

**A CRITIQUE OF THE CONTRIBUTION OF INTERNATIONAL
COMMERCIAL ARBITRATION TOWARD THE REALISATION OF
THE RIGHT OF ACCESS TO JUSTICE IN KENYA**

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ACRONYMS AND ABBREVIATIONS

ADR	Alternative Dispute Resolution
TDRM	Traditional Dispute Resolution Mechanism
SICC	Singapore International Commercial Court
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
GDP	Gross Domestic Product
USD	United States Dollars
UNCITRAL	United Nations Commission on International Trade Law

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Songa Oгода & Associates v University of Nairobi [2014] High Court of Kenya at Nairobi Civil Case 21 of 2013, eKLR

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ABSTRACT

This study critically analyses the contribution of international commercial arbitration toward the realisation of the right of access to justice in Kenya. It highlights the gains made in the Constitution of Kenya of 2010 in relation to the right of access to justice, alongside the developments of international commercial arbitration in Kenya. The overarching objective is to determine whether international commercial arbitration has made an impact on efforts to expand the rights of consumers of dispute resolution services, in attaining justice.

A comparative study of international commercial resolution solutions and access to justice in Singapore, the arbitration hub in the Asia-Pacific Region, offers responses to the question whether international commercial arbitration has a contribution toward the realisation of the right of access to justice. The approach taken in the establishment of the Singapore International Commercial Court as an alternative to international commercial arbitration reinforces the question whether the focus in Kenya should be strengthening the court system or pursuing arbitration, in the overarching goal of realising the right of access to justice.

Chapter one presents a background to the study. Chapter two contains a literature review on the core issues arising in this study on international commercial arbitration, international commercial courts and access to justice. Chapter three analyses the legal framework for international commercial arbitration in relation to access to justice in Kenya, evaluating the current provisions and identifying areas of concern. Chapter four elaborates the discussion on international commercial courts in Singapore and similar international commercial courts in other countries, analysing the frameworks in light of the legal framework for access to justice in international commercial dispute resolution in Kenya. Chapter five carries the conclusions of the findings in the study, and offers recommendations on how the access to justice may be improved in Kenya.

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CHAPTER ONE: BACKGROUND TO THE STUDY

1.1 Introduction

This study critically analysed the contribution of international commercial arbitration toward the realisation of the right of access to justice in Kenya. It highlighted the gains made in the Constitution of Kenya of 2010 in relation to the right of access to justice, and juxtaposed these on the developments of international commercial arbitration in Kenya. The overarching objective was to determine whether international commercial arbitration has made an impact on efforts to expand the rights of consumers of dispute resolution services, in attaining justice.

A comparative study of international commercial dispute resolution and access to justice in Singapore, the arbitration hub in the Asia-Pacific Region, offers responses to the question whether international commercial arbitration has a contribution toward the realisation of the right of access to justice. The approach taken in the establishment of the Singapore International Commercial Court (SICC) as an alternative to international commercial arbitration reinforces the question whether the focus in Kenya should be strengthening the court system or pursuing arbitration, in the overarching goal of realising the right of access to justice.

This chapter presents a framework of the study, and serves as a guide to the conduct of the research. It gives a background to the problem, illuminating the key bases on which the study was founded. The statement of the problem is given, as well as the theoretical framework for the study. The literature review provides a summary of key literature referred to in the study. The objectives of the study, research questions, hypotheses and research methodology are also outlined. Lastly, a chapter breakdown offers a plan for the outlay of the study.

1.2 Background to the Problem

It is generally viewed that it is difficult to achieve justice in Africa.¹ However, as a universal human right, every person in the world is entitled to access justice as a critical element of

¹ Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' 11 <<http://www.kmco.co.ke/attachments/article/119/PROMOTING%20INTERNATIONAL%20COMMERCIAL%20ARBITRATION%20IN%20AFRICA.pdf>> accessed 17 October 2016; Peter Shivute, 'The Rule of Law in Sub-Saharan Africa – An Overview' in Anton Bösl and Nico Horn (eds), *Human Rights and the Rule of Law in Namibia* (Konrad Adenauer Stiftung 2008) <<http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/shivute2.pdf>> accessed 2 May 2017.

ensuring rule of law.² Albert Venn Dicey, a jurist and constitutional law theorist argued that the rule of law is embodied by three concepts: supremacy of the law, equality of all people before the law, and access to justice.³ The state where access to justice is guaranteed in Africa and expressed through respect for the rule of law, is therefore an ideal that we must aim to attain.

