discharge of their duties, and to make arbitration and ADR more effective.[109] It is headed by an executive committee comprising of a chairman[110] and five persons who serve a two year contract.

The analysis of these bodies of Arbitration provides a clear picture of how commercial disputes are resolved. The development of arbitration as a mechanism to solve commercial disputes provides for the adoption of clauses set by the Arbitration Organizations in the jurisdiction. The

[108]Ibid
[109]Available at www.arbitrators.co.za (accessed 4 July 2014)
[110]Judge FC Blackie is the current chair.

burden of ensuring adoption of arbitration methods is on the contracting parties to ensure the incorporation of clauses.

Another point to note is that the Arbitration Organizations are easily accessible and the framework to apply arbitration law in the organizations is well set. This ensures the processes are expedited and are cost effective.

3.4.4 International Arbitration in Mauritius

Mauritius Chambers of Commerce and Industry (MCCI) is the main socio-economic actor of the country. It was established in 1850. It is the oldest non-profit making institution representing the private sector in the country. One of its two functions is the efficient settlement of a dispute relating to trade leading to the setting up of a Permanent Court of Arbitration.[111] In 2004, the parliament of Mauritius proclaimed the accession to The New York Convention on the Recognition and Enforcement of Arbitral Awards. In 2008, Mauritius passed a new law governing arbitration, the International Arbitration Act of 2008. This was designed to modernize international arbitration within Mauritius and to make the country a more attractive regional venue for international arbitration.[112]

The IAA is based on the UNCITRAL Model Law and the subsequent amendments thereto; and was proclaimed with effect from 1st January 2009 and governs all international arbitrations commenced after that date, regardless of the date when the relevant arbitration agreement was

[111]Dev R. Erriah, 'International Arbitration in Mauritius' Available at <http://www.corporatelivewire.com/top-story.html?id=international=arbitration-in-mauritius> (accessed 8 July 2014)
[112]Ibid

executed.[113] Based on the UNCITRAL Model Law, the Act can be classified as being modern as it contains many features found in other modern regional arbitration such as the Indian Arbitration and Conciliation Act, 1996 and the Dubai International Financial Centre Arbitration Law.[114] The Act appears to be more advanced than some other longer-established UNCITRAL based laws as it incorporates features of the amended Model Law.

Some features of the Mauritian IAA, such as including specific provisions for disputes concerning offshore companies incorporated in Mauritius; Expanding the definitions of international arbitration and arbitration agreements to give the Mauritian IAA a specific focus on investment arbitration, specifically excluding confidentiality provisions to improve transparency, and expressly permitting foreign lawyers to act as both counsel and arbitrators. In April 2009 Mauritius concluded a Host Country Agreement with the Permanent Court of Arbitration at The Hague and in accordance to that the Permanent Court of Arbitration has appointed a permanent representative in Mauritius. Mauritius is now co-operating with a leading institution in the field of international arbitration to open a dedicated and state-of-the-art regional Centre for International Arbitration.[115]

3.4.5 Arbitration in Germany

By the end of the nineteenth century to the early twentieth century, German courts had given active support to arbitration. This is partially attributed to the doctrine of separability.[116] This

[113]Jean Meiring, 'Mauritius Launched as New International Arbitral Seat.' Available at <http://www.Sabar.co.za/law-journals/2011/april/2011-april-Vol024-pp20-21.pdf> (accessed 9 July 2014)
[114]Ibid
[115]Ibid. See also Jean who notes that this is a satellite office outside The Hague- in Port Louis. Under the International Arbitration Act, it serves as the appointing authority for arbitrations in Mauritius.
[116]In order to understand this principle, consider the Court of Appeal decision in *Harbor V Kansa (1992)* It was held that; "Once it became accepted that the arbitration clause is a separate agreement, ancillary to

doctrine[117] was later found to be of key importance as it facilitated the enforcement of arbitration agreements.[118]

By the twentieth century, there was formation of arbitral tribunal organizations that operated under the umbrella of trade organizations. This saw a huge development in arbitration law as in the year 1909, 1030 cases were pending in tribunals in Berlin alone.[119]

Arbitration was therefore practiced from early on and it was recognized as an effective means of alternative dispute resolution. This was prior to the enactment of the German Arbitration Act of 1998 that came into force on 1st January 1998. The aim of the act was to facilitate domestic and international arbitration proceedings in Germany. It is important to note that it was modeled after the UNCITRAL Model Law on International Commercial Arbitration. The rationale was to create an arbitration friendly jurisdiction and to attract foreign practitioners as a result.[120] Even before the UNCITRAL rules, Germany had previously ratified the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.[121] In addition, Germany is also part of two conventions that are part of International Arbitration Law. These are namely, the European

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the contract, the logical impediment to referring an issue of the invalidity of the contract to arbitration disappears. Provided that the arbitration clause itself is not directly impeached (e.g. by a *non est factum* plea), the arbitration agreement is as a matter of principled legal theory capable of surviving the invalidity of the contract." See. <The principle of separability | Law Teacher http://www.lawteacher.net/common-law/essays/the-principle-of-separability-law-essays.php#ixzz36XK07LPS> (accessed 4 July 2014)

[117]It led to the adoption of separability clause in Arbitration agreements.

[118]'Introduction to International Arbitration' (Aspen Publishers.) Available at. <www.aspenpublishers.com/%5CAspenUI%5CsamplechaptersPDF%5C625.pdf>(accessed 4 July)

[119]Ibid p 14

[120]Philipp Wagner, 'Arbitration in Germany' Available at <www.weitnauer.net/uploads/downloads/aufsaaetze/dispute-res/Arb_in_Germany.pdf> (accessed 4 July 2014)

[121]The New York Convention of 1958

Union convention on International Commercial Arbitration and the Washington Convention on Settlement of Investment Disputes between States and Nationals of other states.[122]

3.4.5.1 The German Arbitration Act of 1998

As previously discussed, German Arbitration Laws matured with Germany's adoption of UNCITRAL rules in1998. In relation to the UNCITRAL rules, the German Ministry of Justice during Germany's enactment of the Arbitration Act that was predominantly derived from the UNCITRAL Model Law (it not only deals with domestic arbitration awards but even those of foreign states.) went on to state that;

"*If we want to reach the goal that Germany will be selected more frequently as the seat of international arbitrations in the future, we have to provide foreign parties with a law that, by its outer appearance and by its contents is in line with the framework of the Model Law that is so familiar all over the world. This is necessary, in particular, in view of the fact that in negotiating international contracts, usually not much time is spent on the drafting of the arbitration agreement. The purpose of the Model Law to make a significant contribution to the unification of the law of international arbitration, can only be met if one is willing to prefer the goal of unification instead of a purely domestic approach when it comes to the question of the necessity and the scope as well as to the determination of the contents of individual rules.*[123]

[122]ICSID Convention

[123]Bundestags Drucksache No. 13/5274 of 12 July 1996, reprinted in Berger, The New German Arbitration Law 140 (1998) (quoted in Berger,The New German Arbitration Law in International Perspective, 26 Forum Int, l 1, 4 (2000)), http://www.aspenpublishers.com/%5CAspenUI%5CSampleChaptersPDF%5C625.pdf

In comparison to the South African Arbitration law, Germany's Arbitration Act is intertwined with International Arbitration Law. In contrast, South African Arbitration law is purely domestic. This is attributable to the fact that South Africa has not ratified the UNCITRAL rules.

