UNIVERSITY OF NAIROBI

SCHOOL OF LAW

A CRITIQUE OF THE KENYAN JUDICIARY'S EFFICIENCY IN RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS.

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS IN INTERNATIONAL TRADE AND INVESTMENTS LAW.

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NOVEMBER 2016.

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DECLARATION

I **GAD GATHU KIRAGU** do hereby declare that this thesis is my original work and has not been submitted to any other person or university for purposes of examination or award of any degree. Where other people's work has been used, it has been properly acknowledged and referenced.

Signature_____Date_____

GAD GATHU KIRAGU

I **DR. KARIUKI MUIGUA** do hereby certify that this thesis was done under my supervision and has been submitted to the University of Nairobi, School of Law with my approval as the supervisor.

Signature_____Date_____

DR. KARIUKI MUIGUA

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6. The Nairobi Centre for International Arbitration Act Number 20 of 2013 Laws of Kenya.
7. United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration.
8. United Nations Convention on the Recognition and Enforcement of Foreign Awards, 1959 (New York Convention).

Abbreviations

AG-Attorney General

CDF- Constituency Development Fund.

DCJ-Deputy Chief Justice

JSC-Judicial Service Commission

JTI-Judiciary Training Institute

UNCITRAL-United Nations Commission on International Trade Law.

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And I reserve the deepest gratitude to Jehovah the creator of the Universe to whom I pray that I never forget I will always need Him on my best day as much as I did on my worst day.

Dedication

To Junior and Ailsa.

Abstract

International commercial arbitration is a fast emerging area of law that is undoubtedly lucrative. Thus it follows that a country should strive to make itself attractive for parties to an international commercial arbitration. One of the ways of ensuring this is by having a robust, independent, well training and competent judiciary that is capable of dealing with applications for recognition and enforcement of international commercial arbitration awards. This paper critiques the efficiency of the Kenyan judiciary's handling of applications for enforcement of international commercial arbitration awards. It argues that the Kenyan judiciary has made significant steps in having well trained and experienced judicial staff to deal with such applications. However, much still remains to be done as there is a huge backlog of cases and incidences of inefficiency and corruption are a major hindrance. The paper calls for the employment and training of more judicial officers on international commercial arbitration.

CHAPTER 1

1.0. INTRODUCTION

1.1. Introduction

International commercial arbitration has become the dispute settlement process of choice for many parties. This has to do with mostly the confidentiality afforded by the process and the relative ease of enforcement internationally as compared with a foreign court judgment.[1]Howeve r, international commercial arbitration cannot be divorced from the courts, especially when it comes to enforcement.[2]

Courts in which parties to an international commercial arbitration seeks enforcement of an award are supposed to be guided by the provisions of the United Nations Convention on Enforcement of Foreign Arbitral Awards (The New York Convention) if they are a contracting state as well as applicable local laws as regards enforcement of international commercial arbitration awards.[3] The Courts have discretion to refuse the enforcement of an award using the criteria set out therein. However, history has shown instances where courts have applied the provisions of the convention in such a narrow manner as to refuse to enforce an award, or to handle such applications incompetently, or to deny justice to a party by taking inordinately long to determine

[1]Margaret L. M."The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008) pages 1-2.
[2]Muigua, K. Settling Disputes through Arbitration in Kenya.(2nd edition. Glenwood Publishers, 2008) pages 166-195.
[3] Article III of the United Nations Convention on Enforcement of Foreign Arbitral Awards (The New York Convention)

such an application thus denying justice to the party that seeks enforcement hence denial of justice. This can lead to a party taking such a country before an international tribunal.[4]

This study therefore analyzes the Kenyan judiciary's approach to enforcement of international arbitration awards. It addresses the question as to whether Kenya's judiciary is ensuring that Kenya meets its international obligations as a signatory of the United Nations Convention on Enforcement of Foreign Arbitral Awards. It examines the efficiency of the Kenyan courts as efficiency is an important facet of international commercial arbitration. It also looks into the capacity of judicial staff to handle applications for enforcement of international commercial arbitration awards in terms of numbers and training. The study concludes by making recommendations on how to ensure that the Kenyan judiciary has the capacity to ensure that international commercial arbitration awards are enforced in Kenya in a lawful, fair and just manner.

1.2. Background of the problem.

The world has become a village. Technology has opened up commerce in ways that could never have been imagined just a few years ago. A result of these developments has been increased business and investment opportunities in other countries. Borders as drawn on maps are no longer limiting commerce as companies formed in one country expand their businesses and operations to other countries hence International Commerce and Foreign Direct Investments. The World Bank defines Foreign Direct Investments as "the net inflows of investment to acquire a lasting management interest (10 percent or more of voting stock) in an enterprise operating in an

[4]See *White Industries Australia Limited vs Republic of India* available at http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf accessed on 10th November 2014.

economy other than that of the investor. It is the sum of equity capital, reinvestment of earnings, other long-term capital, and short-term capital as shown in the balance of payments." [5]

There have been distinctions drawn between international commerce and international investments.[6]The footnote to the UNCITRAL model law on international commercial arbitration adopts a very wide definition of "commerce" that can be said to include "foreign direct investments."[7] This is the definition of international commerce that will be adopted in the proposed study. International commerce[8] has continued to grow and has also brought new challenges. Disputes are to be expected in any sort of business relationships and international commerce is no exception. The resolution of these disputes has given rise to an emerging area of law referred to as international commercial arbitration.

What international commercial arbitration is has been defined in several ways. The Arbitration Act, 1995 defines an international commercial arbitration as one in which:-

a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
b) One of the following places is situated outside the state in which the parties have their places of business—
    (i) The juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or

[5]See http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD. accessed on 20th November 2014
[6]Bergesten, E.E. United Nations Conference on Trade and Development, "Module 5.1 International Commercial Arbitration of the Course on Dispute Settlement.," http://unctad.org/en/Docs/edmmisc232add38_en.pdf. accessed on November 21, 2014
[7]United Nations Commission on International Trade Law (UNCITRAL) Model law on International Commercial Arbitration. Page 1.Second footnote.
[8]United Nations Conference on Trade and Development, "World Investment Report 2014," available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf accessed November 20, 2014.

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.[9]

International commercial arbitration is therefore essentially a private international law issue as it rarely involves state actors. However, there are instances when it can involve state actors and that is where interplay between public international law and private international law can be discerned.[10]As indicated, international commercial arbitration will invariably involve different countries. For example, the parties could be from different countries and even the seat of arbitration could be in a country that is different from the nationalities held by a party to an arbitration dispute. Therefore, the arbitral award may have to be enforced in one country or the other.

The recognition and enforcement of arbitral awards is a crucial part of the whole process of international commercial arbitrations.[11] This is because parties are usually only willing to engage in international arbitration if they have confidence that if they obtain an award it will be readily enforceable in various countries in the world.[12]In recognition of the difficulties that may be faced by parties wishing to enforce international commercial arbitration awards, the New York

[9]Section 3(3) of the Arbitration Act, 1995.
[10]See generally- Schreuer, C. "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes," accessed November 19, 2014, www.univie.ac.at/intlaw/pdf/csunpublpaper_1pdf; Stephen Fietta and James Upcher, "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?" The Journal of the London Court of International Arbitration, 29, no. 2 (n.d.).
[11]Njoroge R, "Recognition and Enforcement of Arbitral Awards."In Githu Muigai ed. Arbitration Law and Practice in Kenya (Law Africa Publishing (K), 2011).
[12]Margaret L. M."The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008) page 202.

Convention was created.[13]However, this convention did not have a mechanism for addressing grievances by a non-state party that is facing frustration in enforcement of arbitral awards from a State, State owned counterparties or domestic courts.[14]

Public international law has therefore sought to provide solutions in ways such as the doctrine of denial of justice. The doctrine of denial of justice is one area where the interplay between public international law and private international law can be discerned. The doctrine of denial of justice in short summary provides that a State is internationally liable if it administers its system of justice to aliens in an unfair, arbitrary or discriminatory manner. Essentially the doctrine of denial of justice entitles a non-state actor that feels it has been unfairly and unjustly denied its right to enforce an arbitral award in a country, to take that country before an international body for redress.[15] However, to enable the non-state actor get redress before the international body, it must show that it has exhausted the local remedies available in that country without successor that such remedy was not available to it. If the international body finds that a country has indeed perpetrated denial of justice, it may order the country to pay damages and costs to the non-state actor.[16]

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[13]*United Nations Convention on the Recognition and Enforcement of Foreign Awards*, 1959, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.Accessed on 19th November 2014.

[14]Fietta, S. and Upcher, J. "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?" The Journal of the London Court of International Arbitration, 29, no. 2 (n.d.) page 5

[15]Francesco, F. "Access to Justice, Denial of Justice, and International Law," European Journal of International Law, 20, no. 3. Available at www.ejil.org/pdfs/20/3/1862.pdf.Accessed on19th November, 2014.

[16]See for example *White Industries Australia Limited v India* (UNCITRAL Tribunal 2011).Available at http://www.italaw.com/cases/1169.Accessed on 10th November 2014.

1.3. Statement of the problem

The judiciary is one of the three arms of government under the doctrine of separation of powers.[17] The judiciary acts through individual courts which have specific jurisdiction and powers. There has been a movement towards limiting the interventions of courts in arbitrations generally.[18]That notwithstanding, courts have a very powerful role to play in enforcement of international commercial arbitration awards. It has been argued that the arbitration process cannot be divorced from the court process.[19]Courts will ultimately have to be involved in arbitration at the very least at the enforcement stage if parties are not willing to honour an award. Courts also have powers to refuse enforcement of an award on their own motion if the subject matter of the arbitration was not capable of arbitration under the applicable laws of that country or if the award is contrary to public policy.[20]With such huge powers conferred upon the judiciary, parties to an application for enforcement of an international commercial arbitration award are expected to have some expectation of justice from the courts when dealing with the issue of recognition and enforcement of an international commercial arbitration award. This expectation of justice is both on the procedural and substantive aspects of justice.

Procedural justice is concerned with giving a party a fair hearing and an opportunity to present its case. Substantive justice on the other hand has to do with the merits or demerits of a case.[21] Procedural justice in an application for enforcement of an international commercial arbitration award would require that the parties to the arbitration are accorded a reasonable opportunity to

[17]Montesquieu, B. The Spirit of Laws.(London. G. Bell &Sons Ltd, 1914) as it appears on http://www.constitution.org/cm/sol.txt accessed on 10th November 2015.
[18]United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, n.d. Article 5
[19]Muigua, K. Settling Disputes through Arbitration in Kenya(2nd edition. Glenwood Publishers, 2008)
[20]United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*. Article 36 (1) (b).
[21]'Four Types of justice" Available at http//changingminds.org/explanations/trust/four_justice.htm; see also Muigua, K.ADR, The Road To Justice in Kenya Alternative Dispute Resolution, Volume 2, Number 1, 2014, at page 29.

present their cases. Substantive justice on the other hand would require that if an award does not violate the law or public policy[22] then it should be recognized and enforced.

Kenya stands to gain a lot if it became a regional center for international commercial arbitration. There are actually deliberate efforts by the government and the private sectors towards these goals. The government enacted the Nairobi International Arbitration Centre Act in 2013[23] to pave way for the development of an International Arbitration Center. Other bodies such as the Law Society of Kenya[24] are at advanced stages of plans to set up arbitration centers living up to international standards. The Republic of Kenya enacted a new constitution in 2010.[25] One of the prominent tenets of that constitution is alternative methods of resolving disputes.[26] Moreover, Kenya is an important regional and international business hub. Kenya's economy is growing and multinational companies are setting up operations in Kenya at a very fast rate. The Kenyan government and the private sector have thus strived to make Kenya a center of choice for alternative dispute resolution. Kenya has a duty arising from its international obligations under the comity of nations and under its Constitution of 2010 to ensure that international commercial arbitration awards are enforced in a fair and just manner. This will not only build investor confidence and its reputation as an international commercial arbitration hub[27] but it will also avoid wastage of tax payers' money in case Kenya is taken before an international tribunal and found to have abetted denial of justice. It is not in doubt that institutions such as parliament and

[22] Article V of the New York Convention; see also Section 37 of the Arbitration Act No. 4 of 1995.
[23]The Nairobi Centre for International Arbitration Act Number 20 of 2013.
[24]Ayodo, H. "*LSK International Arbitration Centre Unveiled*," accessed November 19, 2014, http://www.lsk.or.ke/index.php/component/content/article/1-latest-news/293-lsk-international-arbitration-centre-unveiled.
[25]Constitution of Kenya 2010.
[26]Ibid. Article 159 (2) (c)
[27]Margaret L. M, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008) page 221

the executive have a role to play in ensuring the absence of denial of justice.[28] However, the judiciary has a much more important and visible role to play as regards enforcement of international commercial arbitration awards.

Such efforts by the government and private sector players to make Kenya a global hub for international commercial arbitration will however only bear fruit if there are indications from the Kenyan judiciary that it will strive to enforce international commercial arbitration awards based on the variables of efficiency, adequate capacity and consistency. In Kenya, the High Court is the court with the relevant jurisdiction to hear and determine applications for enforcement of arbitral awards.[29]At present there is no study on the performance of the judiciary in Kenya as relates to the enforcement of international commercial arbitration awards taking into account the aforementioned variables. There is a need to assess the capacity of judges to handle applications for enforcement of international commercial arbitrations. This will assist the judiciary to improve on training of judges or to allocate judges to specific matters based on their specialization and capacity. Such a study will not only help the judiciary reassess its strategy in dealing with applications for enforcement of international commercial arbitration awards but it will also assist parties to international commercial arbitrations make informed decisions on whether it is worth to seek enforcement of awards in Kenyan courts.

1.4. Objectives of the research.

1.4.1. General objective.

The general objective of this research will be to critically examine the role of the judiciary in enforcement of international commercial arbitration awards. It will seek to understand the

[28]Fietta, S and Upcher, J. "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?" The Journal of the London Court of International Arbitration, 29, no. 2 (n.d.). Page 193

[29]The Arbitration Act, 1995 Section 36 (1)

Kenya judiciary's attitude and approach to enforcement of international commercial awards and whether this attitude reflects international standards and satisfies Kenya's obligations to the comity of nations.