An upward trend in foreign investment to Africa has driven up the demand for international commercial arbitration, as it is said that ‘where international investment goes, disputes invariably follow’.⁴ However, in Africa, foreign investors are reluctant to submit commercial disputes to the local courts of the respective countries in which they invest.⁵ Reasons put forward for this trend is a lack of impartiality, corruption, political instability, civil unrest, and length of proceedings. As a result, most disputes originating in Africa are settled in arbitration centres outside the continent.⁶ It is not possible to generalise trends in international commercial arbitration in Africa,⁷ or any legal phenomenon on the continent in fact. This is because every country has its unique legal and institutional environment which results in differences in the operation of international commercial arbitration in each jurisdiction. It is therefore instructive to discuss the trends in international commercial arbitration in Kenya as a focal point.

²United Nations (UN), ‘Access to Justice Critical in Ensuring Rule of Law, Speakers Stress as Sixth Committee Continues Deliberations on Principle | Meetings Coverage and Press Releases’ (*United Nations*, 10 October 2014) <<http://www.un.org/press/en/2014/gal3478.doc.htm>> accessed 3 September 2016.

³Dikgang Moseneke, ‘Reflections on the Rule of Law in Modern African States’ (Pre-Congress Seminar of International Council for Commercial Arbitration, Johannesburg, 28 July 2015) <http://www.arbitration-icca.org/media/3/14398020489310/new_reflections_on_the_rule_of_law_in_modern_african_states_-_final_check_-_8_aug_-_clean.pdf> accessed 16 November 2016.

⁴Anthony Notaras and Jodi Bartle, ‘Arbitration in Africa: High Stakes and Big Claims in Resolving Disputes in Africa’ [2015] *Legal Business* 104, 104.

⁵Eversheds-Stuart Dutton, Lucy Webster and Timothy Smyth, ‘International Arbitration Africa Style’ (*Lexology*, 6 May 2015) <<http://www.lexology.com/library/detail.aspx?g=d05e1681-235d-4090-b66a-56cfc4282c17>> accessed 16 November 2016.

⁶Alexis Martinez, ‘Arbitration in Africa: Past, Present, and Future’ <<http://www.mediate.com/articles/MartinezAbl20160115.cfm>> accessed 17 November 2016.

⁷Steven P Finizio, ‘Energy Arbitration in Africa’ (*Global Arbitration Review*, 20 April 2016) <<http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2016/1036971/energy-arbitration-in-africa>> accessed 17 November 2016.

Access to justice is a principal requirement for a fair legal system.⁸ In recent years in Kenya, the Judiciary has placed extensive efforts in clearing the backlog of cases in the court system, an initiative that has seen the conclusion of cases not concluded for over 30 years.⁹ In 2016, there were more than 6,000 cases pending in the judicial system, taking the fruits of justice further away from the hands of the people in need of fulfilment of this principal requirement for a fair system.¹⁰ Access to justice in the Judiciary in the Kenyan context has also been hindered by corruption, which improperly swings the scales of justice into the favour of the person with the deepest pockets.¹¹

Access to justice is a civil right guaranteed under the Constitution of Kenya of 2010.¹² The Supreme Court of Kenya in *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscone*¹³ emphasised that access to justice is one of the fundamental rights under the Constitution of Kenya of 2010. In general, the perception is that access to justice, and specifically Article 48 of the Constitution of Kenya of 2010, is meant for ‘*Wanjiku*’, the average citizen who cannot afford or otherwise is inhibited from accessing dispute resolution systems.¹⁴ However, parties to an international commercial dispute who may be considered ‘wealthy’ and not concerned with the provision for access to justice, are also afforded equality before the law regardless of status, to justice in line with the rule of law.¹⁵

In international dispute resolution, the Constitution of Kenya of 2010 has broadened access to justice through providing that persons may either approach Lady Justice through the court

⁸Human Rights Law Resource Centre, ‘The Right to a Fair Hearing and Access to Justice: Australia’s Obligations’ (Human Rights Law Resource Centre 2009) Submission to the Senate Legal and Constitutional Affairs Committee 3 <<http://www.hrlrc.org.au/files/hrlrc-submission-access-to-justice-inquiry.pdf>> accessed 3 September 2016.