Philipp in analyzing Germany's Arbitration rules noted that notwithstanding any international treaties or institutions, or other arbitration rules chosen by the parties, the German Arbitration Law is the underlying basis for domestic and foreign arbitration whenever the place for arbitration is Germany. This essentially means that the German Arbitration Laws are the applicable laws in Germany as the municipal law.

The Act came into force on 1st January 1998 and it is incorporated into the Civil Procedure Code of Germany.[124] Notably, the Act specifically exempts the intervention of the courts in certain arbitration matters. This ranges from acts such as the agreement by the parties that has the arbitration clause among others.

The Act looks at the Arbitration agreement from a broad analytical point of view. The Act defines an arbitration agreement as;

"An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not."

As stated in the definition, arbitration law in Germany does not restrict itself to contractual relationships. It also applies to all disputes that may arise. This provides a clear framework as

[124]The 10th Book of The Code of Civil Procedure

parties to the arbitration agreement are capable of relying solely on arbitration to solve all the arising disputes.

Section 1033 provides that it is incompatible with an arbitration agreement for a court to grant an interim measure of protection relating to the subject matter of the arbitration on request by a party. This limit on the courts interference in matters of arbitration gives powers to the arbitral process and more so the decisions that are issued.

This however may prove a challenge as the arbitral courts are not as accountable to the courts for unfair decisions or practices and the courts in such instances have minimal power to intervene.

In addition, the Act also establishes the Arbitral Tribunal and sets the procedure for the process of arbitration. Under the Act, parties have the power to determine the number of arbitrators to hear the dispute, in the event they do not determine the number, the arbitrators shall be three.[125] Parties are also free to determine the process of appointment of arbitrators. An aggrieved party may apply to the arbitral tribunal within two weeks giving reasons in writing why they disagreed with the appointment process.[126]

The principle of separability is also encompassed under the Act[127] as it provides that the arbitration clause shall be treated as an independent agreement from the other terms of the contract.

Of crucial importance is Section 1055 which states that an arbitral award has the effect as a final binding court judgment. The fact that an arbitral award has such an effect gives the arbitration

[125]Section 1034
[126]Section 1035
[127]Section 1040

aspect of dispute resolution power similar to that of the court. As such, parties seeking arbitration see the process as an important one.

3.4.5.2 The German Institute of Arbitration (DIS)

It offers administrative arbitral proceedings that follow the DIS rules. It also provides model arbitration clauses for contracts. These are what give the institute the power to arbitrate in the said disputes.

The DIS provides for supplementary rules for corporate law disputes and expedited proceedings as well as rules regarding other dispute resolution mechanisms such as mediation and adjudication and in that regard, an analysis of the statistics reveals that the DIS has handled numerous cases and they have been growing over the years. In 2007, they handled 100 arbitration cases. In the following year (2008), they handled 122 and in 2009 the DIS handled a total of 171 arbitration cases. Moreover, the institute is the competent authority for duties of the International Chamber of Commerce (ICC) in Germany. It also acts as an apparent authority for ad hoc proceedings and provides general advice on selection of arbitrators. All this activities are in relation to the ICC.[128]

3.4.6 Malaysia

Arbitration is governed by the Malaysia Arbitration Act.[129] An analysis of the Act shows that it is drafted in line with the UNCITRAL Model Law. It not only deals with domestic arbitration awards but even those of foreign states. Section 38 provides that the courts of Malaysia are

[128]Ibid
[129]The Malaysian Act 646 Arbitration Act 2005 of the Laws of Malaysia Assented to on 30th December 2005

bound to recognize decisions not only from arbitration tribunals in the country but even those emanating from foreign jurisdictions. This caters for both domestic and international arbitration.

With regard to what is arbitrable in Malaysia, the Act provides for a wide array of disputes as the only limits to such disputes are those that are contrary to public policy. This provides a wide spectrum for arbitration laws to apply in the country.[130]

In terms of the procedure for the arbitration process, the Act generally follows the UNCITRAL model laws that confer discretion upon the arbitrating parties. This is regarding matters such as the number of arbitrators to determine the matter, grounds of challenge of arbitration procedure etc. The Act also embraces the principle of separability.[131]

Evidently, the arbitration tribunals have been granted unwavering discretion by the Act. This emanates from the fact that arbitration awards are final and binding on all parties involved; the courts also are bound to recognize all arbitral awards both from Malaysia and foreign jurisdictions.

On the Arbitration institutions, the first institution analysed is The Malaysian Institute of Arbitration (MIARB). Established in 1991, the main aim of MIARB is to promote the determination of disputes through arbitration. It covers a wide array of various sectors which include the commercial sector in the form of banking, finance and insurance. As with other arbitration institutions, the MIARB has its own set of arbitration and mediation rules for parties.

[130]Ibid at Section 4
[131]Ibid at Section 18

In addition, it is dedicated to facilitating the practice and study of arbitration and other alternative dispute resolution methods. Over the past two years, they have provided individuals and corporations with a convenient and neutral form of private settlement of disputes.[132]

In order for Malaysia to be a strong venue of dispute resolution, The Kuala Lumpur Regional Center for Arbitration (KLRCA) was established under the Asian-African Legal Consultative Organization (AALCO).[133]

Unlike MIARB, KLRCA is not only based in Malaysia but encompasses a wide area of Asia and some parts of Africa. Notably, KLRCA was the first regional center in Asia to provide institutional support as a neutral an independent venue for the conduct of domestic and international arbitration proceedings in Asia. It is established pursuant to a host country agreement and the government of Malaysia. It is nongovernmental and also a non-profit organization.