1.4.2. Specific objectives

1. To determine whether the approach of the Kenyan judiciary as regards recognition and enforcement of international commercial arbitration awards is adequate in terms of ensuring access to justice.
2. To come up with suggestions to increase the adequacy of the framework for enforcement of international arbitral awards.

1.5. Hypotheses

This study proceeds on the basis of the following hypothesis.

1. Kenya's judiciary is understaffed and not truly independent; judicial staff and Advocates also lack specialized capacity to deal with cases of enforcement of international arbitral awards. These factors have the general effect of affecting service delivery in terms of conclusion of cases of whatever nature.
2. Applications for enforcement of international commercial arbitration awards are only likely to be lodged in the High Court sitting in Nairobi this being the biggest commercial center in Kenya.

1.6. Literature review

There are various reports, papers, studies and books that discuss various aspects of the international commercial arbitration process including recognition and enforcement of international commercial arbitration awards. These reports, papers, studies and books will be

extensively discussed in chapter two. However, it suffices to state that there is currently no study that has specifically studied the Kenyan judiciary as regards recognition and enforcement of international commercial arbitration awards. This is the gap that this study intends to fill.

1.7. **Research questions**

The main research question is whether the Kenyan judiciary's approach to enforcement of arbitral awards in International Commercial Arbitration is adequate in terms of ensuring access to justice to parties.

The supplementary questions are:-

1. Is judicial staff dealing with recognition and enforcement of international commercial arbitration awards sufficiently trained on arbitration as to be able to handle applications for enforcement of international commercial arbitration awards in a way that ensures access to justice?
2. What reforms, if any, are necessary to ensure that Kenya is capable of efficient, fair and just enforcement of international commercial arbitration awards that ensures access to justice?

1.8. Methodology

The traditional approach to methodology in studies such as this one has been either qualitative or quantitative. In quantitative research the researcher uses positivist claims for developing knowledge and collects data on pre-determined instruments that yield statistical data.[30]In

[30] Creswell, W.J. "Research Design. Qualitative, Quantitative and Mixed Methods Approaches."(2nd edition. Sage Publications, 2003) Page 18.

qualitative research the researcher uses constructivist approaches and collects open ended data with the intent of developing themes from the data.[31]

However, in recent years there has been a movement towards mixed methods which incorporate both quantitative and qualitative approaches.[32] The movement towards mixed approaches has been fueled by the expectation amongst researchers that due to the fact that all methods have inherent biases, the use of mixed methods could neutralize any bias in one method.[33]Indeed it has been argued that neither quantitative nor qualitative approaches are superior to the other. Each approach has strengths and weaknesses and it would therefore not be appropriate to rely on one method singularly.[34]The use of mixed methods also provides a better understanding of phenomena than would be available through the use of one method exclusively.[35]There is no right way of combining the qualitative and quantitative approaches though much depends on the particular research based on practicality.[36]

This study will therefore use the mixed methods approach and will rely on both primary and secondary data. The basic methodology to be used to gather primary data will be questionnaires which shall incorporate both open ended and closed ended questions to accommodate the mixed

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[31] Creswell, W.J. "Research Design. Qualitative, Quantitative and Mixed Methods Approaches."(2nd edition. Sage Publications, 2003) Page 18..

[32]Molina Azorín, J, M and Cameron, R. "The Application of Mixed Methods in Organizational Research: A Literature Review" *The Electronic Journal of Business Research Methods Volume 8 Issue 2 2010 (pp.95-105), available online at www.ejbrm.com accessed on 28th May 2016.* Page 95.

[33] Creswell, W.J. "Research Design. Qualitative, Quantitative and Mixed Methods Approaches."(2nd edition. Sage Publications, 2003) Page 15.

[34] Punch, K.F. Introduction to Social Research Quantitative and Qualitative Approaches. (2nd edition. Sage Publications, 2005) Page 235.

[35]Molina Azorín, J, M and Cameron, R. "The Application of Mixed Methods in Organizational Research: A Literature Review" *The Electronic Journal of Business Research Methods Volume 8 Issue 2 2010 (pp.95-105), available online at www.ejbrm.com accessed on 28th May 2016.* Page 95.

[36] Punch, K.F. Introduction to Social Research Quantitative and Qualitative Approaches. (2nd edition. Sage Publications, 2005) Page 243.

methods approach. Secondary data will be gathered through library research and internet searches these being the most appropriate methods for the nature of this study.

Questionnaires will primarily be administered on judges in the commercial and civil divisions and deputy registrars in Nairobi. This is because Nairobi is the capital city and commercial center of the Republic of Kenya. Other questionnaires will also be administered on advocates who may have been involved in international commercial arbitration.

1.9. Limitations of the study.

The limitations of the study can be divided in terms of the scope of the study and the limitations that will affect the study.

In terms of scope of the study, the research will only cover the Kenyan situation and will only be concerned with recognition and enforcement of international arbitral awards in Kenya. Further, the study intends to cover the High Court Commercial division in Nairobi only. This is informed by the fact that this is the capital city and is the biggest and most notable commercial center in the Republic of Kenya and is a good indicator of the situation in the rest of the country. Further, it is most likely that applications for enforcement of international arbitration awards are only filed in this High Court registry. Other High Court registries can be the subject of future studies.

Other limitations that may affect the study are:-

1. The Kenyan judiciary is the subject of this study and is a government body. It may therefore not be very forthcoming with information, at least not on record.
2. The blurred line between international commerce and international investments. The distinction between International Commerce and International Investment will not be

covered by this study. This study will address international commercial arbitration from the broad definition of commerce as contained in the Arbitration Act, 1995 and the model law.[37]

3. The researcher is a legal practitioner and is also involved in arbitration and the possibility of personal bias can therefore not be ignored totally.
4. The target population for this study is judges and deputy registrars of the High Court of Kenya and advocates who by the nature of their work are very busy people and it will therefore be a challenge to get a big number of respondents.

1.10. Chapter breakdown

The study is intended to be disseminated in four chapters whose contents will be as below:-

Chapter 1.This chapter will consist of an introduction to the study.

Chapter 2.This chapter will consist of a discussion on the theoretical framework and literature review.

Chapter 3-This chapter will discuss recognition and enforcement of international commercial arbitration awards in Kenya.

Chapter 4-This chapter will consist of data analysis.

Chapter 5. This chapter will consist of conclusion and suggestions on the way forward.

[37]UNCITRAL Model law on International Commercial Arbitration. Page 1.Second footnote.

CHAPTER 2

2.0. LITERATURE REVIEW, THEORETICAL FRAMEWORK, AND NORMATIVE FRAMEWORK

2.1. Introduction

This chapter will undertake a comprehensive review of literature related to the Kenyan judiciary and international commercial arbitration. It will also discuss the theoretical framework for the study, provide a normative framework for the study and lastly provide a methodology for the study.

2.2. Literature review

While there have been various studies on the state of the judiciary as well as the recognition and enforcement of foreign arbitral awards, there has been no research so far with specific focus on how the Kenyan Courts treat recognition and enforcement of international commercial arbitration awards with regard to the normative framework already examined.

Quite commendably, some of those studies have been instigated by the judiciary with the stated aim of improving service provisions. Other studies have been institutional reports and scholarly works seeking to fill research gaps. There have also been books authored by scholars of repute on the subject of international commercial arbitration generally. This literature review begins by analyzing studies by the judiciary and other institutions, then goes into scholarly articles and finally analyzes books on the subject. This literature review begins by analyzing reports from the judiciary. It then examines papers written on the subject and finally concludes by analyzing some books on the subject under study.

The Kenyan judiciary has undertaken a review of its institutional capacity to handle disputes [38]and published an 85 paged report on the same. It is important to note that the survey was funded by the World Bank.[39] While this may not be much of an issue, funded studies will always raise questions as to the objectivity of the findings. It is an ethical issue in research where the person funding the study may want to get certain results.

The survey set to find out the case backlog in the courts as well as to the capacity of courts with regard to human and infrastructural resources.[40] The survey found that the Supreme Court has the lowest case load per judicial officer at 0.86 while in the High Court each judge had about 1,674 cases. The report concluded that the High Court was indeed suffering under a huge backlog of cases. The survey also found that the High Court would require 4,566 days or 12.51 years to clear the pending cases.[41] As at June 2013, the report stated that the Commercial division of the High Court at Nairobi, where an application for enforcement of an international commercial arbitration award is likely to be made, were 6,422 or 9.11% of all pending cases. The report identifies some of the problems leading to a backlog of cases as frequent adjournments sought by parties, frequent transfer of judicial officers and inadequate judicial officers.[42]

An analysis of the survey shows a judiciary that is critically overwhelmed. An institution that is not able to keep up with its clients and one that has utterly failed to come up with a system of handing inefficiencies. It is hardly the sort of institution that one would expect to deliver on the

[38] Judiciary Case Audit and Institutional Capacity Survey, Volume 1. August 2014. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015.
[39] Ibid note 38 at page vii.
[40]Judiciary Case Audit and Institutional Capacity Survey, Volume 1. August 2014. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015at page viii
[41] Judiciary Case Audit and Institutional Capacity Survey, Volume 1. August 2014. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015 at page 41-42.
[42] Judiciary Case Audit and Institutional Capacity Survey, Volume 1. August 2014. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015pages 28-29.

normative framework previously identified. The funding of the survey could also raise questions as to whether it is a truly independent report. The survey was conducted with funding from the World Bank and there has been criticism levied at this institution that it funds research which may result in a particular outcome.[43]

While the foresaid survey by the judiciary is helpful, it does not address the main variables identified in this study which is whether judges are sufficiently trained to handle applications for enforcement of international commercial arbitration awards. The survey does not break down its analysis of cases to include a category for enforcement of international commercial arbitration awards which is the subject of this study. Further, the survey does not seek to establish whether high court judges posted in various divisions have specializations suited for those divisions. This is a gap that this study intends to fill.

The Kenya judiciary has also published a report on institutionalizing performance management and measurement in the judiciary.[44]The report was prepared by the Performance Management and Measuring Committee of the judiciary. The report was aimed at improving performance of the judiciary. The report contains a comparative analysis of the judiciary's efficiency in terms of conclusion of cases with other jurisdictions such as United States of America and Australia.[45] The report can be said to have been a study into how to improve the efficiency of the judiciary in terms of how fast cases can be concluded. This can be seen from the fact that its biggest

[43]Banerjee, A, Deaton, A, Lustig, N, Rogoff, K, Hsu, E. "An Evaluation of World Bank Research, 1998 – 2005" (September 2006) available at https://www.princeton.edu/~deaton/downloads/An_Evaluation_of_World_Bank_Research_1998-2005.pdf page 142.

[44] Institutionalizing Performance Management and Measurement in the Judiciary, April 2015. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015.

[45] Institutionalizing Performance Management and Measurement in the Judiciary, April 2015. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015 Page 12-21

recommendation was for establishment of timelines within which cases must be concluded[46]as well as setting targets for judicial officers as to a number of cases that each should conclude in a given time.[47] To give credit where it is due, the report does identify some of the causes of inefficiency in the judiciary which are basically lack of adequate resources in terms of human resources and physical infrastructure as well as reasons that can be blamed on the parties such as frequent applications for adjournments.[48]

However, the main weakness with the report is that it places the High Court and other courts with the status of the High Court that is, the Land and Environment Court and the Employment and Labour Relations Court together. It fails to appreciate the specialized nature of some of the Courts. It also fails to appreciate the nature of some applications such as those relating to enforcement of international commercial arbitration awards that are grouped together with civil cases. This study intends to focus on applications for enforcement of international commercial arbitration awards thus addressing the gap identified in the aforesaid report.

Mboce Harriet has written a thesis on enforcement of international arbitral awards with reference to public policy limitations.[49] The paper is mainly concerned with how the Kenyan judiciary has treated the question of the Public Policy exemption that can be exploited to deny enforcement of an arbitral award in Kenya and also under the New York Convention.[50]

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[46] Institutionalizing Performance Management and Measurement in the Judiciary, April 2015. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015 at page 31
[47] Institutionalizing Performance Management and Measurement in the Judiciary, April 2015. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015 at page 32
[48] Institutionalizing Performance Management and Measurement in the Judiciary, April 2015. Available at www.judiciary.go.ke/portal/assets/filemanager_uploads/reports accessed on 6th July 2015 pages 24-26
[49]Mboce, H.K. "Enforcement of International Arbitral Awards: Public Policy Limitations in Kenya." (LLM Thesis, University of Nairobi School of Law, 2014).
[50]Section 37 (b) (ii) of the Arbitration Act, 1995.

The author's theoretical framework is not clear and she does not state whether her research is qualitative or quantitative or mixed methods. The whole idea behind the thesis however seems to be an attempt to come up with a guidance on how to approach the public policy exception when it comes to recognition and enforcement of international commercial arbitration awards. The author sets out on a journey towards seeking a definition of public policy. She tries to compare judicial pronouncements in other jurisdictions such as the United States of America before she ultimately concludes that it is virtually impossible to come up with a textbook definition of public policy. Mboce concludes her Thesis by admitting that it is virtually impossible to come up with a definition of public policy.

The major gap in Mboce's Thesis that this study aims at filling is to identify whether judges handling enforcement of international arbitration awards in Kenya are sufficiently trained on the task and whether such a factor could influence a determination on the issue of public policy in a certain way. If they are sufficiently trained, it may be clear in decisions emanating from the Court as there could be a narrowing down of what amounts to public policy and as a result there will be no need to embark on an uncertain expedition towards definition of a concept that is as abstract as public policy.

Christoph Schreuer has written a Paper on the relevance of Public International Law in International Commercial Arbitration with reference to investment disputes.[51]He looks at International Investment Arbitration as being at the borderline of international law and domestic law mostly because it involves a state that is the subject of International law and a private

[51]Christoph Schreuer, "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes," accessed November 19, 2014, www.univie.ac.at/intlaw/pdf/csunpublpaper_1pdf.

individual or entity that is the subject of domestic law.[52] He uses the term "International Investment Arbitration" throughout his paper in apparent reference to International Commercial Arbitration.[53]This could be informed by the fact that he focuses on arbitration borne out of Bilateral Investment Treaties.[54]He further argues that International Investment Arbitration comes in to replace litigation in domestic courts and diplomatic protection as remedies for investment disputes since both litigation in domestic courts and diplomatic protection are unsatisfactory. He therefore argues that International Investment Arbitration is the nexus between Public International Law and International Commercial Arbitration.[55]

However, his paper does not cover the modalities of enforcement of arbitral awards by a state and the remedies available to a non-state party that feels it has not been treated fairly and justly by a state when seeking to enforce an arbitral award in that particular state.