⁹Republic of Kenya, ‘State of the Judiciary and the Administration of Justice’ (The Judiciary 2016) Annual Report 159 – 167 <http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Downloads/STATE%20OF%20THE%20JUDICIARY%20REPORT%203.pdf> accessed 2 May 2017; Kamau Muthoni, ‘I Enhanced Access to Justice, Says Outgoing CJ Willy Mutunga’ *Standard Digital News* (Nairobi, Kenya, 17 June 2016) <<http://www.standardmedia.co.ke/article/2000205537/i-enhanced-access-to-justice-says-outgoing-cj-willy-mutunga>> accessed 16 November 2016.

¹⁰Republic of Kenya (n 9) 29 – 30; Macharia Mwangi and Maureen Kakah, ‘Kenya: A Few Corrupt Officers Taint Image of the Judiciary, Says Chief Justice’ *The Nation* (Nairobi, Kenya, 24 October 2016) <<http://allafrica.com/stories/201610241230.html>> accessed 16 November 2016.

¹¹Macharia Mwangi and Maureen Kakah (n 10); Kamau Muthoni (n 9).

¹²Constitution of Kenya 2010, art 48.

¹³*Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscone* [2013] Supreme Court of Kenya Application 4 of 2012, eKLR.

¹⁴ Kariuki Muigua and Kariuki Francis, ‘Alternative Dispute Resolution, Access to Justice and Development in Kenya’ [2015] *Strathmore Law Journal* 5 <<http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-KMuigua-FKariuki-Alternative-Dispute-Resolution.pdf>> accessed 20 September 2016.

¹⁵ *ibid* 22.

system, or through Alternative Dispute Resolution (ADR) mechanisms such as mediation, arbitration and traditional dispute resolution.¹⁶ For example, in *Anne Wangui Ngugi & 2,222 Others v Edward Odundo, C.E.O Retirement Benefits Authority*,¹⁷ the High Court of Kenya at Nairobi recognised that ADR under the Retirement Benefits Authority Act fulfils the constitutional requirements for access to justice.¹⁸ While the dispute resolution under the Retirement Benefits Authority Act is carried out by an administrative tribunal and may therefore not be categorised as ADR in its strict sense, the High Court of Kenya applied a broad interpretation of ADR, therefore bringing the role of the tribunal under the ambit of ADR. The High Court of Kenya in rendering this decision affirmed the proposition that ADR contributes to access to justice. In line with this argument, international commercial arbitration is a possible avenue of achieving access to justice in the Kenyan context.

The Constitution of Kenya 2010 mandates the State to ensure access to justice for all persons.¹⁹ This means that access to justice should be guaranteed for all persons including parties to international commercial agreements. The State should therefore ensure that both the local and foreign parties who would be involved in an international commercial arbitration, have access to justice. As Kenya, among other African states, pushes to have disputes resolved locally through home-grown international commercial arbitration solutions,²⁰ it is imperative that all the persons involved in the arbitration are afforded the indispensable right of access to justice.

International commercial arbitration is provided for under the Constitution of Kenya of 2010,²¹ the Arbitration Act,²² the Nairobi Centre for International Arbitration Act of 2013,²³ the Civil Procedure Act,²⁴ and the Civil Procedure Rules of 2010.²⁵ However, parties to international commercial disputes tend to ‘export’ their arbitration proceedings out of Africa, to more established arbitration destinations such as London, Paris, Switzerland or

¹⁶Dikgang Moseneke (n 3).

¹⁷*Anne Wangui Ngugi & 2,222 Other v Edward Odundo, CEO Retirement Benefits Authority* [2015] High Court of Kenya at Nairobi Petition 57 of 2014, eKLR.

¹⁸*ibid* 68 – 77.

¹⁹Constitution of Kenya (n 12), art 48.

²⁰Steven P Finizio (n 7).

²¹Constitution of Kenya (n 12), art 159.

²²Arbitration Act 1995 ss 2, 3(3).

²³The Nairobi Centre for International Arbitration Act 2013 ss 5, 22.

²⁴Civil Procedure Act 2010, Part VI.

²⁵Civil Procedure Rules 2010, order 46.