The Asian-African Legal Consultative Organization (AALCO), realizing the importance of international commercial arbitration for the development of the developing countries, felt the need to improve the procedure of international commercial arbitration, the necessity for institutional support, develop necessary expertise and create environment conducive to conduct arbitration in the Asian and African regions.[134] This, it was expected, would "process and guide the future of international commercial arbitration in a manner which led to the creation of a '*lex*

[132]Available at <www.miarb.com/institute.html> (accessed 8 July 2014)
[133]AALCO was established on 15th November 1956. Due to the Banding conference in Indonesia. It was initially created to serve as an advisory board to member states on international law overseas. It launched the International Scheme for Settlement of Disputes in the Economic and Commercial Transactions in 1978. More information is available at <www.klrca.org.my.about.html> (accessed on 8 July 2014)
[134]B.S. Chimni *"AALCS's Regional Center for Arbitration: Historical Context, Genesis and Functions"* p 111

mercatoria'" which took into account the needs and concerns of developing countries.[135] While several countries had established national arbitral institutions and passed requisite legislation, the need to establish regional centers to fulfill the urgent needs for the Asian-African community of States was also felt.

Accordingly, the AALCO endorsed the recommendations of its Trade Law Sub-Committee that efforts should be made by Member States to develop institutional arbitration in the Asian and African regions and envisaged *inter alia* the establishment of a network of Regional Centres for Arbitration functioning under the auspices of the AALCO in different parts of Asia and Africa so that the flow of arbitration cases to arbitral institutions outside the Afro-Asian region could be minimized and as a viable alternative to the traditional institutions in the West.

The AALCO Secretariat study titled 'Integrated Scheme for Settlement of Disputes in the Economic and Commercial Matters',[136] elaborated two basic objectives: first, to establish a system under which disputes and differences arising out of transactions in which both the parties belong to the Asian-African and Pacific regions could be settled under fair, inexpensive and adequate procedures. Secondly, to encourage parties to have their arbitrations within the region where the investment made or the place of performance under an international transaction was a country within this region.[137] The conclusions made in the study were in favour of establishment

[135]Ibid
[136]See 'Asian-African Legal Consultative Organization' Available at <http://www.aalco.int/scripts/view-posting.asp?recordid=10> (accessed 6 November 2014)
[137]R Babu 'International Commercial Arbitration and Developing Countries' pg 14 Available at<http://www.lawgazette.com.sg/2010-03/Feature2.htm> (accessed 27 July 2014)

of six sub-regions, namely East Asia, South-East Asia, West Asia, North Africa and West Africa.[138]

In pursuance of this, AALCO in cooperation with its Member states established four institutions namely, Kuala Lumpur Regional Arbitration Centre (KLRCA) in 1978, Cairo Regional Centre for International Commercial Arbitration (CRCICA) in 1979, Lagos Regional Centre for International Commercial Arbitration (LRCSCA), in 1980 and Tehran Regional Arbitration Centre (TRAC) in 1996.[139] Most recent is the Nairobi Center for International Arbitration.[140]

Clearly, Malaysia is indeed a hub of arbitration in Asia and in Africa too. The advancements of arbitration in the country have been spread out and are being felt in Kenya. Kenya should embrace the arbitration process at a faster pace borrowing from Malaysia.

3.5 Conclusion

From the foregoing, arbitration seems to be seen as a preferred method of resolving various disputes, more so in the commercial sector. The analysis above reveals that the countries have promoted alternative dispute resolution through the establishment of various arbitration institutions. The said institutions have their own set of rules and procedure and furthermore, the doctrine of non-interference by courts seems to be the key drive in their affairs. The involvement of various players and neighboring countries for example as seen with South Africa, can also be argued to be a reason behind the success and continued growth of arbitration in those jurisdictions. Cooperation in the international community too has and still plays a key role in the continued growth of international arbitration. The implementation of national laws which are in

[138]SeeAALCC, *Consolidated Report of the Seventeenth, Eighteenth and Nineteenth Sessions held in Kuala Lumpur (1976), Baghdad (1977) and Doha (1978)* (NewDelhi: AALCC, 1979).
[139]Ibid p 15
[140]Established by the Arbitration Act no 26 of 2013.

line to the various international instruments governing arbitration exhibits evidence of the continued appreciation and acceptance of international commercial arbitration.

Kenya has a lot to borrow from the international community and the above analyzed institutions. The private sector for example should push for the establishment of more arbitration institutions and especially for each sector of the economy. Establishment of strong ties with neighboring states should also be encouraged as this will see the possibility of establishment of regional arbitration institutions.

CHAPTER FOUR

DATA ANALYSIS AND THE CURRENT STATUS OF ARBITRATION IN THE BANKING SECTOR IN KENYA

4.1 Introduction

Chapter three gave a brief of arbitration in various jurisdictions that are considered hubs of international commercial arbitration and gave a brief of the link between arbitration practice in Kenya and in the said jurisdictions.

This chapter deals with data analysis from questionnaires sent to a sample of respondents. The sample included staff from twelve out of the 44 registered Banks in Kenya, 10 Banking customers and 10 legal practitioners. There was no precise formula of choosing the interviewees or coming up with the sample size. The study relied on the snowball method in getting the interviewees.[141] The questionnaires and selected interviews were conducted between the months of June to September 2014.

[141]That snowball method can be placed within a wider set of methodologies that takes advantage of the social networks of identified respondents, which can be used to provide a researcher with an escalating set of potential contacts and further that snowball sampling is something of a misnomer for a technique that is conventionally associated more often with qualitative research and acts as an expedient strategy. See Rowland Atkinson and John Flint, 'Snowball Sampling" in 'The Sage Encyclopedia of Social Science Research Methods' Available at <http://www.srmo.sagepub.com/view/the-sage-encyclopedia-of-social-science-research-methods/n931.xml> (accessed 6November 2014)

The return rate of the questionnaires was 75%. The findings confirm that there is need to improve Kenya's internal arbitration mechanism if Kenya is to be considered a hub of arbitration. Additionally, there seem to be a knowledge gap in relation to Bank customer and even senior Banks staff who have admitted not having a grasp of what arbitration encompasses. Though a number of legal practitioners are aware of arbitration, the arbitration process in Kenya is elaborately discussed in chapter 2above.