Stephen Fietta and James Upcher have written an article titled "Public International Law, Investment Treaties and Commercial Arbitration: An emerging system of complementarity?"[56] They argue that while the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards forms the basis for modern International Commercial Arbitration, it does not have dispute resolution mechanisms that a wronged party can use to enforce its rights under an arbitral award. They argue that this lacuna has exposed parties to frustration when pursuing

[52]Christoph Schreuer, "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes," accessed November 19, 2014, www.univie.ac.at/intlaw/pdf/csunpublpaper_1pdf. Page 1.
[53]Christoph Schreuer, "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes," accessed November 19, 2014, www.univie.ac.at/intlaw/pdf/csunpublpaper_1pdf.
[54]Christoph Schreuer, "The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes," accessed November 19, 2014, www.univie.ac.at/intlaw/pdf/csunpublpaper_1pdf. Page 2
[55]Ibid.
[56]Stephen Fietta and James Upcher, "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?" The Journal of the London Court of International Arbitration, 29, no. 2 (n.d.).

remedies. However, they argue that International Arbitration Tribunals and regional Human Rights Courts have recently stepped in to ensure recognition and enforcement of Arbitral awards and in doing so they have applied Public International Law principles.[57] The authors then proceed to examine a number of recent decisions to back up their argument.

Duncan Bagshaw in a paper titled "Emerging Threats to International Commercial Arbitration"[58] examines some of the emerging threats that are likely to reduce the efficacy, popularity and perceived legitimacy of international commercial arbitration. He identifies those threats as International Commercial Courts such as the Singapore International Commercial Court;[59] threat of excessive costs;[60] and threats to neutrality and legitimacy.[61] He concludes by looking at what the London Court of International Arbitration is doing to address these threats which includes establishing arbitration centers in Africa and widening the pool of arbitrators.[62] This paper is of interest to this study as it sought to address threats to international commercial arbitration but did not address one of the most fundamental aspects which is the aspect of enforcement by national courts of a state. The fair and just enforcement or otherwise of awards in international commercial arbitration is a big threat to its continued development and this is the gap that this study seeks to address.

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[57]Stephen Fietta and James Upcher, "Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?" The Journal of the London Court of International Arbitration, 29, no. 2 (n.d.).Page 5.

[58]Duncan Bagshaw, "Emerging Threats to International Commercial Arbitration," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): 21–27.

[59] Duncan Bagshaw, "Emerging Threats to International Commercial Arbitration," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Page 21.

[60]Duncan Bagshaw, "Emerging Threats to International Commercial Arbitration," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Page 22

[61]Duncan Bagshaw, "Emerging Threats to International Commercial Arbitration," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Page 25

[62]Duncan Bagshaw, "Emerging Threats to International Commercial Arbitration," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.):Page 26

Kariuki Muigua has written a paper titled "ADR: The Road to Justice in Kenya"[63] where he examines the philosophical underpinnings of the concept of justice. He argues that the concept of justice involves three key elements, that is: Equality of access to legal services; National Equity; and Equality before the law.[64] He analyzes the concept of justice from the point of natural law, positivism and feminist jurisprudence[65]and their relation to the concept of access to justice.

Francesco Francioni has written a paper titled "Access to Justice, Denial of Justice and Investment Law.[66]He considers the question whether the extensive penetration of foreign investment guarantees into areas of national regulation previously reserved for domestic jurisdiction should require a corresponding opportunity for access to justice and participation in arbitral proceedings by the civil society of the host state. He argues that the concern can be addressed by the inclusion of civil society as amicus curiae in arbitration proceedings and by the application of the domestic law of the disputing state in arbitration proceedings to the extent that it pursues legitimate public policy objectives.

Njoroge Regeru has written a paper titled "Recognition and Enforcement of Arbitral Awards." [67] He argues that recognition of an award is the final vindication of the whole arbitral process. He has summarized the process of recognition and enforcement of awards in Kenya and also briefly covered international law governing enforcement of arbitral awards. He concludes that the present legislation and practices in Kenya are consistent with International law. However, he has

[63]Muigua K, "ADR: The Road to Justice in Kenya," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Pages 28–95.
[64]Muigua K, "ADR: The Road to Justice in Kenya," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Page 30.
[65]Muigua K, "ADR: The Road to Justice in Kenya," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): Pages 32-42
[66]Francesco Francioni, "Access to Justice, Denial of Justice, and International Law," European Journal of International Law, 20, no. 3, accessed November 19, 2014, www.ejil.org/pdfs/20/3/1862.pdf.
[67]Njoroge Regeru, "Recognition and Enforcement of Arbitral Awards."In Githu Muigai ed. Arbitration Law and Practice in Kenya (Law Africa Publishing (K), 2011)

not looked into aspects of denial of justice as regards to the general practice of the Kenyan state and courts which may lead to Kenya being accused of denial of justice hence this study.

Attiya Waris and Muthomi Thiankolu have written a paper titled "International Commercial Arbitration in Kenya.[68] The authors set out to examine the provisions of the Kenyan Arbitration Act as regards International Commercial Arbitration. The authors dwell much on the definition of "International Commercial Arbitration" [69] and provide an interpretation of the various provisions of the Arbitration Act as relates to international commercial arbitration. There is limited reference to court decisions on the interpretations though this could be ascribed to the fact that international commercial arbitration is a developing area of law for which courts may not have had adequate opportunity to pronounce themselves on various emerging issues. The authors wrongly claim that a dispute on the issue of whether an arbitration is international or local.[70] Such would have an impact especially due to the reservation on the New York Convention by Kenya. The authors have briefly looked into enforcement of international commercial arbitration awards where they have just stated the provisions of the New York Convention and the Arbitration Act. The authors have briefly looked into enforcement of international commercial arbitration awards where they have just stated the provisions of the New York Convention and the Arbitration Act. They have not wholly examined the process of recognition and enforcement of arbitral awards. This is a major gap in the work.

[68]Attiya, W and Thiankolu, M. International Commercial Arbitration in Kenya in GithuMuigai ed. Arbitration Law and Practice in Kenya (Law Africa Publishing, 2011)
[69]Attiya, W and Thiankolu, M. International Commercial Arbitration in Kenya in Githu Muigai ed. Arbitration Law and Practice in Kenya (Law Africa Publishing, 2011) pages 198-200
[70]Attiya, W and Thiankolu, M. International Commercial Arbitration in Kenya in GithuMuigai ed. Arbitration Law and Practice in Kenya (Law Africa Publishing, 2011) page 204.

Kariuki Muigua has written a book that covers arbitration in Kenya.[71]The book can be aid to be aimed at providing an overview of the whole process of arbitration from inception of a dispute to recognition and enforcement of an award.

The book covers the whole process of arbitration from the arbitration agreement to the recognition and enforcement of arbitral awards. It has a section on the Court's role in arbitration which is relevant to this study.[72] The writer examines the role of the court before the arbitration, during the arbitration and after the arbitration. He also offers a very useful critique of the role of the court in arbitration. He argues that all instances of court intervention as provided for under the Arbitration Act, 1995, the Arbitration Rules, the Civil Procedure Act and the Civil Procedure Rules, 2010 are justified and necessary.[73] He however admits that in spite of the justification for court intervention, the legal provisions relating to such interventions are ambiguous.[74] He also argues that there has been a change of attitude by the courts in terms of development of a more positive attitude to arbitration as a means of reducing the huge backlog of cases bedeviling our courts.[75]The gap in this work as relates to this study is the absence of a comprehensive critique on the judiciary in terms of an assessment of its performance in enforcement of international commercial arbitration awards.

Margaret L. Moses has written a book on the Principles and Practice of International Commercial Arbitration.[76]The book seems to be aimed at providing a basic understanding of international commercial arbitration. The author generally examines the process of arbitration

[71]Muigua, K. Settling Disputes through Arbitration in Kenya (2nd edition. Glenwood Publishers, 2008)
[72] Ibid page 166.
[73]Muigua, K. Settling Disputes through Arbitration in Kenya (2nd edition. Glenwood Publishers, 2008) page 188.
[74] Ibid.
[75]Muigua, K. Settling Disputes through Arbitration in Kenya (2nd edition. Glenwood Publishers, 2008) page 193.
[76]Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008).

right from jurisdiction to the award and recognition and enforcement thereof. The subject of international commercial arbitration is wide and the author has done a commendable job of compressing and summarizing the entire process into a relatively small book of 239 pages excluding appendixes. The author tries to maintain a neutral stance towards international commercial arbitration and she does not attempt to paint it as problem free. She actually states that in recent years parties have incorporated many of the tactics in litigation into arbitration resulting into a process that is costly and that creates delays.[77]

However, understandably due to the attempt to summarize and compress the contents the author does not go into deep details on various issues on international commercial arbitration. For example, in Chapter 10 the author writes on enforcement of awards. While the author recognizes that the New York Convention and the UNCITRAL model law provide very limited defenses to enforcement of international commercial arbitration awards[78], she fails to appreciate that these defenses are framed in such a way as to give courts in the enforcing country a lot of leeway to determine the applicability of these defenses. This is a shortcoming that this study intends to address.

2.3.Theoretical framework

How judges decide as they do in a particular case has been a fundamental concern of several legal theories. While judges are expected to decide disputes in a rational manner, it does not rule out the possibility that judges may be influenced by intuition or by stimuli that is not within the case before the judge to decide in a particular way.[79]The foregoing is related to the concept of

[77]Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008)4.
[78]Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008)208
[79] Freeman, M.D.A Llyod's Introduction to Jurisprudence. (8th edition. Sweet & Maxwell, 2008) Page 1533

statutory interpretation or construction in that it is likely that there will always be situations where the law as it exists in statutes is not clear leaving the judge with discretion to apply the law thus ultimately making law.[80]

The law making capacity of judges is not just limited to statutory interpretation but can also be seen in the common law system where judges can depart from previous decisions which would ordinarily be binding on them but for the fact that a judge finds a reason to depart from the previous decision within some parameters such as distinguishing the facts in the previous decision from a current case before the judge. Indeed common law has actually been built on continuous development of the law by judges deciding particular cases before them by consistently measuring them against a standard set by earlier decisions of a court of higher jurisdiction.[81]A decision of a court of equal jurisdiction is usually binding though as per the decision in *Island Tug Ltd vs S.S. Makedonia*[82] a judge may reject a precedent from a court of equal jurisdiction if the earlier decision was wrong. This essentially means that precedence from courts of equal jurisdiction is merely persuasive. On the other hand, even where the court is the highest court, it has found a way to depart from its previous decisions.[83]The law making endeavors of judges in common law have been criticized for their retroactive approach to facts.[84]

Indeed, there seems to be a convergence of reasoning that judges do actually make law whether under the doctrine of *stare decisis* or under statutory construction.[85]The extent and the reasoning behind such law making capabilities of judges has been the point of departure between the various legal theories. Of particular interest to this study is the position of legal positivists such

[80]Harris, J.W. Legal Philosophies (2nd edition.Buttersworth, 1997) page 156.
[81]Bix, B. Jurisprudence: Theory and Context (Sweet & Maxwell, 2012) page 154.
[82] (1958) 1 Q.B 365
[83] For example in England the House of Lords by virtue of *Practice Direction (1966) 3 All E.R. 77* may depart from a previous decision if it seems that such is the right course.
[84]Bix, B. Jurisprudence: Theory and Context (Sweet & Maxwell, 2012) page 155.
[85] Freeman, M.D.A Llyod's Introduction to Jurisprudence. (8th edition. Sweet & Maxwell, 2008) Page 1533

as HLA Hart and of realists such as Oliver Wendell Holmes Jr. on the issue of judges making laws.

Positivists such as HLA Hart have attempted to explain how judges make law by his concept of "indeterminacy of law" and "open texture of law". Hart argues that there will always be situations where the law will be indeterminate as it is not possible to anticipate every situation.[86] Moreover, he argues that the open texture of law means that there are areas of conduct where courts or officials will be given a chance to develop the law by striking a balance in particular circumstances between various competing interests.[87]

On the other hand, legal realists were of the opinion that in deciding cases judges were influenced by factors other than legal rules.[88]This was the claim at the center of legal realism. Legal realists were also rule skeptics. Oliver Wendell Holmes Jr. famously remarked that the life of the law has been experience rather than logic.[89]They believed that rules as a reason for action[90] did not exist since a judge could depart from rules without attracting any sanctions.

The positivist interpretations of Hart on judicial law making and the legal realism argument as to judges being influenced by factors outside of the law should converge on their arguments as to judges making laws. However, they do not. Hart was heavily critical of rule skepticism as fronted by the legal realists. While Hart conceded that there were situations when the law was indeterminate and that it fell upon judges to make law in such instances based on the facts, he was very critical of rule skepticism associated with the American Legal realism movement. Hart dismissed rule skepticism by stating that the courts were bound secondary rules which conferred

[86]Hart, H.L.A. The Concept of Law (3rd edition. Clarendon Law Series, 2012) page 125
[87]Hart, H.L.A. The Concept of Law (3rd edition. Clarendon Law Series, 2012) page 135
[88]Bix, B. Jurisprudence: Theory and Context (Sweet & Maxwell, 2012) page 200.
[89]Holmes, O.W. Jr. The Common Law. (New York, Dover Publications, (1881)(1991) page 1.
[90]Michael Steven Green,Legal Realism as Theory of Law, 46 Wm. & Mary L. Rev. 1915 (2005), available at http://scholarship.law.wm.edu/wmlr/vol46/iss6/2 page 1922 accessed on 14th November 2014.

jurisdiction on them thus making their decisions authoritative.[91] Further, he argued that even rules which have an exception were still rules.[92]

While the law is agreeably indeterminate on some points, it is doubtful that there are always secondary rules that will always guide judges in resolving multiple points of indeterminacy. If such rules existed then it would mean that there was no indeterminacy in the strict sense of the word. Rather, it is more likely that judges will indeed respond to other stimuli when deciding cases. This is the core claim of legal realism and is a persuasive theoretical framework for this study. When it comes to enforcement of international commercial arbitration awards, there are laws that are meant to guide the process. However the laws are indeterminate on multiple points for example on the question of public policy exception under article V (2) (b) of the New York Convention. There are no rules to determine what is public policy which has been described as an unruly horse.[93] Judges are therefore likely to be influenced by outside stimuli such as the judges' believe system when deciding what amounts to public policy. This study therefore proceeds on a theoretical frame work based on legal realism.