Singapore.²⁶ This tendency is also expressed where parties ‘import’ arbitrators from other jurisdictions to determine disputes emerging in Kenya.²⁷ All this happens in the wake of establishment of international commercial arbitration centres not only in Africa in general, but in Kenya to be specific.²⁸

The increase in international commercial arbitration centres has come about on one hand, as on the other hand the rise of international commercial courts in certain jurisdictions takes place. There are five outstanding examples of international commercial courts globally: the Singapore International Commercial Court, the London Commercial Court, the Qatar International Court, the courts of the Dubai International Financial Centre and the Abu Dhabi Global Market.²⁹ The first international commercial court was set up in Dubai, where disputes emerging from contracts that adopted this avenue of dispute resolution, would be subject to common law, and not the local Islamic Law or Dubai Law.³⁰ Recently, Singapore followed suit, introducing the Singapore International Commercial Court.³¹ Australia is also considering establishing an international commercial court.³² While some view this as an avenue to increase access to justice and give parties to a dispute more choices of dispute resolution processes, critics view international commercial courts as unnecessary, especially in states with sound commercial backgrounds.³³

While the uptake of international commercial arbitration in Kenya is on the rise, this study enquired whether it contributes to increasing the chances of disputants to achieve access to justice.

²⁶Collins Namachanja, ‘The Challenges Facing Arbitral Institutions in Africa’ (Chartered Institute of Arbitrators 2015) 4 <<https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfvrsn=0>> accessed 16 November 2016; Steven P Finizio (n 7).

²⁷ Ibid

²⁸Kariuki Muigua, ‘Promoting International Commercial Arbitration in Africa’ (n 1) 19.

²⁹Lara Bullock, ‘CJ Warren Calls for International Commercial Court’ *Lawyers Weekly* (16 May 2016) <<http://www.lawyersweekly.com.au/wig-chamber/18578-cj-warren-calls-for-international-commercial-court>> accessed 17 November 2016.

³⁰Lara Bullock, ‘Debate over Need for International Commercial Court in Aus’ *Lawyers Weekly* (27 October 2016) <<http://www.lawyersweekly.com.au/news/19850-debate-over-need-for-international-commercial-court-in-australia>> accessed 17 November 2016.

³¹ Ibid.

³²Lara Bullock (n 29); Lara Bullock (n 30).

³³Lara Bullock (n 30).

1.3 Statement of the Problem

An ideal situation is one where Kenya achieves the government's vision of establishment of a prime dispute resolution hub in Africa.³⁴ Under this ideal, Kenya would offer a stable legal and institutional framework that allows parties to realise their moral rights against each other without inhibition. The Nairobi Centre for International Arbitration, for example, was established to promote international commercial arbitration in Kenya, and to 'ensure that arbitration is reserved as the dispute resolution process of choice'.³⁵ This position would allow parties to an international commercial dispute have the matter resolved locally, regardless of their nationality. This ideal would further suggest that parties to disputes originating from other jurisdictions would also be inclined to have their disputes resolved in Kenya.

Kenya is applauded for its well established legal infrastructure based on common law, with a robust business sector and a steady interest in efficient resolution of international commercial disputes.³⁶ Kenya has for years been the entry point to East Africa, for foreign investors seeking a stable economy with promise for investment activity.³⁷ However, when a dispute arises in the investment agreement, the foreign investors either export the dispute to another jurisdiction or import arbitrators into Kenya to resolve the dispute. This is indicative that the legal and institutional framework for international commercial arbitration in Kenya is weak, and incapable of attracting foreign investors to have their disputes settled locally. A weak legal and institutional framework limits access to justice even though the parties are free to select the seat and venue of the arbitration and presumably have no difficulty accessing justice at a different seat or venue, because once the seat and venue are selected, the framework may contribute to an unjust outcome.

³⁴Daisy Owuor Ajima, 'Making Kenya a Hub for Arbitration of International Financial Service Disputes' (LLM Thesis, University of Nairobi 2014) 5 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/75602/Ajima_Making%20Kenya%20a%20hub%20for%20arbitration%20of%20international%20financial%20services%20disputes.pdf?sequence=3> accessed 30 September 2016; Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya' (2013) <<http://www.ciarbkenya.org/assets/making-east-africa-a-hub-for-international-commercial-arbitration-paper.pdf>> accessed 17 October 2016.

³⁵The Nairobi Centre for International Arbitration Act (n 23).

³⁶Andrew Mizner, 'Arbitration Rising' (*African Law and Business*, 8 February 2016) <<http://www.africanlawbusiness.com/news/6143-arbitration-rising>> accessed 17 November 2016.