4.2 Data Analysis

The purpose of this study was to understand the arbitration process and practice in Kenya as compared to the arbitration process and practices in jurisdictions that are considered "hub" of International Commercial Arbitration and to what extent Kenya can review its regime to ensure it is considered as a hub of ICA. The study also sought to; highlight the benefits derivable from arbitration as an alternative dispute resolution mechanism and ascertain to what extent Kenya's legal regime has advanced this cause, discuss the current legal, institutional and policy framework for domestic arbitration and international arbitration in Kenya, review the best practices for international arbitration for financial services with selected case study of jurisdictions with best practices and to make proposals towards effective arbitration of financial services disputes in Kenya.

The data is analyzed in two parts. One part deals with demographic findings while the other deals with specific information, based on the respondents' opinion on certain matters examined in this paper.

4.3 Demographic findings

These are the findings on general information of the respondents like, the respondents' field of specialization, management level in the organization and the number of arbitrations experienced in their banking career. This information is greatly relevant as it makes the information received reliable in that the source is seen to be authentic. The table below is a brief summary of a sample of the data collected.

Table A

Number of years in Banking	level in the organization	Frequency	Number of arbitration experienced over the career period
0 – 3	Senior officer	4	1
4 – 9	Middle manager	15	3
10 – 12	Middle manager	8	4
Over 12	Senior manager	2	3

Table (A) reflects the persons interviewed. Most of the respondents are bank officials who hold management positions. The information obtained can be relied upon owing to their level of seniority in the organisations. The table also reflects the number of arbitrations they have experienced in over their career period.

4.4 Knowledge of arbitration

The study sought to examine whether banks have trained their staff on arbitration. Below are the findings on this particular issue:

Table B

Response	Frequency	Percentage
Yes	6	21
No	20	71
Do not know	2	8

The results as shown in Table B above reflect that arbitration is not well established as a mechanism of resolution of disputes especially in the banking sector. Some respondents did not know whether the banks (their employer) had conducted such training. This further supports the hypothesis that there is a knowledge gap of benefits of arbitration and there is need for all key players in the financial industry to embrace ADR.

4.5 Preference of arbitration to litigation

Table C

Response	Frequency	Percentage
Yes	16	60
No	4	15
Others did not know	6	24

The majority of the respondents were of the view that arbitration is way much better than litigation. They cited various reasons, for instance, some stated that arbitration is faster/ save on time and fair as both parties will agree in the end, some noted confidentiality in solving the dispute; majority were also of the view that arbitration is cheaper compared to litigation. One respondent interestingly noted that she preferred arbitration because it eliminates reputational risk. Another respondent also noted that he preferred arbitration in the banking sector because, banking matters in general are not legal and that the arbitrator is better placed to understand technical aspects and resolve the matters easily as opposed to a legal mind. One was of the opinion that litigation is laborious and that it looks more on the side of the accuser/petitioner.

The above findings show a positive attitude towards arbitration. It shows that the banks are more willing to depart from litigation and adopt arbitration as an alternative method of settling disputes. The findings further show that respondents who are in the Banking sector feel that

courts of law have no capacity to handle arbitration for financial matters as they involve unique financial transactions which lawyers and the courts may now well appreciate.

4.6 On whether specialized arbitral bodies should be set up to work hand in hand with courts

Table D

Response	Frequency	Percentage
Yes	14	70
No	2	10
Others did not know	4	20

A majority of the respondents supported the formulation of specialized arbitral bodies especially to solve banking disputes. Some stated that, such a body will most likely be constituted of a team of staff that understands the banking jargon and process involved as stipulated by the KBA, hence it will be faster to conclude the disputes. Some said that, such a body can be efficient in that it can handle specialized matters transferred to it by the courts. One noted that settling disputes through such a specialized body is easy as it can allow for compromise of the parties involved. One stated that such an arbitral body would lead to uniform settlement of certain disputes. It is worth noting that a few preferred arbitration to be handled by individual arbitrators as it is now as opposed to creating such a specialized body. For such a body would turn into a system similar to that of the courts.

4.7 Preference of out of court settlement to litigation

Table E

Response	Frequency	Percentage
Prefer out of court settlement	8	40
Prefers court	4	20
Depends on the dispute	8	40

Only 20 percent of the respondents preferred litigation to arbitration. The other remaining respondent where equally divided in choosing to settle disputes out of court and some choosing either depending on the nature of the dispute.

4.8 Other findings

The findings further revealed the areas that drive complaints or disputes in the banking sector to include; general staff error. Some noted ATM failures, bank charges not being explained by the staff, banks not following customer instructions and credit reference bureau reporting.

In addition, the respondents gave their opinion on the cases they thought are viable for arbitration. They cited cases involving, opening of parallel accounts leading frauds. Some noted cases involving unpaid fees to banks, unpaid interests to customers, change of contracts by the banks without ample notice to the customers. Some cited Credit Reference Bureau cases. One noted disputes on transactional errors and claims related thereto.

The study also established that most of the banking officials blamed the long duration taken in litigation to be the fault of advocates. They argued that it is the advocates that determine the duration of solving a dispute through litigation.

4.9 Conclusion

From the foregoing, it can be said that the existing arbitration laws and practice do not promote Kenya to be a hub of international commercial arbitration for financial transactions. There is still a gap that needs to be filled. The study has revealed that various players in the banking sector are more willing to embrace and encourage the culture of arbitration. The study has also shown that the banks seem to be ready to move from litigation to other ADR mechanisms such as arbitration. The assumption that the culture of arbitration is lacking in Kenya has been proved by the fact that 70 % of the banks examined have never settled their disputes through arbitration and 80 % have not offered their staff any training on arbitration.

This position confirms my hypothesis that, in order for Kenya to be a preferred seat of arbitration for financial disputes, the internal mechanisms for resolution of domestic financial disputes through arbitration needs to be strengthened and the hypothesis that there is a knowledge gap of benefits of arbitration in Kenya and there is need for all key players in the financial industry, to embrace ADR and include in standard contracts to encourage ADR culture.

Some of the research objectives were met, for instance, the views of the respondents helped in highlighting on some of the benefits derivable from arbitration as an alternative dispute resolution mechanism. Some of the views also gave an insight of proposals that may be adopted towards effective arbitration of financial services disputes in Kenya.