2.4.Normative Framework

The normative framework for this study is based on the concept of access to justice and is related to the research question on whether the Kenyan judiciary handles applications for recognition and enforcement of international commercial arbitration awards in a way that ensures access to justice.

[91]Hart, H.L.A. The Concept of Law (3rd edition. Clarendon Law Series, 2012) page 135
[92]Hart, H.L.A. The Concept of Law (3rd edition. Clarendon Law Series, 2012) page 139
[93]The words of Burrough, J in *Richardson v. Mellish* (1824), 2 Bing. 252

Access to justice is considered to be a basic inviolable right.[94] However, justice does not apply in a blanket form and what is considered as justice to one person may be different to another. Justice can be conceptualized in at least four forms that is Distributive justice, which is concerned with fairness in sharing, Procedural Justice which entails the principles of fairness in the idea of fair play, Restorative Justice and Retributive Justice.[95] In applications for recognition and enforcement of international commercial arbitration awards it is likely that the applicable form of justice is procedural justice. This is because courts will usually not deal with the merits of the award as the same is meant to be final and binding.[96]The Arbitration Act of 1995 has actually sought to limit the intervention of the Courts in arbitration proceedings to very specific and limited instances.[97]

Procedural justice therefore comes in when a party to an international commercial arbitration whether the party in whose favour the award is delivered or the party against whom the award is directed in the arbitration is given a chance to either set aside the award or seek to have it recognized and enforced respectively. Whether it is an application for enforcement that has been filed or one for setting aside, the other party is entitled to be heard on the application.

The concept of access to justice does not have a single universally accepted definition but can be said to refer to the judicial and administrative remedies available to a natural or juristic person who has been aggrieved by an issue.[98]It has been argued that there are three key elements of

[94]Muigua K, "ADR: The Road to Justice in Kenya," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): 28–95.

[95] 'Four Types of justice" Available at http//changingminds.org/explanations/trust/four_justice.htm See also Alternative Dispute Resolution, Volume 2, Number 1, 2014, KariukiMuigua, *ADR, The Road To Justice in Kenya* at page 29

[96]Arbitration Act, 1995 section 32A

[97]Arbitration Act, 1995 section 10

[98]Four Types of justice" Available at http//changingminds.org/explanations/trust/four_justice.htm See also Alternative Dispute Resolution, Volume 2, Number 1, 2014, Muigua, K. *ADR, The Road To Justice in Kenya* at page 29.

access to justice namely: equity of access to legal services regardless of means; national equity which is the equal access to legal service markets and services to all persons; and equality before the law which comprises of equal opportunities in all fields, use of community facilities and access to services to all person regardless of race, ethnic or social origins, pregnancy, marital status, health status, colour, age, conscience, belief, culture dress, language or birth, gender or disability and religion.[99]

Access to justice is one of the internationally acclaimed human rights considered to be basic and inviolable[100] and the same is achieved when members of society have unhindered opportunity to have their disputes resolved or settled through means that result in just outcomes.[101]The concept of Access to Justice is inextricably linked to the doctrine of Denial of Justice[102]such that when you apply deductive analysis to the doctrine of denial of justice, it follows that for denial of justice to occur there has to be denial of access to justice. Only when justice is not delivered because judicial remedies are not available, or the system of administration of justice is so inefficient and inadequate as to deprive a party effective remedial process, can it be said that one has been denied access to justice.[103]Access to justice can only be as effective as the available mechanisms to facilitate the same[104] and in the absence of access to justice, people are unable to

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[99]Access to Justice Advisory Committee, *Access to Justice:* An action plan, AGPS, Canberra, 1994. See also Louis Schetzer, et al, Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW', Page 7, Background Paper, August 2002, Available at *www.lawfoundation.net.au/ljf/site/articleIDs/.../$file/bkgr1.pdf and* See also Alternative Dispute Resolution, Volume 2, Number 1, 2014, Muigua, K. *ADR, The Road To Justice in Kenya* at page 30, see also Article 27 (4) The Constitution of Kenya, 2010

[100]Muigua, K "ADR: The Road to Justice In Kenya," Chartered Institute of Arbitration (Kenya Chapter) Journal of Alternative Dispute Resolution 2014, 2, no. 1 (n.d.): 28–95.

[101]Muiruri, L.N. *Reflections on access to Justice Through Alternative Dispute Resolution Mechanisms in a Globalised Society* at page 247 in Alternative Dispute Resolution, Volume 2, Number 1, 2014.

[102]Francioni, F. "Access to Justice, Denial of Justice, and International Law," European Journal of International Law, 20, no. 3, accessed November 19, 2014, www.ejil.org/pdfs/20/3/1862.pdf. Page 2.

[103]Francioni, F. "Access to Justice, Denial of Justice, and International Law," European Journal of International Law, 20, no. 3, accessed November 19, 2014, www.ejil.org/pdfs/20/3/1862.pdf. Page 731.

[104] See Alternative Dispute Resolution, Volume 2, Number 1, 2014, Muigua, K. *ADR, The Road To Justice in Kenya* at page 31

have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.[105]

Domestication of international conventions which require our courts to recognize and enforce arbitral awards was adopted without the necessary policy framework, modifications or adaptation of the law to local circumstances[106] These circumstances include high court fees, geographical locations, complexity of rules and procedure, the use of legalese,[107] lack of infrastructure, high costs of advocacy, illiteracy and/or lack of information and corruption.[108]The Kenyan judiciary actually admits that access to justice in Kenya is impeded by inadequate staff numbers, tortuous procedures, long distances to court as well as inefficiency and corruption.[109]

As such, enforcement of international arbitral awards may at times take years due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice[110] thus losing the one of the purported advantages of arbitration being efficiency.

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[105] United Nations Development Programme, *'Access to Justice and Rule of* Law' Available at *http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law*See also Alternative Dispute Resolution, Volume 2, Number 1, 2014, Muigua, K. *ADR, The Road To Justice in Kenya* at page 30

[106] See Gakeri, J.K. *Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR* at page 1

[107]*Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Muigua, K. *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012. Available at http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf

[108] See Ojwang' J.B "The Role of the Judiciary in promoting Environmental Compliance and sustainable Development," *Kenya Law Review Journal 19 (2007), pp. 19-29: 29* and Muigua, K. *ADR The Road to Justice in Kenya* at page 51

[109]State of the Judiciary and the Administration of Justice Annual Report, 2013.Available at www.judiciary.go.ke.Accessed on 6th July 2015.

[110] See Mbote, P. K., et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011 [Accessed on 17th July, 2015]. See also Muigua, K. *Emerging Jurisprudence in the Law of Arbitration in Kenya* page 6

Being a private and consensual procedure, arbitration may be perceived by some judicial officers as competition to the courts in the administration of justice,[111]leading to instances when courts apply the provisions of the conventions in such a narrow manner as to refuse to enforce an award and this amounts to denial of justice.[112]This is an area where the core claim of legal realism can be seen as judges are influenced by other factors in making judicial determinations and not just the facts that are placed before the courts.

The current Constitution of Kenya has incorporated access to justice provisions. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. Article 27(1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Article 159(2) (d) binds courts to follow access to justice principles by ensuring that justice is done to all, is not delayed and is administered without undue regard to procedural technicalities.[113]These provisions are not biased towards people dealing with public law only but also protect those dealing with private law.[114]

In *Republic v Attorney General & another Exparte James Alfred Koroso*[115]the High Court provided an interesting take on the concept of access to justice when it held that:-

"access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers."

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[111] See Julian D.M. Lew, The Applicable Law In International Commercial Arbitration 51-61 (1978).
[112] Ibid, See White Industries Australia Limited v Republic of India available at http://www.italaw.com/sites/default/files/case-documents/ita0906.pdf accessed on 10th November 2014.
[113]Muigua, K. *ADR, The Road To Justice in Kenya* Alternative Dispute Resolution, Volume 2, Number 1, 2014,at page 51
[114]Muigua, K. Emerging Jurisprudence in the law of arbitration in Kenya at page 20
[115] [2013] eKLR

The above decision is interesting to the question of enforcement of international commercial arbitration awards as it opens a door for a party who may have been locked out of the doors of justice due to state influence to approach the court by way of judicial review. This decision is a judicial innovation that amplifies access to justice.

In Kenya the High Court is the court that has jurisdiction as regards enforcement of international commercial arbitration awards.[116]The High Court of Kenya is bound by the principles in article 159 (2) (d) of the Constitution of Kenya 2010 to wit it bound to ensure that-

a) Justice shall be done to all, irrespective of status;
b) Justice shall not be delayed;
c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted;
d) Justice shall be administered without undue regard to procedural technicalities;

The High Court should therefore ensure that applications for enforcement of international commercial awards are speedily heard and determined. It should ensure that the person against whom the award is enforced has had access to justice by having its day in court while at the same time safeguarding the right of a successful party to enjoy the fruits of its award after the same has been recognized by the court. Thus in *Erad Suppliers & General Contracts Limited v National Cereals & Produce Board*[117]refused to grant stay of execution sought to stay the award of an arbitrator for amongst other reasons the fact that the party against whom the award was to be enforced had been to various courts seeking to stay the execution of the award without any success.

[116] See generally part IV of the Arbitration Act 1995.
[117][2013] eKLR

In summary based on the foregoing, it can be argued that there are some basic minimum normative criteria which one would expect to be present for a system of recognition and enforcement of international commercial arbitration awards to be said to be adequate.

Firstly, there is the expectation of efficiency in determination of applications for recognition and enforcement of international commercial arbitration awards. It is arguable that one of the advantages of arbitration over court litigation is efficiency in terms of the speed of final determination of the dispute.[118] It therefore does not make sense for a party to quickly get an award only to be kept for a long period waiting for the court to decide on whether the award can be enforced. To achieve this efficiency, there has to be adequate staff in the judiciary in terms of both judges and support staff such as researchers and paralegals.[119] Further, there could be a need to specify the maximum duration of time within which an application for enforcement of an international commercial arbitration award should be determined from the time of filing.

Secondly, there is an expectation that judges are well trained and experienced on enforcement of international commercial arbitration awards. This training is in terms of the initial basic qualifications expected of a judge in addition to persistent capacity building and professional development. It is also expected that specialists in the field of international commercial arbitration will be appointed to the bench to handle such matters specifically.

Finally, there is a need to accept that a judge will determine what the law is and such determination is likely to be influenced by factors outside the law as explained in legal realism. Due to this, different judges may interpret the law differently especially where they are given

[118]Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008) Page 4.
[119]State of the Judiciary and the Administration of Justice Annual Report, 2013.Available at www.judiciary.go.ke.

discretion. However, parties have an expectation of consistency in terms of decisions emanating from the judiciary. Parties also expect the judiciary to be sufficiently independent as not to be influenced by external factors in rendering decisions. Considering the wide discretionally powers given to courts to for example determine what public policy[120] is, it is clear that there is a need for some level of consistency in terms of decisions emanating from the courts as to what is enforceable and what is not enforceable. It would be unfortunate for conflicting decisions to emanate from courts having similar jurisdiction as this will erode public confidence in the judiciary. Moreover, there is a need to guard against abuse of judicial power.

2.5.Methodology

A crucial step when it comes to methodology is to identify the population. Population refers to an entire group of individuals, events or objects having a common observable characteristic or the aggregate of all that conforms to a given specification.[121]The focus of this study is on enforcement of international commercial arbitration awards. The population involved in this case therefore is advocates, judges and deputy registrars of the High Court. It is not lost on the researcher that there are various instances where litigants represent themselves in international commercial arbitrations and perhaps even file applications for enforcement without the involvement of lawyers. However, given the confidential nature of arbitrations generally, it would be difficult to trace such litigants to have them participate in this study without the involvement of considerable time and finances.

[120]Ibid.
[121]Mugenda M,O and Mugenda G,A. Research Methods Quantitative and Qualitative Approaches.(Acts Press, 1999) Page 9.

There are about twenty five judges of the High Court sitting at Nairobi. They are deployed in the various divisions being the Constitutional and Human Rights division, Judicial Review division, Commercial and Admiralty division, Civil division, Family division and Criminal division.[122]

One of the hypotheses of this study is that applications for enforcement of international commercial arbitration awards are only filed in the commercial division of the High Court at Nairobi. However, as pointed out earlier, these divisions used to be informal and administrative[123] in nature and a judge may be posted to any such division. For this reason, the target population of judges is twenty five.

As for deputy registrars, each division has at least one deputy registrar. The target population of each division is therefore six.

For advocates, there is currently no data on the number of advocates who practice ordinarily in the High Court in Nairobi. The target population of advocates is therefore unknown.

The next step is sampling which is also crucial as flawed sampling can undermine research findings.[124]Where time and resources allow, it is advisable for the researcher to take the biggest sample possible or to even use the entire target population. However, time and resources do not always allow for this hence techniques for selecting a sample size.[125]

There are various methods of sampling that are available to a researcher which can be divided into two main approaches, that is probability sampling and non-probability sampling. Each

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[122] See www.kenyalaw.org accessed on 22nd September 2015.
[123] The High Court Organization and Administration Act number 27 of 2015 which came into effect on 02/01/2016 has since formally established divisions of the High Court at section 11.
[124]Punch, K.F. Introduction to Social Research Quantitative and Qualitative Approaches. (2nd edition. Sage Publications, 2005) Page 235.
[125]Mugenda M.O and Mugenda G.A. Research Methods Quantitative and Qualitative Approaches. (Acts Press,1999) Page 42.

approach has its advantages and disadvantages. One huge advantage of probability sampling is that it is more likely to produce representative samples and facilitate estimates of sample accuracy which allow inferences to be made to a wider population. On the other hand, probability sampling may be problematic if the information require to come up with a sampling frame does not exist.[126] As for non-probability sampling one advantage is that it makes it easier and quicker to administer as it does not require a sampling frame.[127]Given the nature of this study and the target populations identified above, the researcher chose to use stratified random sampling. In stratified random sampling, the population is divided into two or more groups using a given criterion then a given number of cases are randomly selected from each population sub group.