³⁷Rosemary Maina, 'Legal Developments That Have Changed the Kenyan Business Landscape' (*African Law and Business*, 26 July 2016) <<http://www.africanlawbusiness.com/news/6568-legal-developments-that-have-changed-the-kenyan-business-landscape>> accessed 17 November 2016.

There is a need to offer credible dispute resolution systems in Kenya in order to reverse the trend of exporting commercial disputes to other jurisdictions, and importing arbitrators into Kenya.³⁸ Although the Constitution of Kenya of 2010, the Arbitration Act of 1995 and the Nairobi Centre for International Arbitration Act of 2013, the Civil Procedure Act and the Civil Procedure Rules of 2010 are in place, signalling a concrete legal framework to support international commercial arbitration, this has not reversed the trend in referring international commercial disputes to international commercial courts and tribunals outside Kenya.

Challenges such as governance issues in Kenya paint a picture that it is impossible to attain justice in the country, even though international commercial arbitration is on the rise.³⁹ In other jurisdictions such as Singapore, international commercial courts have been introduced alongside international commercial arbitration, increasing the avenues for dispute resolution. This study analyses international commercial arbitration and international commercial courts in the context of access to justice, based on the rationale that if access to justice were indeed guaranteed by the legal framework for international commercial arbitration in Kenya, then parties to international commercial disputes would consider having the disputes resolved locally than abroad.

1.4 Theoretical Framework

This section discusses the theoretical framework of this study. The theories supporting the view of this study, that access to justice should be a part of all dispute resolution mechanisms including international commercial arbitration and international commercial courts, are from the natural law school of thought. Natural law posits that law does not come from man, but instead derives from a supernatural.⁴⁰ According to natural law theory, certain rights such as access to justice, should be afforded to persons simply as a result of their humanity.⁴¹ In this line of thinking, even in international commercial arbitration and at the international commercial courts, access to justice should be afforded to the parties.

³⁸Kariuki Muigua, 'Promoting International Commercial Arbitration in Africa' (n 1) 15, 16.

³⁹Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya' 11 <<http://www.kmco.co.ke/attachments/article/128/Nurturing%20International%20Commercial%20Arbitration%20in%20Kenya.pdf>> accessed 17 October 2016.

⁴⁰Francesco Viola, 'Natural Law Theories in the Twentieth Century' in Enrico Pattaro and Corrado Roversi (eds), *A Treatise of Legal Philosophy and General Jurisprudence*, vol 12 (Springer Netherlands) <http://www1.unipa.it/viola/Natural_Law_Theories_in_the_Twentieth_Century.pdf> accessed 17 November 2016.

⁴¹Robert P George, 'Natural Law' (2008) 31 *Harvard Journal of Law and Public Policy* 171, 172.

Aquinas theorised that state authorities translate natural law into the rules of positive law.⁴² According to Augustine any human-made law that is not in line with natural law, does not have moral force, is not law and should not be respected.⁴³ Under this framework, the Constitution of Kenya of 2010, the Arbitration Act of 1995 and other laws relating to international commercial arbitration and international commercial courts, must be in line with natural law. Following this theory, if the human-made laws do not assure access to justice and therefore does not fulfil its purpose as required for justice and fairness to prevail, then those arbitration laws do not have moral force and are not ‘law’.

Theories on the rule of law are also instructive to this study. Dworkin proposes a rights-based approach to the rule of law, suggesting that the moral rights of citizens between each other, and the political rights between the citizens and the state, must be recognised in positive law.⁴⁴ Further, citizens must have the right to demand fulfilment of these rights through the courts and other judicial institutions. In the context of this study, the positive law providing for international commercial arbitration and international commercial courts must recognise the moral rights of the parties between each other. The parties should be assured that their rights will be respected, as the law is applied equally between themselves, in respect of the principles of the rule of law.

This section has presented the theoretical framework which guides this study. In summary, the study is carried out in line with the natural law theory. Here, justice is deemed to be a component of rights, which are attributable to all human beings. Even parties to an international commercial dispute must be accorded access to justice. In line with the theory that positive law must adopt natural law principles for it to be considered just law, the law in Kenya relating to international commercial arbitration and international commercial courts, must embody access to justice, for it to have moral force.

⁴²ibid 188.

⁴³ibid 193, 194.