The findings have also answered the research questions that this study had sought to answer, for instance, whether the current laws and regulation provide the proper forum for Kenya to be considered a hub of international commercial arbitration and in particular for disputes in the financial sector.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Summary of findings

A review of the current financial sector in the country reveals that there is a rapid growth in the banking and international trade financing together with import / export trade. Kenya's share of manufacturing exports to the global market is about 0.02 per cent. Kenya's total export grew only by a meager 1% from Ksh. 512.6 billion in 2011 to 517.8 billion in 2012 while total imports grew by 5.7% from 1,300.7 billion in 2011 to 1,374.6 billion in 2012.[1]

Among the objectives of this study was to highlight the benefits derivable from arbitration as an alternative dispute resolution mechanism and to ascertain the extent to which the Kenyan legal regime has advanced the same, to discuss the current institutional and policy framework for domestic arbitration and international arbitration in Kenya and to review the best practices for international arbitration for financial services with selected case studies of jurisdictions with the best practices.

In this regard, the study has proved under chapter one and two the benefits derivable from arbitration, together with looking at institutional framework in Kenya under chapter two and selected jurisdictions under chapter three. Further, the research proved that though existing arbitration laws and practices in Kenya have made notable attempts to promote Kenya as a hub for international commercial arbitration for settling disputes in the financial sector, review of

[1]KIPPRA, 'Kenya Economic Report 2013.' Available at <http://www.kippra.org/downloads/kenya%20Economic%20Report%202013.pdf> (accessed 2 August 2014)

institutional and legal set up, together with government support needs to be looked at as highlighted in this chapter.

Chapter three looked at various jurisdictions considered as a hub of arbitration and gave a comparison of what Kenya can adopt. The interviews and questionnaires proved that the culture of settling disputes in the financial sector, specifically the banking sector through arbitration is lacking. What was clearly found was that there is a knowledge gap of arbitration practice and laws among the staff engaged in the financial sector. Further there is little government involvement in the promoting of settling disputes in the financial sector through arbitration.

All the hypotheses were proven and objectives met as detailed above. All the research questions were answered in the affirmative except that; Arbitration will hinder Banks from seeking conservatory orders, which was answered in the negative. From the research, and interpretation of section 7 and section 18 of the Act allows a party to apply for orders for conservation, which can include appointment of a receiver.

5.1 Conclusions

The government's willingness to support and promote ADR more so arbitration will greatly promote its growth. The fast growing economy and population comes with various challenges and the need for new methods of solving such challenges. Time is now ripe to explore various methods such as arbitration and more so international commercial arbitration as we grow towards globalization each day. It is the author's firm belief that the above recommendations if implemented, a big stride will be made in the quest to make Kenya a hub of commercial arbitration.

The Kenya Bankers Association is an industrial organization that represents the interest of the business sector and various stakeholders. It is currently comprised of 43 licensed banks represented by Managing Directors, CEOs and Executives.[2] In ensuring its functions the KBA is comprised of various committees in finance and audit, operations and technical, human resources and personal relations. Among its activities is the development of banking by ensuring aligned standards of industries, modernization of payment systems and automated clearing house and implementation of government initiatives and policies.[3]

KBA can borrow from PRIME Finance in various aspects. In terms of the administrative structure, PRIME Finance is more advanced as it is visible from the list of experts who act as arbitrators.

Article 159 of the Constitution strongly encourages the use of traditional dispute resolution mechanisms. It can be argued that the provision encompasses the encouragement of the use of arbitration. For arbitration to prosper, it needs a strong corporation between the various arms of the government. Traditional systems in Kenya have broken down largely due to a rise in political appointments at district level and a lack of understanding of legal rights by the older, less educated, generation such that our communities have come to believe that litigation provides not only the ultimate, but the only, justice.[4]

This statement evidences the faded belief in arbitration. A large part of Kenya's Bench initially perceived ADR as a threat to the court system and is still not comfortable with it; lawyers saw it

[2]'The Structure of KBA.' Available at <www.kba.co.ke-overview/kba-structure> (accessed 18 July 2014)

[3]'Activities of KBA.' Available at <www.kba.co.ke/overview/about-us> (accessed 18 July 2014)

[4]Brenda Brainch, 'The Climate of Arbitration and ADR in Kenya.' Available at <http://www.disputeresolutionkenya.org/pdf/The%20Climate%20of%20Arbitration%20and520ADR%20in%200Kenya.pdf> (accessed 12 July 2014)

as a threat to their incomes. Happily, the mood is changing albeit slowly: some enthusiastic, others resigned to the inevitability of its incorporation in the legal system.[5]

The executive, the judiciary and the legislatures all need to work together. Arbitration as a form of ADR will likely succeed in an environment where the government strongly encourages it. "The Government of Mauritius has embarked on an ambitious project to establish Mauritius as an international arbitration centre, the first of its kind in the region. Our main aim is to offer a modern and attractive jurisdiction for international arbitration."[6] Such sentiments allude to a government willing and full of optimism in establishing an international arbitration hub. On if it is too late for the Kenyan government to develop such an attitude, the researcher chooses to answer this in the negative as she believes that the government will promote and encourage the use of arbitration.

The courts too can play a big role in encouraging and promoting the culture of ADR especially arbitration in the financial sector. The CBK Consumer Protection Guidelines seek under its objectives to protect fair and equitable financial services practices by setting minimum standards for institutions in dealing with customers, increase transparency in order to inform and empower customers of financial products, foster confidence in the banking sector and provide efficient and effective mechanisms for handling complaints relating to provisions of financial products and services. The court should assist in meeting these objectives by upholding and respecting arbitral orders and awards which are consistent with any written laws of the land.

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[5]Ibid

[6]Prime Minister, Dr the Hon. Navinchandra Ramgoolam Speech during the 2010 Mauritius International Arbitration Conference. See 'The PCA and Other International Arbitral Institutions: Developments in Mauritius. Available at <http://www.arbitration-icca.org/media/1/13371679808210/international_arbitral_institutions_and_their_development_in_mauritius_levine.pdf> (accessed 12 July 2014)

The legal treatment of ADR process differs in different jurisdictions and the impact of an ADR process will depend on local laws. The indirect impacts, such as improvements in court effectiveness, the business environment, and trust in the legal system could potentially be even more important in the overall contribution of ADR to economic development.[7] ADR Programs complement state dispute Resolution. Better quality of courts is associated with more frequent use of ADR services and this suggests that ADR should be developed alongside improvements in the traditional litigation processes.[8]

The fast growing population and technological advancements warrant the need for new methods of solving disputes in Kenya. Kenya's economy is growing fast. The increase in commercial transactions warrant a further need for the development and the encouragement of the use of ADR especially Arbitration in solving any disputes that may arise. With the advent of global economy and the increasing number of international commercial transactions, arbitration has become an important dispute resolution option.[9] Arbitration will and is very advantageous as it restores the parties' relationship unlike litigation which leaves the parties one as a loser and the other as a winner. With this, it is necessary to adopt new methods of resolving disputes. Arbitration in the financial sector can be greatly advantageous over court litigation. Speedier resolution, less costly, exclusionary rules of evidence do not apply, no public hearing and so the