In this study, we have already divided the population into judges, deputy registrars and advocates. We have identified twenty five judges who are working at the High Court at Nairobi. Out of this number we are targeting five judges as respondents. This is because the number of judges at the commercial division of the High Court at Nairobi is five.[128] We have also identified six deputy registrars as working at the High Court at Nairobi. Out of this number we are targeting at least four of them as subjects of this study again because the number of deputy registrars in the commercial division of the High Court at Nairobi is four.[129] The number of advocates ordinarily practicing in the High Court at Nairobi is not known. Since the researcher is

[126]Punch, K.F. Introduction to Social Research Quantitative and Qualitative Approaches. (2nd edition. Sage Publications, 2005) page 311.
[127]Punch, K.F. Introduction to Social Research Quantitative and Qualitative Approaches. (2nd edition. Sage Publications, 2005) page 313.
[128] See generally www.kenyalaw.org. This information is also gleaned from the researcher's interviews with deputy registrars.
[129] See generally www.kenyalaw.org. This information is also gleaned from the researcher's interviews with deputy registrars.

using stratified random method of sampling, the researcher selected at least fifteen advocates as subjects of this study.

The main data collection instrument for primary data was questionnaires. The researcher prepared three different sets of questionnaires for the different strata of respondents, that is, judges, deputy registrars and advocates. The questionnaires contained both open ended and closed ended questions.

The questionnaires were handed out to the respondents between the months of September to November 2015. To cater for the possibility that some respondents may not be interested in participating, questionnaires were handed out to all judges of the High Court at Nairobi and all the deputy registrars. Twenty five questionnaires were handed out to judges and six to deputy registrars. The researcher approached the Chief Registrar of the judiciary who issued him with a written authorization that allowed him to interview judges and deputy registrars. The researcher then approached individual judges and deputy registrars and sought their participation in the study.

Questionnaires for advocates were handed out mostly in court at the High Court to ensure that it captured advocates who ordinarily practice there. Fifty questionnaires were handed out to advocates. Samples of the questionnaires for judges, deputy registrars and advocates are annexed to this study as an appendix.

A total of 81 questionnaires were handed out and a total of twenty seven were returned which signifies a response rate of 33.33%. At the time of conclusion of the study, the researcher had gotten back the targeted number of questionnaires being five from judges, four from deputy registrars and eighteen from advocates.

The advocates were normally interviewed at the High Court at Nairobi to ensure that respondents were advocates, who practiced at the commercial division of the High Court at Nairobi,

66.7% of the total respondents were Advocates; 14.8% of the total respondents were deputy registrars while 18.5% of the total respondents were judges.

For secondary data, the researcher made use of materials available on the internet. The researcher also made use of the High Court library and the library at the school of law of the University of Nairobi to gather secondary data.

3.0. RECOGNITION AND ENFORCEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION AWARDS IN KENYA

3.1. Introduction.

This chapter discusses the process of recognition and enforcement of international commercial arbitration awards. It will also discuss the capacity of the high court in terms of the available number judicial officers and also its workload. It will conclude by briefly assessing the role of lawyers in recognition and enforcement of international commercial arbitration awards

3.2. Recognition and Enforcement of International Commercial Arbitration Awards

The Arbitration Act, 1995 does not distinguish between an international commercial award and a local arbitration award as far as enforcement is concerned. The procedure is basically the same whether the arbitration was local or international. The Act only goes further to incorporate the provisions of the New York Convention as far as international commercial arbitration awards are concerned.[130]Kenya acceded to the New York Convention on 10th February 1989 with a reciprocity reservation.[131]The distinction between international commercial arbitration and a local arbitration is therefore important even though the Act does not make a distinction where enforcement is concerned. The distinction would be a crucial point if the aspect of Kenya's reciprocity reservation were to become an issue in an application for enforcement of an international commercial arbitration award.

There seems to be some distinction between recognition and enforcement. The convention at article III provides that:-

[130]Section 36 of the Arbitration Act, 1995.
[131] See http://www.newyorkconvention.org/contracting-states/list-of-contracting-states accessed on 28th July 2015. See also section 36(5) of the Arbitration Act, 1995.

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, ……."

A plain reading of the foregoing provision seems to indicate that an award may just need to be recognized without the need for enforcement. Authors such as Margaret L. Moses also seem to be of the same opinion. She argues that in recognition a court is called upon to acknowledge that the award is valid and binding and gives it an effect similar to a court judgment such that it can be relied upon in a future litigation or arbitration matter as a set off or counterclaim. On the other hand enforcement means using whatever official means as are available to carry out any mandate in the award.[132]However enforcement must comply with the rules of a contracting state though it may not impose higher fees then would be payable when seeking to enforce a domestic award.[133]I f it were to impose such higher fees as to prevent a party from accessing the court then that would indeed amount to denial of justice.

In terms of the procedure to be followed in recognition and enforcement of an international commercial arbitration award, the first step is for the party seeking to enforce the award to lodge a formal application which must be accompanied by: the duly authenticated original award or certified copy; the original arbitration agreement or certified copy; and a certified translation of the arbitration agreement if it is not in the English language.[134]An arbitral award is normally filed in the High Court and all parties must be notified of the filing. Thereafter if no application to set

[132]Margaret L. Moses, "The Principles and Practice of International Commercial Arbitration.(Cambridge University Press, 2008) page 203.
[133] Ibid.
[134]Section 36 (1) & (2) of the Arbitration Act, 1995. See also the Arbitration Rules, 1997. Legal Notice No. 58 of 1997

aside the award is made, the applicant may apply *ex parte* by chamber summons for confirmation of the award as a decree of the Court[135].

In reality though such applications are rarely heard and determined *ex parte*. The other side is given an opportunity to be heard whether an application for setting aside was made or not. Perhaps this is in keeping with the constitutional threshold for a fair hearing[136]. Indeed the court in *Justus Nyang'aya v Ivory Consult Limited*[137] has held that it is only fair and just that all parties to the arbitration are served with the application for recognition and enforcement whether or not an application for setting aside of the award has been made.

3.3. Grounds for setting aside an international commercial arbitration award and for refusing recognition and enforcement of an arbitral award.

The grounds for setting aside an international commercial arbitration award and those for refusing recognition and enforcement under the Arbitration Act are eerily similar whether instigated by a party or on the court's own motion.[138]The only difference is when it comes to enforcement where one of the grounds upon which a court may refuse recognition and enforcement is that the award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made.[139]That ground is not listed as a ground for setting aside an award. The implication is that unless an award has been set aside in the country in which the award was made or under whose

[135]See rules 5, 6 and 9 of the Arbitration Rules, 1997. Legal Notice No. 58 of 1997
[136]Article 50 (1) of the Constitution of Kenya, 2010.
[137][2015] eKLR. See also *Samura Engineering Limited V Don-Wood Co Ltd* [2014] eKLR
[138] Compare section 35(2) (a) (i-vi) and (b) (i-ii) and section 37(1) (a)(i-vii) and (b) (i - ii)of the Arbitration Act, 1995.
[139] Section 37(1) (a) (vi) of the Arbitration Act, 1995.

law the award was made a party can be refused recognition and enforcement in one jurisdiction and then moves to another jurisdiction to try and get if enforced.

A court may refuse to recognize or enforce an award either on its own motion or upon the application of the party against whom the Award is being sought to be enforced. The party against whom the Award is being sought will have to prove to the court the existence of the following grounds in seeking that a court refuses to recognize or enforce an award:-[140]

a) A party to the arbitration agreement was under some incapacity; or

b) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

c) The party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

d) The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognized and enforced; or

[140]Section 37 (1) (a) of the Arbitration Act, 1995

e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

f) The arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

g) The making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

The court may also on its own motion refuse the recognition or enforcement of an award if it finds that:-[141]

a) The subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

b) The recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

Both arbitrability and the public policy exceptions give judges very wide discretion to make laws. Courts can decide what matter is arbitrable and what is not. There are therefore instances where courts have held that a divorce matter is not arbitrable[142]while in another the High Court allowed a serious criminal matter involving murder to be settled vide some form of traditional arbitration. [143]

[141]Section 37(1) (b) of the Arbitration Act, 1995.
[142] *See T.S.J v S.H.S.R*[2014] eKLR.
[143]*Republic V Mohamed Abdow Mohamed*(2013)eKLR

Public policy on the other hand is truly and unruly horse.[144] Attempts towards a definition of public policy have only provided a rough guideline which is again devoid of rules but is more dependent on outside stimuli in application to a particular case. For example in *Christ For All Nationals vs. Apollo Insurance Co. Ltd*[145]the court attempted to define public policy as follows: -

> *"Although public policy is a most broad concept incapable of precise definition…an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:*
>
> *a) Inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or*
>
> *b) Inimical to the national interest of Kenya; or*
>
> *c) Contrary to justice and morality."*

A critical analysis of the aforesaid attempt towards a definition of public policy leaves more questions than answers. For example under "justice and morality" the questions that arise would be whose standards of "justice" and "morality" are to be applied in determining that a certain matter is contrary to such justice and morality? In a cosmopolitan society, standards of justice and morality are bound to differ in different segments of society. This would also mean that judges would have varying interpretations of "justice" and "morality" and would seek to impose them in a particular matter before them.

[144]The words of Burrough, J in *Richardson v. Mellish* (1824), 2 Bing. 252
[145] (2002) EA 366

Such paradoxical situations and decisions serve to show that indeed the life of the law is experience rather than logic. Judges are shaped more by their experiences than by some set of rules.

3.4. Appeals against decisions refusing to recognize and/or enforce an arbitral award.

It is not possible to appeal a decision to refuse recognition and enforcement of an award. This used to be a relatively grey area as the Arbitration Act, 1995 is silent on the question of an appeal to the Court of Appeal in case of a refusal to recognize and enforce an international arbitration award. However, the Court of Appeal decision in *Tanzania National Roads Agency v Kundan Singh Construction Limited*[146]has made it clear that though the Arbitration Act is silent on the right of appeal against a decision refusing to enforce an international commercial arbitration awards, the fact that the UNCITRAL model law does not provide for a right of appeal means that no appeal can be proffered from a decision of the High Court refusing to recognize and enforce an arbitration award. The Court stated thus:-

"the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the Arbitration Act and Rules which regulates the procedure in arbitration matters, or in the case of international arbitration, the general rules of International Law, treaty or convention ratified by Kenya which form part of the Law of Kenya under Article 2(5) & (6) of the Constitution. It is not disputed that although the Arbitration Act provides a right of appeal in the case of domestic arbitral award, it does not provide any right of appeal in the case of international awards. Therefore the appellant can only find respite if there is a right of appeal

[146][2014] eKLR

provided under UNCITRAL Model Law which govern International Commercial Arbitration and to which Kenya is a signatory.

An examination of UNCITRAL Model Law shows that there was a clear and deliberate intention to limit court intervention in arbitration matters ……."

In holding that there is no right of appeal against the decision of the High Court refusing recognition and enforcement of an arbitral award, the court seems to have been guided by section 10 of the Arbitration Act, 1995 which strives to limit court intervention in arbitration and the desire to bring the arbitration process to a close.

3.5. The Capacity of the High Court.

One of the normative framework for this study is that parties seeking recognition and enforcement of an international commercial arbitration award have an expectation of efficiency in determination of such an application.

The High Court has both appellate and original jurisdiction as may be conferred by any law.[147]Its appellate jurisdiction is also related to its general supervisory power over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.[148]Were it not for the fact that the Arbitration Act of 1995 expressly limits the interference of courts except as provided for in the said Act[149], it can be argued that this is one clause that could be used to repeatedly place roadblocks on the path of arbitrations. However, courts have also tended to look at such applications as meant to impede the arbitration

[147]Constitution of Kenya, 2010 at Article 165(3) (e).
[148] Ibid article 165 (6)
[149]Section 10 of the Arbitration Act, 1995.

process as a whole. This is as per the decision of Justice Deverell in *Epco Builders Ltd vsAdan S. Marjan-Arbitrator and another*.[150]

The capacity of the High Court shall be analyzed using the qualification and number of judges and the workload in terms of pending cases. This study focuses on the High Court at Nairobi and therefore while some aspects of the analysis of the High Court such as the minimum qualifications of judges may apply nationally, the Nairobi High Court remains the core focus of the study.

However, the High Court is the third highest court in Kenya and some of its decisions may be overturned. Therefore in some instances this study shall focus on the highest court in the land being the Supreme Court in examining some fundamental issues such as judicial independence.

The High Court at Nairobi is divided into the Constitutional and Human Rights division, Judicial Review division, Commercial and Admiralty division, Civil division, Family division and Criminal division. Each of these divisions has at least two judges.[151]At the moment, the Civil and Commercial division each have five judges.[152]. It is therefore common for judges to be transferred from one division to the other as well as from one high court station to the other.[153]

The minimum qualifications for appointment as a judge of the High Court is simply having ten (10) years' experience as a judge of a superior court or professionally qualified magistrate or as an academic or legal practitioner.[154] You do not have to be specialized in a certain area. The same goes for the Industrial Court which does not call for specialization, though the

[150] Civil Appeal No. 248 of 2005 (Unreported)
[151] A full list of judges and their postings to the various stations and divisions as at 28th July 2015 is available at http://kenyalaw.org/kl/index.php?id=4685 accessed on 28th July 2015.
[152] See www.kenyalaw.org. accessed on 28th July 2015.
[153] Ibid.
[154]Article 166 (5), The Constitution of Kenya, 2010

Environment and Land Court Act requires that for a person to be appointed as an Environment and Land Court judge, he or she should have knowledge and experience in matters related to land[155].