[7]Inessa Love, 'Settling Out of Court: How Effective is Alternative Dispute Resolution?' The World Bank Group, Financial and Private Sector Development Vice Presidency Note No. 329 October 2011. Available at <http://wwwsiteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Settling-out-of-court.pdf> (accessed 13 July 2014)

[8]Voigt Stefan, 'Does Arbitration Blossom when State Courts are Bad?' 2009. Available at <http://wwwssrn.com/abstract=1325479> (accessed 12 July 2014)

[9]Susan D Franck, 'The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity.' 2000. New York Law School Journal of International and Comparative Law. Available at <http://www.law.wlu.edu/faculty/profile.detailasp?id=267&showsec=publications> (accessed 13 July 2014)

reputation of a financial institution remains protected, the arbitration is more informal than litigation.[10]

It is also worth noting some of the disadvantages of arbitration, for instance; there is no right of discovery unless the arbitration agreement so provides or the parties stipulate to allow discovery or the arbitrator permits discovery, the arbitration process may not be fast and it may not be inexpensive, particularly when there is a panel of arbitrators, unknown bias and competency of the arbitrator unless the arbitration agreement set up the qualifications or the organization that administers the arbitration, has pre-qualified the arbitrator, an arbitrator may make an award based upon broad principles of "justice" and "equity" and not necessarily on rules of law or evidence, an arbitration award cannot be the basis of a claim for malicious prosecution and the possibility of compromise or splitting of baby awards.[11] Despite these disadvantages alluded to, arbitration in the commercial sector more so in the Banking sector comes with a lot of advantages like; restoring the bank-client relationship especially after any disputes, confrontations and court tussles. The privacy of the arbitral process further ensures that the Banks' reputation is protected and safeguarded. The bank clients become confident with the bank and the relationship is strengthened as they know that any future dispute will be solved amicably.

[10]Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation.' Available at <http://www.cre.org/images/MYOB/presentations/The_Advantages_And_Disadvantages_of_Arbitration_As_Compared_To_Litigation_2_Mazirow.pdf> (accessed 10 July 2014) See also George who notes ADR delivers speed, informality technical expertise and avoidance of national for a, while withstanding judicial challenge and otherwise enjoy legitimacy. In George A Bermann, 'The "Gateway" Problem in International Commercial Arbitration.' Vol. 37:1. Yale Journal of International Law. available at <http://www.yjil.org/docs/pub/37-1-bermann-the-gateway-problem.pdf> (accessed 13 July 2014)
[11]Ibid

5.2 Recommendations

What is the way forward?

5.2.1 Establishment of various specialized arbitration institutions

Firstly, the author recommends the establishment of various additional specialised arbitration institutions, more so in the commercial sector. Borrowing from South Africa for instance, they have various national arbitral bodies that work close to each other. For example AFSA was founded by the legal and commercial fraternity. The Bar associations such as: the Cape Bar and Johannesburg Bar. Presence of such institutions promotes the culture of arbitration and it creates a familiar environment whereby a party can easily decide to opt for arbitration. Kenya can emulate South Africa by establishing more specialized arbitral bodies or institutions. This will in the long run promote the culture of ADR and will boost the efforts of promoting arbitration in the banking sector.

In furtherance of the above, the specialized arbitral bodies should comprise of various experts in finance. A good example of this is PRIME Finance which is composed of a list of experts in the fields of general international law, investment arbitration, international commercial arbitration and business and financial law. Such expertise is advantageous as it ensures quality and attractiveness of the arbitration.[12] This will be greatly beneficial as it will ensure that the quality of arbitration in Kenya matches international standards and hence promoting Kenya as an international arbitration hub.

[12]Erick De Brabandere, 'PRIME Finance: The Role and Function of the New Arbitral Institutions for the Settlement of Financial Disputes in the Hague.' Vol 16, Issue 3. Available at <http://www.asil.org/insights/volume/16/issue/3/prime-finance-role-and-function-new-arbitral-institution-settlement> (accessed 19 July 2014)

In addition to the above, the institutions need to set up Rules and Regulations that facilitate speedy resolution of disputes. For instance, PRIME Finance, in order to reflect the market need of speedy resolution of disputes, has included several provisions and annexes which allow the parties to arbitral proceedings to shorten time frames in several ways, for example; the arrangement with the Secretary General of the PCA means that in cases where an appointing authority is required, he will make appointments on the basis of the PRIME Finance list of arbitrators, Article 26 and Annex C, together providing for emergency arbitral proceedings before the arbitral tribunal in the main proceedings has been appointed, the general provisions for expedited proceedings as set out in Article 20(a) of the Rules, the Referee arbitral tribunals in Article 26(b) and Annex C to the Rules which allow for fast track proceedings which results in enforceable awards within 30 to 60 days. If Kenya adopts provisions similar to the above, arbitration proceedings will be carried out at a much faster rate and hence promoting the adoption of arbitration in solving commercial disputes.

5.2.2 Legal reforms

Some of the statutes that may curtail arbitration should be reviewed. The Consumer Protection Act for example, an amendment should be made to section 88. This provision limits the use of arbitration as it provides that a consumer agreement that provides for arbitration is invalid as far as it prevents a consumer the right to commence an action in the High Court. The in effect provides that a consumer can opt to have arbitration or proceed to the high court while if a financier has a course of action must proceed to arbitration. This provision needs to be amended so as to include the option of having arbitration as an alternative means of solving any emerging disputes that can be relied on by either parties.

The Nairobi Centre of International Arbitration Act[13]needs to be reviewed and amended especially Section 6. This section is quite contradictory when read with Section 2. Section 2 defines the term Cabinet Secretary to mean the Attorney General. Section 6 (1) (b) provides for the composition of the Board of Directors to include the Attorney General or his representative. Section 6 (1) (a) allows the Attorney General to recommend a person to the president for appointment as non-executive chairperson. The Attorney General is further given the power to appoint other members of the board under 6 (1) (e) this time as the Cabinet Secretary and a member of the Board. This should be aligned through amendments to provide clear boundaries for the exercise of power by the Attorney General.

5.2.3 Marketing of arbitration as a mechanism of dispute resolution

Lobbying of key players in the financial sector to embrace ADR and include in standard contracts to encourage ADR culture. This will go a long way in ensuring that ADR more so arbitration is continuously employed. This will also be advantageous in that many individuals will get a chance to familiarize themselves with arbitration as an alternative form of dispute settlement.

5.2.4 Introduction of ADR as a compulsory unit in tertiary institutions

Introduction of ADR as one of the compulsory units in various tertiary institutions will come in handy. At the moment, ADR is one of the selective/optional units for instance, at the University

[13]Act No. 26 of 2013

of Nairobi, School of law it is an optional unit for students pursuing their legal studies.[14] The Moi University, School of law on the other hand offers a course in International Dispute Resolution which is not compulsory.[15]

The Strathmore Business School is a good example of an institution that adopts the culture of ADR. This is through the Strathmore Dispute Resolution Center, in collaboration with the Dispute Resolution Center.[16] The institution has established the Banking Industry mediation center. The pilot project is established to provide a complimentary service to banks and their customers in an effort to promote Alternative Dispute Resolution with a focus on mediation.

In addition to the above, ADR should also be introduced as a unit in other institutions which do not offer legal studies. The Council of Education should adopt Arbitration studies as a field of study on its own. This will have the effect of incorporating the culture of adopting various alternatives of dispute resolution in every sector of the economy. This in turn will encourage the culture of ADR moreover arbitration.

5.2.5 Strengthening the East African Community integration

Fifthly, borrowing from the model of East African Court of Justice, it is possible to establish an East African Court of Arbitration. A good example of such a court is the London Court of Arbitration as was highlighted in chapter 3. This will eventually promote growth and investment

[14]'University of Nairobi, School of Law.' Available at. <http://www.law-school.uonbi.ac.ke/uon_degrees_details/1482> (accessed 12 July 2014)
[15]Moi University School of law.' Available at. <http://www.law.mu.ac.ke/index.php/academic-programmes/degree-in-lawllb#Second-semester> (accessed 12 July 2014)

[16]It was founded in 2012 more information is available at <www.sdrc.or.ke> (accessed 17July 2014)

as investors will be confident as they will have arbitration as one of the choices of resolving any disputes apart from the courts. The government should therefore recommend to the East African Assembly for the establishment of an East African Court of Arbitration. In addition to such a court, there can also be various arbitration institutions comprising of various persons of different nationalities. This will also increase the platform for settling international commercial disputes.

5.2.6 Adopting new technology in dispute resolution

The rapid growth of population and changes in technology also call for various changes. From this, the researcher does recommend the embracing of the faster growing technology by the government. The government in collaboration with various stakeholders should strive to introduce and promote online arbitration (E-Arbitration). Disputes concerning the non-electronic world can be submitted to online dispute resolution, even though the litigants are in a position physically to meet. In practice, there is, however, an in dissociable link between electronic commerce operations and online dispute resolution. For economic and sociological reasons, online dispute resolution will be the preferred means of dealing with disputes on the internet and on private networks.[17]

5.2.7 Hosting of seminars and conferences on arbitration

The author further recommends that the government in collaboration with various stakeholders do push for the hosting of various conferences and seminars on arbitration in Kenya. Such will be beneficial to various persons who will attend and will also market Kenya as a growing regional hub for arbitration. Mauritius is a good example that we can emulate. In December this

[17]O. Cachard, 'Dispute Settlement: International Commercial Arbitration. Electronic Arbitration.' Available at <http://unctad.org/fr/Docs/edmmisc232add20_en.pdf> (accessed 9 June 2014)

year (2014), Mauritius will hold a third International Arbitration Conference. This will be under the auspices of six major international arbitration institutions: UNCITRAL, the LCIA, the Permanent Court of Arbitration at The Hague, ICSID, the ICC and ICCA. The conference will be of particular relevance to those working in, or interested in, cross-border disputes with an African connection.[18] The first conference took place in 2010 and announced the arrival of Mauritius as a significant new jurisdiction for international arbitration, and introduced practitioners around the world to the International Arbitration Act 2008. The second MIAC (Mauritius International Arbitration Conference) was held in December 2012 which brought together even a larger group of arbitrators, practitioners, academics and judges under the theme "An African Seat for the 21st Century".[19] Kenya can borrow a lot from Mauritius especially in this aspect which can lay a foundation and act as a ground breaker in introducing Kenya as the new arbitration hub in the region.

5.2.8 Government loans and grants on training in ADR

In addition to the above, the government should also advocate and provide scholarships and loans for various persons in an effort to encourage the training on ADR. The Government should also continue working closely with institutions such as the Dispute Resolution Centre as it has done in the past. A good example of such collaboration with the government was in 2005-2006 when two 6-week video link courses were conducted at the World Bank's office in Nairobi for the judiciaries of Kenya, Uganda, Tanzania, Nigeria, Ghana and Ethiopia. The DRC (Dispute

[18]'Mauritius to Hold a Third Mauritius International Arbitration Conference in December 2014.' Available at <http://www.lcia-miac.org/news/mauritius-to-hold-a-third-mauritius-international-arbitration-co.aspx> (accessed 9 July 2014)
[19]Ibid

Resolution Centre) presented introductory ADR Module.[20] Such collaborations should continue as they will greatly benefit Kenya as it aims to be the next arbitration hub.

In addition, the government should promote and market Kenya as an international commercial arbitration hub. The government should also strive to form close links with international arbitral bodies so as to encourage foreign arbitrators to also practice in Kenya. This may come in handy owing to the current increase in investments by foreigners in Kenya. With the establishment of the Nairobi Centre of International Arbitration, there is hope for a brighter tomorrow especially in solving banking disputes.

The Kenya Bankers Association recently launched a mediation centre for inter-bank disputes and disputes between clients and banks. The inter-bank mediation center is a pilot project established to provide complementary service for banks and their customers in an effort to promote alternative dispute resolution practices, mainly mediation, as an alternative to litigation.[21] This move brings a ray of hope in the banking sector. It portrays the willingness of various stakeholders in the banking sector to adopt alternative dispute resolution mechanisms apart from litigation. Kenya Bankers Association is encouraging its members, the banks, to resort to mediation and through the inter-bank mediation centre which will handle cases dealing with transactions, loans and credits disputes and court cases where both parties are willing to discuss an alternative agreement outside the court.