There is no clear legal framework to have specialists deal with their areas of specialization thus the question whether high court judges posted in various divisions have specializations suited for those divisions, or in this case, to handle applications for enforcement of international commercial arbitration.

Amongst the superior courts, the High Court has the highest number of pending civil cases.[156]Civ il cases represented 54.14% of all pending cases at the High Court.[157]The High Court had 145,596 pending cases; the Court of Appeal had 4,329 pending cases while the Supreme Court had 6 pending cases as at June 2013.

At the Milimani Law Courts, there were a total of 70,461 pending cases in all the divisions. Out of this, the Civil and Commercial divisions where applications for enforcement of international commercial arbitration awards are most likely to be lodged, had a total of 38,560 pending cases reflecting 54.72% of all the pending cases.[158]The High Court at Nairobi also had the highest number of all pending cases countrywide totaling to 74,695 cases including cases filed at the Industrial Court. This reflected 51.30% of all pending cases countrywide.

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[155]Section 7(1) (b) of the Environment and Land Court Act, Chapter 12A, Laws of Kenya.
[156]Judiciary Case Audit and Institutional Capacity Survey. August 2014. Pages 10 - 11Available at www.judiciary.go.ke. Civil cases includes commercial cases and applications for enforcement of International Commercial Arbitration Awards would fall under this category. The report gives a summary of the cases pending as at June 2013.
[157] Ibid
[158]Judiciary Case Audit and Institutional Capacity Survey. August 2014. Pages 10 - 11Available at www.judiciary.go.ke..

Additionally, in the High Court, cases tended to stay longest. 48% of all pending cases in the High Court had been there for over five (5) years. 32% had been pending for between 24-59 months, 7% between 12-23 months and 14% less than 12 months.[159]

The ratio of judicial officers is 1 judge to about 300,000 Kenyans and 1 magistrate to 80,000 Kenyans.[160]

3.6. The Role of Advocates in applications for enforcement of international commercial arbitration awards.

Legal training has tended to focus on legal analysis through the case method which involves imparting problem solving skills by asking about the rights and liabilities of parties in various situations.[161] This has perhaps led to a situation where lawyers are perceived as complicating problems instead of solving them leading to a feeling over the years attributed to non-lawyers that lawyers had no place in arbitration. Lawyers are perceived as devious and overly technical and thus incapable of understanding the intricacies of arbitration.[162] Lawyers were also seen as importing the tedious procedural rules of litigation into arbitration which is clearly not the core objective of arbitration.[163]

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[159]Judiciary Case Audit and Institutional Capacity Survey. August 2014. Pages 10 - 11Available at www.judiciary.go.ke at page 19.
[160]Judiciary Case Audit and Institutional Capacity Survey. August 2014. Pages 10 - 11Available at www.judiciary.go.keat page 31.
[161]Muigua, K. "Alternative Dispute Resolution and Access to Justice in Kenya." (Glenwood Publishers, 2015.) Page 163
[162]Garrett, S. "The Role of Lawyers in Arbitration." Available at http://naarb.org/proceedings/pdfs/1961-102.PDF accessed on 21st September 2015.
[163] See generally, Eiseman, M, *etal.*A Tale Of Two Lawyers: How Arbitrators And Advocates Can Avoid The Dangerous Convergence Of Arbitration And Litigation. Available at http://cardozojcr.com/wp-content/uploads/2013/05/CAC304.pdf accessed on 28th July 2015.

However, lawyers are social engineers and as such they play a very important role in shaping the society.[164] Moreover, due to legal technicalities when it comes to court matters, it is likely that regardless of how parties are represented in arbitrations, when it comes to applications for enforcement of international commercial arbitration awards, parties may wish to be represented by lawyers to address technical legal requirements for which the services of lawyers would be crucial. An example would be the requirement that a copy of the award be annexed to the application for recognition and enforcement. A layman may bypass such a requirement as having little significance. However, it would be expected of a lawyer to know that overlooking the requirement to provide a copy of the award could lead to the application for recognition and enforcement being dismissed. Lawyers therefore have a crucial role to play in the enforcement of international commercial arbitration awards and are a key focus of this study.

[164] *Ibid*

4.0. DATA ANALYSIS

4.1. Introduction.

This chapter consists of an analysis of data collected by the researcher. The study relied on both primary and secondary data. The latter part of the chapter then focuses on analysis of the data collected.

4.2. Respondents by gender.

In terms of gender, male respondents were 51.9% while female respondents were 48.1%.Of the male respondents, 78.57% were advocates while 21.43% were judges. There were no male deputy registrars. Of the female respondents, 53.85% were advocates, 30.77% were deputy registrars while 15.38% were judges.

The constitution of Kenya 2010 requires the state to take legislative and other measures to ensure that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.[165]A clear reading of this provision implies that no more than two thirds of judicial staff, that is judges and magistrates, should be of the same gender the said offices being appointive.

From the foregoing observation, it can be concluded that the judiciary is observing the one third gender rule either by more likely by default rather than design considering that the High court has held that the JSC cannot be compelled to implement the one third gender rule as per the decision in *Federation Of Women Lawyers Kenya (Fida-K) & 5 Others V Attorney General &Another.*[166]The background to this case was that upon the enactment of the constitution of

[165]Article 27 (8) of the Constitution of Kenya, 2010.
[166][2011] eKLR

Kenya 2010 and the subsequent appointment of judges of the Supreme Court, the Kenyan Chapter of the International Federation of Women Lawyers (FIDA-Kenya) moved to court seeking a declaration that the recommendation of people of more than two-thirds or 66.7 percent of the male gender and less than one-third or 33.3 percent of the female gender for approval and or eventual appointment to the office of Judges of the Supreme Court was gender insensitive, discriminatory against women, disrespectful of women and contrary to articles 27, 2, 3, 10, 163, 166, 172(2) (b), 248 and 249 of the Constitution of the Republic of Kenya and therefore null and void. The court held that Article 27 of the constitution does not give any immediate and enforceable right to any particular gender. The court further held that Article 27 as a whole or in part does not address or impose a duty upon the JSC in the performance of its Constitutional, Statutory and administrative functions.

The import of the foregoing decision is that the JSC does not have to make gender considerations when recommending judges for appointment as such by the President. That leaves it open for a situation where judges could all be of one gender. It could also explain the unavailability of data on gender balance in judicial appointments of judges and magistrates. Nevertheless, this study was not overly concerned with the decisions and performance of judges on the basis of their gender. The same can be the subject of a future in depth study.

4.3. Levels of education and further training on arbitration in respondents.

The constitution of Kenya 2010 sets out the basic minimum qualifications for appointment as a judge of the High court. Chief amongst this is that one should have a law degree or be admitted as an Advocate of the High court of Kenya or possess an equivalent qualification in a common

law jurisdiction.[167]The Advocates Act[168] contains the qualifications for admission as an Advocate of the High Court of Kenya the minimum of which is a degree from a recognized university and a post graduate diploma from the Kenya School of Law. However, there are situations where one could get admitted as an Advocate of the High court of Kenya if they have been admitted as such Advocates in the High court of the east African states of Uganda, Tanzania, Rwanda and Burundi or if they have been admitted as Advocates of a superior court in a commonwealth country, has practiced for at least five years and is in good standing with the relevant professional body in that country.[169] Nevertheless all the respondents in this study had the minimum qualification of a degree in law and a post graduate diploma from the Kenya School of Law.

In terms of level of education, 81.5% of the respondents had not progressed beyond this minimum qualification. 94.4% of advocates had the basic minimum qualifications outlined above. Only 5.6% had more advanced level qualifications. 11.1% of the total number of respondents had Master of Laws degrees and 7.4% of the total number of respondents had post graduate degrees or diplomas that were not strictly in the area of law. None of the deputy registrars had a Master of Laws qualification or any advanced qualification apart from the basic degree in law and diploma from the Kenya School of Law. 20% of judges had the basic degree in law and diploma in Law from the Kenya School of Law, 40% of judges had Master of Laws degrees and another 40% of judges had post graduate degrees or diplomas that were not strictly in the area of law.

[167]Article 166 (2) (a) of the Constitution of Kenya 2010.
[168]Chapter 16 Laws of Kenya.
[169] Ibid Section 13 (1) (d) and (e).

100% of judges had undergone some form of training on arbitration after being appointed as judges as can be seen from the bar chart below. 80% of judges had undergone further training on alternative dispute resolution methods after joining the judiciary. 66.7% of Advocates opine that judicial officers were adequately trained to handle applications for recognition and enforcement of international commercial arbitration awards.

The Bangalore principles of judicial conduct require that a judge constantly keeps informed of developments in law and takes initiative to maintain and enhance the judge's knowledge and skills necessary for the performance of the judicial function.[170] A judge should take advantage of training opportunities accorded by the judiciary through the Judiciary Training Institute (JTI) to enhance knowledge and skills. It would therefore be reasonable to expect judicial officers to advance from the basic minimum qualifications to advanced levels including masters and doctorate degrees.

The Kenyan judiciary does not post judges to various divisions based on their specialization. This is with the exception of judges of the specialized courts created under article 162 (2) of the constitution of Kenya 2010. It would therefore be of utmost importance to ensure that judges whether newly recruited or just transitioning from one division to another undergo some in house training.[171]Regardless of the number of years of post-admission experience that a judicial officer has, keeping abreast of developments in law and enhancing skills is a must.[172]

However, the expectation that judicial officers should advance their education and skills must be considered in light of the admission by the judiciary that its judicial staff is overworked due to a

[170]Principle 6 of the Bangalore Principles on Judicial Conduct.
[171]Commentary on the Bangalore Principles on Judicial Conduct by the United Nations Office on Drugs and Crime (September 2007) Page 135 available at https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf accessed on 6th July 2015.
[172] Ibid.

huge backlog of cases.[173] In such an environment, it is expected that judicial officers will find it hard to engage in pursuit of enhancement of their skills and knowledge.

4.4. Years of post-admission experience.

The term post-admission refers to the period after a respondent was admitted to the bar, that is being sworn in as an advocate of the high court of Kenya. This is a minimum basic qualification for all the respondents as required under the Advocates Act[174] since as discussed hereinbefore for one to practice as an advocate or to be appointed as a judge or as a deputy registrar they have to be qualified as advocates first.

66.7% of the total number of respondents had 0-5 years post admission experience. 7.4% of the total number of respondents had 6-10 years post admission experience. 3.7% of the respondents had 11-15 years post admission experience while another 3.7% of the total number of respondents had 16-20 years of post-admission experience. 18.5% of the total number of respondents had 21-25 years or more post admission experience. A majority of the advocates being 94.6% had 0-5 years post admission experience.

All the judges had 21-25 years or more post admission experience. 25% of the deputy registrars had 0-5 years post admission experience. 50% of the deputy registrars had 6-10 years post admission experience. Another 25% of deputy registrars had 11-15 years post admission experience. As regards the experience of judicial officers in the judiciary, 100% of judges and deputy registrars had been with the judiciary for between 0-5 years.

[173]Judiciary Case Audit and Institutional Capacity Survey, Volume 1. August 2014. Available at www.judiciary.go.ke accessed on 6th July 2015.
[174]Section 13 of the Advocates Act, Chapter 16 Laws of Kenya.

4.5. Participation in arbitration

44.4% of the total number of respondents had never participated in arbitration before while 55.6% of the total number of respondents had participated in arbitration. 66.7% of advocates had participated in arbitration while 33.3% had not. None of the deputy registrars had participated in arbitration while 60% of the respondents who were judges had participated in arbitration prior to joining the judiciary.

83.3% of advocates had participated in arbitration as counsel for parties. 66.7% of judges had participated in arbitration as counsel for parties prior to joining the judiciary. 8.3% of advocates had acted as an arbitrator. 33.3% of judges had participated in arbitration as an arbitrator. 8.3%of advocates had also participated in arbitration as a party.

4.6. Membership to professional bodies of arbitrators.

There are various professional bodies of arbitrators. The most popular one at least it terms of membership worldwide is the Chartered Institute of Arbitrators of the United Kingdom. The institute is structured in such a way that it has branches spread out through the world. It currently has branches in 50 countries including Kenya.[175]The benefits of membership to professional arbitration institutions include access to training and networking opportunities that are very valuable for anyone involved in arbitration.

88.9% of the respondents were not members of any professional body of arbitrators while 11.1% of the respondents were member of a professional body of arbitrators. All those who were members of a professional body of arbitrators were members of the Chartered Institute of

[175]https://www.ciarb.org/membership accessed on 21st September 2015.

Arbitrators (Kenya Branch). Only 11.1% of advocates were members of a professional body of arbitrators. None of the deputy registrars were members of any professional body of arbitrators. 20% of the judges were members of a professional body of arbitrators.

4.7. Understanding of what amounts to an international commercial arbitration

When it comes to understanding of what amounts to international commercial arbitration, the respondents were all asked a similar question which is reproduced below:-

"Which of the following best describes what amounts to an international commercial arbitration?

1. Where the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states;
2. One of the following places is situated outside the state in which the parties have their places of business:-
    (i) the juridical seat of arbitration is determined by or pursuant to the arbitration agreement; or
    (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;
3. Where the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one state.
4. All the above
5. Not sure
6. Other"

The above question is based on section 3 (3) of the Arbitration Act, 1995 and the correct answer is all the above, that is response number 4.

34.6% of the respondents could accurately describe what amounts to an international commercial arbitration. 22.2% of Advocates were able to accurately describe what amounts to an international commercial arbitration. 50% of Deputy Registrars could accurately describe what amounts to an international commercial arbitration and 75% of judges could also accurately describe what amounts to an international commercial arbitration.

Other respondents who selected either responses numbers 1, 2 or 3 separately can also be said to have an idea of what amounts to an international commercial arbitration though such an idea is not entirely accurate.

4.8. Familiarity with applications for enforcement of international commercial arbitration awards

11.8% of advocates had filed an application for recognition and/or enforcement of an arbitration award in the last five years while 40% of judges had dealt with an application for enforcement of an arbitration award at some point as a judge. Having already found that all the judges who were respondents had been with the judiciary for between 5-10 years, then this means that those who had dealt with applications for enforcement of international commercial arbitration awards had done so within the last five years.

4.9. Time taken for determination of applications for enforcement of international commercial arbitration awards and place of filing such applications

11.8% of Advocates had filed an application for recognition and/or enforcement of an international commercial arbitration award in the High Court in the last five years. All such applications were filed in the High Court at Nairobi specifically in the commercial division. All such applications had been heard and determined with the average length of time taken from the time of filing to determination being one month to two years. Similarly, based on previous experience with the judiciary, 70% of Advocates opined that an application for recognition and/or enforcement of international commercial arbitration awards would take on average one month to two years from the time of filing to final determination.

50% of Deputy Registrars felt that an application for recognition and enforcement of an international commercial arbitration award could be determined in less than one month while another 50% felt that the same could take between 2-5 years to be determined.

Of the 40% of judges who had dealt with applications for enforcement of international commercial arbitration awards, they had taken two months or less from the time of filing to determine the application.

4.10. High Court station where applications for international commercial arbitration are filed.

Of the 11.8% of advocates who had filed applications for enforcement of international commercial arbitration awards, they had all filed such applications at the High Court sitting at Nairobi specifically at the commercial division.

60% of judges had not been posted to any other high court station apart from Nairobi. Of the 40% who had been posted to other High Court stations outside of Nairobi, none of them had dealt with an application for enforcement of an international commercial arbitration award in such a station out of Nairobi.

50% of deputy registrars had been posted to High Court stations outside of Nairobi and none of them had dealt with an application for enforcement of an international commercial arbitration award in such a station out of Nairobi.

4.11. Pending applications for enforcement of international commercial arbitration awards.

The nature of the High Court administration is such that the Deputy Registrars are the administrative officers. They are therefore better placed to have information of the number of applications for enforcement of international commercial arbitration awards that have been filed and are pending.

75% of Deputy Registrars had no idea how many applications for enforcement of international commercial arbitration awards had been filed in the last five years. The 25% who had an idea opined that such applications numbered less than 100.

4.12. Need to hire additional staff

37% of the respondents felt that there was a need to employ more judicial staff to handle applications for enforcement of international commercial arbitration awards. 11.1% of Advocates felt that there was a need to employ more staff in the judiciary to handle applications for enforcement of international commercial arbitration awards. 80% of judges felt there was a need

to employ more staff to handle applications for enforcement of international commercial arbitration awards. 100% of deputy registrars felt that there was a need to employ more staff to handle applications for recognition and enforcement of international commercial arbitration awards.

Out of the advocates who felt that there is a need to employ more staff in the judiciary to handle applications for enforcement of international commercial arbitration awards, 36.4% felt there was a need to employ more judges. 9.1% felt there was need to employ more legal researchers. 27.3% felt there was a need to employ more deputy registrars. 9.1% felt there was a need to employ both judges and legal researchers while 18.2% felt that there was a need to employ judges, legal researchers, deputy registrars, court clerks and other support staff.

As relates to deputy registrars, you will recall that 100% of them felt that there was a need to employ additional staff. 75% of them felt that there was a need to employ judges, legal researchers, deputy registrars, court clerks and other support staff while 25% felt that the staff who needed to be employed were judges, deputy registrars and legal researchers. The 25% basically felt that there was no need hiring additional court clerks and other support staff.

As for judges, 25% felt there was a need to employ judges, another 25% felt there was need to employ deputy registrars, yet another 25% felt there was a need to employ legal researchers and finally another 25% felt there was a need to was a need to employ judges, legal researchers, deputy registrars, court clerks and other support staff.

4.13. The independence of the Kenyan judiciary, a mirage or reality?

An independent judiciary is a minimum standard for the guarantee of a fair trial. Even with adequate staff, training, knowledge and skills, a judiciary that is not independent cannot promise the quick and effective determination of applications for recognition and enforcement of international commercial arbitration awards.

An independent judiciary is also essential if courts are to fulfill their role in upholding constitutionalism and the rule of law. Judicial independence also serves to restore and ensure public confidence in the judicial system. The primary role of ensuring high standard of judicial conduct lies in the judiciary in each country. [176]

What then is an independent judiciary? The concept of an independent judiciary can be traced back to the separation of powers doctrine that is associated with Baron de Montesquieu. Montesquieu believed that political power should be divided amongst the executive, the legislative and the judicial branches to ensure that the liberty of the people is preserved. If the powers of judging were left to the legislature then the power over the life and liberty of the citizens would be arbitrary as the judge would be the legislator. On the other hand if the power of judging were left to the executive then the judge could have the force of an oppressor.[177]

Montesquieu proceeded on the assumption that the judiciary, the executive and the legislature possessed equal powers. This was not entirely true as it could be argued that the judiciary was actually the least powerful of the arms as it possessed the least political power. This was well captured in the words of Alexander Hamilton that:-

[176]Recitals and Principle 1 of the Bangalore Principles of Judicial Conduct. Available at http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdfaccessed on 10th November 2015.
[177]Montesquieu, The Spirit of Laws (1914) G. Bell &Sons,Ltd, London as it appears on http://www.constitution.org/cm/sol.txt accessed on 10th November 2015.

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE *nor* WILL*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"*[178]

Thus it could be argued that the judiciary is from its conceptualization a weak institution that has to depend on other institutions to survive since the foregoing situation is present in many countries in the world today. Even in countries that have very progressive constitutions such as Kenya, the judiciary still has to rely on the executive and the legislature to survive.[179]

To mitigate this peculiar weakness of the judiciary is the concept of judicial independence. Judicial independence requires that there shall be finality to the decision of the court and which decision shall be obeyed by those to whom it is addressed; that the judiciary shall be guided by rules, principles and discretions and the judiciary shall be fair in its decision making.[180]A judge is also required to be free from any association with any of the parties appearing before him; free from any inappropriate connections with the executive or the legislature in the eyes of a

[178]Hamilton, A. The Federalist No. 78 as it appears on http://www.constitution.org/fed/federa78.htm accessed on 10th November 2015.
[179]Ojwang, J.B. The Independence of the Judiciary in Kenya.P age 4. Available at http://www.kenyalaw.org/kl/fileadmin/Download_Journal/The_Independence_of_the_Judiciary_in_Kenya-J.B_OJWANG.doc accessed on 9th November 2015.
[180] Ibid.

reasonable observer. Moreover, a judge should also exercise the judicial function on the judge's understanding of facts and a conscientious understanding of the law free from any threats, inducements or interference from any quarters whether directly or indirectly.[181]

Judicial independence can therefore be said to be a call for the judiciary to exercise its functions in an atmosphere that is free from interference by the legislature and parliament all the while ensuring that judicial officers are not issued with a blank cheque to act in an uncontrolled and arbitrary manner.[182]

In Kenya, the Constitution enacted on 27th August 2015 was touted as one of the most progressive constitutions ever.[183] The judiciary is covered under Chapter 10 of the said constitution. The independence of the judiciary is specifically provided for in terms of provisions that the judiciary shall not be subject to the control of any person or authority.[184] Other provisions provide that the office of a judge of a superior court[185] shall not be abolished while there is a substantive officeholder[186] the remuneration and benefits payable to or in respect of judges shall be a charge on the consolidated fund; the remuneration and benefits payable to a judge shall not be varied to the disadvantage of a judge and the retirement benefits payable to a retired judge shall not be varied to the disadvantage of the retired judge during the lifetime of the retire judge;[187]a member of the judiciary shall not be liable in an action or suit in respect of

[181]Principle 1 of the Bangalore Principles of Judicial Conduct. Available at http://www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdfaccessed on 10th November 2015.
[182]Diescho, B.J, The paradigm of an independent judiciary: Its history, implications and limitations in Africa available at http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdfccessed on 10th November 2015.
[183]Glinz, C. Kenya's New Constitution. Available at http://www.kas.de/wf/doc/kas_22103-1522-2-30.pdf?110412154839 accessed on 10th November 2015.
[184]Article 160 (1) of the Constitution of Kenya, 2010.
[185] See Article 162 (1) of the Constitution of Kenya 2010. The superior courts are the Supreme Court, the Court of Appeal, the High Court and Courts with the status of the High Court established under article 162 (2) of the Constitution of Kenya, 2010.
[186]Article 160 (2) of the Constitution of Kenya, 2010.
[187]Constitution of Kenya, 2010.Article 160(4).

anything done or omitted to be done in good faith in the lawful performance of a judicial function.[188]

There has also been an attempt to reduce executive and parliamentary control over the judiciary in terms of the appointment of judges by providing that the President shall only appoint judges on the recommendation of the judicial service commission.[189] There is no requirement for approval by parliament for the appointment of judges except for the Chief Justice.[190] The President is also not given leeway to interfere with the decision of the judicial service commission. Once names of judges recommended for appointment have been forwarded to the President for such appointment, then he must do so.

When it comes to financial matters or "purse strings" as referred to by Alexander Hamilton[191], there has been an attempt to give the judiciary control of its finances by creation of the judiciary fund.[192]Be that as it may, the legislature still retains some control over the funds allocated by the judiciary as the national assembly has to approve the estimates of the judiciary's expenditure for the next financial year before they can be charged on the consolidated fund.[193] This can be said to be a negation of the independence of the judiciary as the national assembly can try to influence the judiciary by threatening to withhold approval of the budgetary estimates thus financially crippling the judiciary as it would not be able to pay salaries and generally run its operations.

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[188]Constitution of Kenya, 2010.Article 160(5).
[189]Constitution of Kenya, 2010.Article 166.
[190] Ibid
[191]Hamilton, A. The Federalist No. 78 as it appears on http://www.constitution.org/fed/federa78.htm accessed on 10th November 2015.
[192]Constitution of Kenya, 2010.Article 173 (1).
[193]Constitution of Kenya, 2010.Article 173 (4).

There have been instances when members of the national assembly have actually threatened to withhold budgetary allocations due to the judiciary due to various conflicts between the judiciary and the national assembly. A good example is when the High Court in the case of *Institute of Social Accountability & another v National Assembly & 4 others*[194] declared that the Constituency Development Fund Act, 2013 was in contravention of the Constitution of Kenya 2010 and thus null and void. Members of the national assembly in reaction to the said decision threatened to withhold budgetary funding for the judiciary to protest the ruling.[195] This was in spite of the fact that the court exhibited judicial law making functions as alluded to in legal realism and indeterminacy of law theories by giving twelve months to the government to remedy the unconstitutionality of the CDF Act.

Arguably the exercise of discretion by the court in the case of *Institute of Social Accountability & another v National Assembly & 4 others* was political as the court must have been alive to the sensitive political nature of the CDF created under the CDF fund. It therefore strove to create a delicate balance between upholding the law on one hand and political expediency that saw the CDF as a very important developmental tool. This is how courts must always approach issues. They must be political.

As far as the judiciary's finances are concerned, the lesson we learn from the decision in *Institute of Social Accountability & another v National Assembly & 4 others* is that there is an urgent need to enact legislative and constitutional measures to ensure that a proportion of government

[194] [2015] eKLR
[195]Kisika, S. MPs vow to slash Judiciary budget following ruling on CDF news article available at http://www.news24.co.ke/MyNews24/MPs-vow-to-slash-Judiciary-budget-following-ruling-on-CDF-20150227 accessed on 10th November 2015.

revenue is reserved for the judiciary and not subjected to control of the legislature in terms of approval.[196]

4.14. Judges as lawmakers-The case of the Supreme Court of Kenya.

This study is based on the theoretical framework that judges can and do indeed make law. This study shall therefore examine the law making forays of the judiciary in Kenya with relevance to the Supreme Court. Being the highest court in Kenya, it falls on the Supreme Court to exercise its law making capabilities with the greatest of prudence and restrain as its decisions are binding on all other courts.[197] This has however not been the case.

The Supreme Court has come under a lot of criticism over one of its recent decisions which in turn has triggered a debate as to whether the Supreme Court serves any useful purpose at all. The conduct of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and others*[198] triggered calls for a referendum towards amending the constitution to do away with the Supreme Court.[199] In that case, the majority decision relying on the doctrine of judicial notice went ahead to consider and pronounce themselves on an issue that was not before them. The judges considered an issue in two letters that had been written to the Chief Justice and to the registrar of the court by an Advocate acting for the Appellant concerning the suitability of judges over the age of 70 to conduct proceedings in view of a directive by the Judicial Service Commission setting the retirement age for judges at 70 years. The letters had

[196]Ojwang, J.B. The Independence of the Judiciary in Kenya. Page 4. Available at http://www.kenyalaw.org/kl/fileadmin/Download_Journal/The_Independence_of_the_Judiciary_in_Kenya-J.B_OJWANG.doc accessed on 9th November 2015. Page 10.
[197]Article 163 (7) of the Constitution of Kenya, 2010.
[198] Supreme Court petition No. 23 of 2014 (Unreported)
[199]See press statement by the President of the Law Society of Kenya dated 21/10/2015 available at http://www.lsk.or.ke/Downloads/PRESS%20RELEASE-MISCONDUCT%20OF%20SUPREME%20COURT.pdf accessed on 10th November 2015.

specifically been addressed to the Chief Justice and the Registrar of the Supreme Court and not to the court as a whole. The majority nevertheless in an attempt to sanitize their judicial wandering and indiscipline invoked the right to a fair hearing as provided for in the constitution of Kenya 2010;[200] "the trust held by the judiciary as a custodian of the sovereign power of the people of Kenya as provided for under article 1(3) of the constitution of Kenya 2010 and the right and obligation by a judge who has attained the age of over 70 years to preside over matters in court in view of a directive by the JSC retiring such judges [201] and pronounced themselves on an issue that was not before them.