[20]'Dispute Resolution Centre.' Available at <http://www.disputeresolutionkenya.org/training.htm> (accessed 10 July 2014)

[21]'SLS's Centre to Host Inter-bank Disputes Mediation Center.' Available at <http://www.strathmore.edu/en/media-center/258/54/SLS-s-centre-to-host-inter-bank-disputes-mediation-center> (accessed 10 July 2014)

Nevertheless, the financial sector should also actively participate in promoting the adoption of arbitration in resolving financial disputes as they will benefit the majority. A case in point is the Financial Dispute Resolution Center (FDRC) in Hong Kong. The FDRC is a private company limited by guarantee. It is nonprofit and operates in a similar manner to the institutions discussed in the previous chapters. It is specific for financial disputes and how to use arbitration to settle disputes. It has achieved more than 89% settlement rate since inception.[22]

On the issue expressed by some of the respondents which was also part of the research question herein was lack of interim orders from arbitration. This proves the knowledge gap as the Kenya Arbitration Act provides under section 7 and 18 provides for interim orders. Further, borrowing from other jurisdictions, most international arbitration rules provide the arbitral tribunal with broad discretion to order interim measures. The ACICA Rules[23] allows the tribunal to order interim measures of protection, but also clarifies[24] that such power shall not prejudice a party's right to apply to any competent court or judicial authority for interim measures. The ICC Arbitration Rules[25] provides that "unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate." Before the file is transmitted to the tribunal or in "appropriate circumstances even after the transmission of the file to the tribunal, it further provides that an application by a party to "any judicial authority" for interim or conservatory

[22]'About FDRC' Available at <www.fdrc.org.hk/en/html/resolvingdisputes/resolvingdisputes/resolvingdisputes.php?lang=en> (accessed 19July 2014)
[23]Article 28.1
[24]Article 28.8
[25]Article 23(1)

measures will not be an infringement or waiver of the arbitration agreement.[26] The LCIA Rules[27] provides that unless the parties otherwise agree, the arbitral tribunal has the power to order the preservation of property relating to the subject matter of the arbitration. The parties can apply for interim relief before the formation of the tribunal, but they can only apply to a court for such relief after it is constituted in "exceptional circumstances" and must forward their application to the arbitral tribunal.[28]

5.2.9 Creating global confidence in Kenya's arbitration enforcement procedures

As mentioned above, enforcement risk is one of the risk parties may face in arbitration if they select a jurisdiction they feel enforcement of arbitral award may be a challenge, Though Kenya is a signatory to the New York Conventions, various administrative issues ought be resolved to ensure Kenya is considered a Hub, vis; (a) perception of bias or corruption on the part of a judicial authority;(b) delay in court process, (c) training of local lawyers and judges in dealing with derivatives contracts; (d) consist in decision-making by courts.

5.3 Further research

The study further recommends that further research be carried out in this field so as to promote growth and improvements. Suggested arrears include review of Arbitration under the 2010 Constitution and further research on role of courts in arbitration. The government should offer grants and incentives so as to influence more research in this field.

[26]Article 23(2)
[27]Article 25.1
[28]Article 25.3

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APPENDIX 1 QUESTIONNAIRE

The questionnaire below was used between the month of June and September in conducting interviews for this study. The same was administered personally by the author to the respondents.

Background Information

1. Please state your gender (Tick where appropriate)

   Male [ ] Female [ ]

2. Educational background (Tick where appropriate)

   Legal [ ] Others (specify) [……..]

3. Organization

   Banking [ ] Import / Export [ ] Others (specify) [……]

4. Number of years in Banking or dealing with Banks (Tick where appropriate)

   0-3 [ ] 4-6 [ ] 7-9 [ ] 10-12 [ ] Over 12 years [ ]

5. Management level in the organization

   Senior Manager [ ] Middle Manager [ ] Senior Officer [ ] Others (specify)[……]

6. Area of expertise in the organization

   Legal [ ] Operations [ ] Business/branched [ ] Recoveries [ ] others [ ]

7. Have you ever been involved in a dispute in Banking? If yes, what did it related to?

   ……

   ……

8. What is the number of arbitration you have experienced in Banking?

   0 [ ] 1-10 [ ] 10-30 [ ] Over 30 [ ]

9. Has the dispute been resolved?

Yes [ ] No [ ]

10. How long on average does it take to resolve a dispute through litigation?

    Less than a year [ ] 2-3 years [ ] 3-4 years [ ] Over 5 years [ ] Others [ ]

11. Please list briefly below your suggestions on ways to improve arbitration in the banking sector in Kenya.

12. Would you advocate for arbitration to be adopted as an alternative to litigation in solving disputes in the commercial sector more so in the banking sector?

    Yes [ ] No [ ]

    Give reason/reasons.

    ---

13. Do you think arbitration can be the most effective method in resolving disputes in the banking sector?

    Yes [ ] No [ ]

    Give reason/reasons.

    ---

14. In your view, who is largely responsible for determining how long a civil case takes from the beginning to the end?

    The Court [ ] The Parties [ ] The Advocates [ ]

15. Should a specialized arbitral body be set up to work hand in hand with the courts in dealing with banking disputes?

    Yes [ ] No [ ] Give reason/reasons.

16. Has your bank held any training on arbitration?

    Yes [ ] No [ ]

17. If yes, were the trainings,

    In house training [ ] External training [ ]

18. Between arbitration and litigation, which one do you prefer?

    Arbitration [ ] Litigation [ ]

    Give reason. ----------

19. Have you been involved in an international financial dispute where dispute has arisen

    Yes [ ] No [ ]

20. If yes, please indicate where the forum of the dispute was held…….

21. How long does it take a Bank to resolve a dispute:

    One week [ ] two to three weeks [ ] One month [ ] six months [ ] indefinite []

22. If Kenya Bankers Association the umbrella body for Bank were to come up with an arbitration centre, would this be supported by customers?

    Yes [ ] No [ ] Maybe [ ]

23. Do you prefer out of court arbitration that litigation?

    Yes I would rather settle out of court [ ]

    No, I would rather the courts decide [ ]

    It depends on the issue being disputed [ ]

24. In your opinion, or from experience, what are the areas that drive complaints or disputes?

    System issues, not effecting payments, standing order or ATM failure [ ]

    Bank charges not explained by agent or staff [ ]

    Misspelling or misinterpretation of product information [ ]

    General staff error [ ]

Credit Reference Bureau Reporting [ ]

Bank not following instructions [ ]

Other

……

……..

25. In drafting contracts, what is your preferred seat of arbitration and reason?

……

……

26. What factors would you consider in recommending arbitration to your clients or customer?

……..

27. What type of cases do you find viable for Arbitration?

……

28. Any other comment that you may deem relevant to the study……

……

……

……

……

……

Thank you for participating.