Indeed, there had been a directive by the Judicial Service Commission requiring judges above seventy years to stop hearing cases. Two of the judges who were part of the majority opinion, that is Lady Justice Kalpana Rawal and Mr. Justice Phillip Tunoi, had actually filed cases in the High Court against the JSC challenging the said directive. The fact that the question of the retirement age of judges or the directive by the JSC was not an issue that was before the court and further the fact that two of the judges had an interest in the matter meant that the likelihood of bias in any decision that they were involved in was very high. Disregarding all these pertinent issues that would have called for restraint on the part of the Supreme Court, the majority went ahead to pronounce itself as below:-

"This Court takes the position that the security of tenure for all Judges under the Constitution of Kenya, 2010 is sacrosanct, and is not amenable to variation by any person or agency, such as the Judicial Service Commission which has no supervisory power over Judges in the conduct of their judicial mandate. We find and hold that the Judicial Service Commission lacks competence

[200]Article 50 of the Constitution of Kenya 2010.
[201] Supreme Court petition No. 23 of 2014 (Unreported) Pages 37-38

to direct or determine how, or when, a Judge in any of the Superior Courts may perform his or her judicial duty, or when he or she may or may not sit in Court. Any direction contrary to these principles, consequently, would be contrary to the terms of the Constitution which unequivocally safeguards the independence of Judges. It follows that the said directive concerning Judges of the Superior Courts, issued by the Judicial Service Commission, is a nullity in law."[202]

However, in a dissenting opinion, Chief Justice Willy Mutunga aptly found that the court lacked the requisite jurisdiction to consider and decide on matters that were not before the court. He further held that by deciding on such matters, the court had "*violated and subverted fundamental rights and freedoms of the parties to the appeal and third parties who were not part of the proceedings in the Appeal. They have also violated and subverted values and principles of the Constitution."*[203]

The majority in the *Salat* case[204] indeed violated the right to be heard that should have been accorded to the JSC and any other interested parties to make representations on the issue of the retirement age of judges and the directive by the JSC before the court could render a decision. Indeed the conduct of the majority in the *Salat* case was a sad and blatant negation from the principles of judicial conduct as contained in the Bangalore Principles.

In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank and Two Others*[205]the Court held that section 14 of the Supreme Court Act[206] was unconstitutional as it conferred jurisdiction to the Supreme Court beyond the jurisdiction conferred upon it by the Constitution of Kenya 2010. The said section allowed the Supreme Court within twelve months of the

[202] Supreme Court petition No. 23 of 2014 (Unreported) Pages 40-41
[203] Ibid page 73.
[204] Supreme Court petition No. 23 of 2014 (Unreported)
[205][2012] eKLR
[206]Chapter 9A Laws of Kenya.

commencement of the Supreme Court Act, either on its own motion or on the application of any person to review the judgment or decision of any judge who had been removed from office or had retired due to a complaint against the judge arising out of the judgment or decision to be reviewed. The court in an ironic twist invoked jurisdictional issues to declare the said section unconstitutional as it gave the court jurisdiction outside that conferred on it by the constitution. While the fact that the Supreme Court would not have wanted to touch an issue beyond its jurisdiction is pretty much clear and understandable, the same Constitution that it relied to refuse jurisdiction on does not give it original jurisdiction to determine constitutionality of any provisions of law. What the Supreme Court could have done when faced with such a situation is beyond the scope of this study and should be the subject of interesting debates and future studies but what it did was arguably outside its very jurisdiction.

The decision of the majority of the Supreme Court in the *Salat* case and the unanimous decision in the *Samuel Kamau Macharia* case brings into focus the criticism levied against the contention that judges do make law on the basis that if judges do make law, then this would amount to usurping the role of the electorate as judges were not elected officials. This is what seems to have happened in the *Salat* case, the electorate in Kenya through a referendum enacted a constitution that provided that the retirement age of judges would be 70 years. The Supreme Court not consisting of elected officials went ahead and sought to amend the constitution in this regard in the most foul of ways tainted by the possibility of bias.

Again, the decision by the Supreme Court in the *Salat* case also proves the legal realist theory that judges can and do decide cases by responding to external stimuli and not merely by the facts placed before them.

4.15. The relevance of judicial law making to recognition and enforcement of international commercial arbitration awards.

As we have seen in our examination of the Supreme Court's law making forays, it is clear that judges can and do make law. To understand the relevance of this judicial law making function in regards to recognition and enforcement of international commercial arbitration awards, we may consider the question of public policy exemption. Courts may reject an application for recognition and enforcement of international commercial arbitration awards on the basis of public policy.[207] However, public policy is not defined in any of national statutes and international conventions concerned with recognition and enforcement of international commercial arbitration awards. Indeed, the definition of public policy is beyond the scope of this paper. However, it suffices to say that public policy is one area of law as regards recognition and enforcement of international commercial arbitration awards where the law can be said to be indeterminate. It therefore falls on judges to determine what amounts to public policy and such a decision can become binding or at least of persuasive authority to other courts.

Another example is the question of an appeal on a decision refusing the recognition and enforcement of an award which has been discussed previously. This was also an issue where the law was indeterminate and the Court of Appeal therefore moved to make law and find that there is no provision for an appeal over the decision of the High Court refusing to recognize and enforce an arbitration award.

[207] See generally the Arbitration Act, 1995, the New York Convention and the UNCITRAL model law.

CHAPTER 5

5.0.CONCLUSIONS AND SUGGESTIONS

5.1. Introduction

This chapter consists of a summary of findings of this study and make recommendations based on the findings.

5.1.1.Gender

This research can be said to have been balanced in terms of gender. Gender was not a major focus of this research but was rather a check to ensure that there is no gender bias in the outcome. The results have also although men are the majority in the legal profession; women are also well represented in all sectors of the legal profession that is as judges, deputy registrars and advocates which is in accordance with the Law Society of Kenya statistics that show that there are currently 4,749 female legal practitioners and 6,569 male legal practitioners.[208] In some instances it has actually been found that women are a majority for example all the deputy registrars who were respondents were women. This outcome can be said to be reflective of more women joining the legal profession.

As per the decision of the Court in *Federation Of Women Lawyers Kenya (Fida-K) & 5 Others V Attorney General & Another.*[209], the JSC is under no obligation to observe the one third gender rule in theory. However, in practice the JSC seems to try to balance representation between the genders in recommending appointment of judges to the President. As this study was not overly concerned with the gender question, it is recommended that a future study is undertaken to

[208] http://online.lsk.or.ke
[209] [2011] eKLR

determine the effectiveness of judicial officers with regard to gender in specific courts or divisions of the High court. Such a study will be of assistance in the recruitment and posting of judges.

5.1.2 Advanced academic qualifications

The level of education of judges, deputy registrars and advocates has a bearing on how efficiently they can handle applications for recognition and enforcement of international commercial arbitration awards. Indeed this was a major normative framework.

A majority of legal practitioners only have the basic minimum entry level qualification into the legal profession. This is true of judges, deputy registrars and advocates. Amongst all the respondents none of them had a doctorate qualification. While such advance level qualifications are not a bar to efficient functioning of a legal practitioner, they are indicative of practitioners who continually thirst after knowledge and can therefore be counted upon to have current knowledge and skill sets covering emerging areas of law such as arbitration. All fields of law are generally dynamic and ever changing and it would be expected that practitioners who have advanced their skill sets and knowledge are better equipped to handle such changing dynamics.

5.1.3. Post-admission and judicial experience

This study had an objective of determining the number of years of post-admission experience that judges, judges, deputy registrars and advocates involved in international commercial arbitration awards have. It also sought to determine the number of years that judges and deputy registrars involved in applications for recognition and enforcement of international commercial arbitration awards have been in the judiciary.

On average judges have 21-25 or more years of post-admission experience. On the other hand, a majority of Advocates fall within the 6-10 years post admission bracket. This has been referred to in some quarters as the changing demographics of the legal profession with a majority of its members being young people.[210] As for deputy registrars, they are evenly distributed from the 0-5 years post admission bracket to the 16-20 years bracket.

Related to the foregoing is the finding that most judicial officers have been with the judiciary for between 0-5 years. This is true of both judges and deputy registrars. This finding may be attributed to the fact that a majority of judges joined the judiciary after the promulgation of the constitution of Kenya 2010. The saving grace is that a majority of the judges have over 21 years of post -admission experience and their relative judicial inexperience may not affect their ability to determine matters competently.

5.1.4.Involvement in arbitration.

This study also set out to determine whether judges and deputy registrars have been involved in arbitration prior to joining the judiciary. Prior involvement in arbitration is likely to mean that one is well equipped to handle an application for recognition and enforcement of an international commercial arbitration award.

It is of fundamental concern for this study that only 60% of judges have been involved in arbitration prior to joining the judiciary and none of the deputy registrars had been involved in any arbitration prior to joining the judiciary. Further, only 66.7% of Advocates have been involved in arbitration in their professional lives. This statistics are indicators of a very low uptake of arbitration generally and specifically international commercial arbitration in Kenya and

[210]Pravin Bowry. The Changing Face of the Legal Profession. Available at http://www.standardmedia.co.ke/article/2000071108/the-changing-face-of-the-legal-profession accessed on 15th October 2015.

further indicate that the country has very little or no human resource skills, experience and capacity to become a hub for international commercial arbitration.

5.1.5.Membership to professional bodies of arbitrators.

This study also set out to find whether judges, deputy registrars and advocates are members of professional bodies of arbitrators. There are myriad advantages to being members of professional bodies of arbitrators including training and networking opportunities. It is to be expected that membership to a professional body of arbitrators is likely to enhance an individual's capacity to handle applications for recognition and enforcement of international commercial arbitration awards in an efficient and competent matter whether as a judge or deputy registrar.

This study has found that legal professionals including judges and magistrates are not members of professional arbitration institutions where they stand to benefit from training and networking opportunities that could impart the skills set needed to deal with international commercial arbitrations. While this may not expressly limit their capacity to effectively handle applications for recognition and enforcement of international commercial arbitration awards it is not in doubt that such capacity could be enhanced by membership to professional bodies of arbitrators.

5.1.6. Understanding of international commercial arbitration.

It is also clear that a majority of Advocates do not have an understanding of what entails an international commercial arbitration. However, a majority of judges and deputy registrars do seem to have an understanding of what entails an international commercial arbitration.

5.1.7.Training

On training, most judges who are crucial in applications for enforcement of international commercial arbitration awards seem to have undergone training on arbitration generally. This may be ascribed to the Judiciary Training Institute which in interviews with judges was named as

an institution that is at the forefront of training judges. However, deputy registrars seem to be excluded from such training. Advocates also do not seem to have access to such training except by personal initiative. This could inform the general lack of understanding of international commercial arbitration amongst advocates.

5.1.8.Place of filing applications for recognition and enforcement of international commercial arbitration awards

It is clear that Nairobi is the commercial hub of the country as all applications for enforcement of international commercial arbitration awards are lodged in the High Court at Nairobi. However, this goes against the spirit of devolution that is sweeping across the country and serves to further clog the Nairobi High Court registry which has one of the highest backlog of cases in the country.[211]

5.1.9. Time taken for determination of applications for enforcement of international commercial awards

The research also found that applications for enforcement of an international commercial award are likely to take less than two months from the time of filing and conclusion. However, when this finding is weighed against the backlog of cases at the High Court at Nairobi as per the judiciary's own case audit[212], it seems to have been affected by bias of the respondents. This is because the judiciary's own case audit found that over 31% of pending cases had been in court for over five years, 29% had been in court for between 24 and months while only 13% were concluded within two years.[213]

5.1.10.Need to hire additional staff.

[211]Judiciary Case Audit and Institutional Capacity Survey (August 2014) Pages 10 - 11Available at www.judiciary.go.ke.
[212]Ibid.
[213] Ibid note 215 at page viii.

Finally, there seems to be concurrence that there is a need to hire more staff to deal with applications for international commercial arbitration awards. The additional staff should cover all cadres of employees, that is, judges, legal researchers, deputy registrars, court clerks and other support staff.

5.1.11. Judicial independence

There have been significant improvements in judicial independence as compared to the pre-2010 constitutional period. The Constitution of Kenya 2010 attempted to create the Judiciary Fund to ensure the financial independence of the judiciary. Moreover judges except the CJ and the DCJ are not vetted by parliament prior to being appointed. Vacancies for judges are now advertised and judicial officers are competitively recruited. However, more still needs to be done to guarantee further independence of the judiciary to ensure that decisions are rendered that inspire confidence in the judiciary from the public and investors. One of the things that need to be done is to find ways of taming misconduct in the judiciary where judges can be said to fail to adhere to the Bangalore Principles. Judicial misconduct can be said to be as a result of the current situation where there are no means of assessing judicial officers after they have been appointed.

5.2. Suggestions

Firstly, it is clear that judges can and do make law through judgments. These judgments if not made judiciously and in a prudent way have the capacity to affect international commercial arbitration especially in matters to do with recognition and enforcement of international commercial arbitration awards. There is therefore a need to ensure judges are competently hired and well trained to ensure that a situation does not arise where a judgment that negatively affects the recognition and enforcement of international commercial arbitration awards is delivered by the Kenyan judiciary. International commercial arbitration is an emerging area of law that has

the potential to earn the country a lot of foreign exchange. To do this, the country must create a reputation as a hub for international commercial arbitration. There is therefore a need for the government to come in and allocate resources towards training of judges, advocates and deputy registrars on arbitration.

In service training by the JTI should be enhanced especially to assist newly recruited judges or judges transitioning from one division to another to easily adapt to the new surroundings. This is considering that there is no legal requirement to post judges to specific divisions in accordance with their areas of specialization prior to joining the judiciary. Such training can be easily tailor made to fit specific training needs as identified by judicial officers.

A major challenge to the advancement of education and further training is the huge backlog of cases in the judiciary which means that judicial officers do not have sufficient time for self-advancement as they are clearly overworked. Creative way of clearing this backlog apart from hiring additional staff should be explored. Such could include encouraging parties to embrace alternative means of dispute resolution and having the courts work in shifts to ensure that the courts work twenty four hours a day at least until the backlog is cleared.

Secondly, recognizing the importance attached to arbitration and other alternative dispute resolution mechanisms in various legislation in Kenya and taking note of the fact that most legal practitioners and judicial staff do not have advanced degrees beyond the minimum qualifications it is important for stakeholders to come up with ways to ensure that international commercial arbitration is part of the curriculum for the post graduate diploma in law taught at the Kenya School of Law that is a basic minimum qualification for anyone intending to practice law in Kenya and perhaps eventually become a judicial officer.

Finally, there is a need for the government to allocate more resources to the JSC to enable it hire more staff to deal with applications for enforcement of international commercial arbitration awards. The staff to be hired includes judges, legal researchers, deputy registrars, court clerks and other support staff. The additional staff will help in the fast conclusion of matters filed in court including applications for enforcement of international commercial arbitration awards.

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