⁴⁴Cameron Stewart, ‘The Rule of Law and the Tinkerbelle Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’ (2004) 7 Macquarie Law Journal 135.

1.5 Conceptual Framework

This section presents the links between the key concepts discussed in this study. It presents the ‘international commercial arbitration’, ‘international commercial courts’ and ‘access to justice’ as three distinct ideas.

While there is no all-encompassing definition of international commercial arbitration, the phrase may be understood in terms of its constituent elements: international; commercial; and arbitration.⁴⁵ International commercial arbitration is a consensual and private mechanism for the settlement of disputes arising from all relationships of a commercial nature, whether contractual or not; between parties with places of business in different states, where the place of arbitration is outside the state in which the parties have their places of business, where a substantial part of the obligations of the commercial relationship is to be performed or the place with which subject-matter of the dispute is most closely connected is outside the state to which the parties have their places of business, or where the parties agree that the subject-matter of the arbitration agreement relates to more than one country; and where the result is a final and binding determination of the rights and obligations of the parties.⁴⁶

International commercial courts are state courts which have express jurisdiction to hear international cases with a commercial aspect.⁴⁷ Ordinarily, in these courts parties litigate, even though the subject matter is specialised to arbitration disputes; and the court usually has a mandate to apply ADR procedures in resolution of the dispute.⁴⁸ For example, in the London Commercial Court, over 25% of the cases handled involved arbitration, including interim applications to preserve status quo and challenges to awards and enforcement.⁴⁹

In Kenya, efforts to improve the environment for international commercial arbitration include establishment of the Nairobi Centre for International Arbitration. The Nairobi Centre for

⁴⁵ United Nations Conference on Trade and Development, ‘Dispute Settlement: International Commercial Arbitration’ 17 <http://unctad.org/en/Docs/edmmisc232add38_en.pdf> accessed 31 January 2017.

⁴⁶ *ibid* 3 – 17; UNCITRAL Model Law on International Commercial Arbitration 1985.

⁴⁷ Andrew Stephenson, Lindsay Hogan and Jaclyn Smith, ‘Is an International Commercial Court for Australia a Viable Option?’ (*Corrs Chambers Westgarth*, 21 June 2016) <<http://www.corrs.com.au/thinking/insights/is-an-international-commercial-court-for-australia-a-viable-option/>> accessed 17 October 2016.

⁴⁸ Johannes Landbrecht, ‘The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?’ (2016) 34 *ASA Bulletin* 112, 124.

⁴⁹ William Blair, ‘Contemporary Trends in the Resolution of International Commercial and Financial Disputes’ (Institute of Commercial and Corporate Law Annual Lecture 2016, Durham University, 21 January 2016) 10 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>> accessed 22 January 2017.

International Arbitration is an arbitration centre that is not part of the national court system. It is established as an arbitration and ADR centre, and not a litigation court. The Nairobi Centre for International Arbitration Act of 2013 provides for the establishment of a regional centre for international commercial arbitration and the Arbitral Court, together with providing for mechanisms for ADR.⁵⁰ However, as part of the Nairobi Centre for International Arbitration, there is established the Arbitral ‘Court’, which may lead to confusion that this institution is part of the national court system.⁵¹

Other arbitral institutions which have the word ‘court’ in their name, while still retaining the character of an arbitral institution with no direct affiliation of the national court system, include the London Court of International Arbitration which has a mandate to provide arbitration, mediation and conciliation services including international commercial arbitration;⁵² which may be distinguished from the London Commercial Court, a specialised court within the Queen’s Bench Division of the High Court of Justice, the major civil court in England and part of the national court system; a litigation court dealing with arbitration matters.⁵³ In Singapore, it is suggested that the establishment of the SICCC, an international commercial court, will complement the work of the SIAC, an international commercial arbitration centre.⁵⁴ Based on the premise that through dispute resolution the ends of justice are sought by parties to a dispute, the conceptual framework includes the concept of access to justice in viewing the relationship between international commercial courts and international commercial arbitration.

An illustration of these key concepts shows the complementary role that international commercial arbitration and international commercial courts play in efforts toward achieving the right of access to justice. The interplay of these concepts is illustrated in the following diagram. The diagram shows the relationship between these three aspects.

⁵⁰ The Nairobi Centre for International Arbitration Act (n 23), preamble.

⁵¹ Wilfred A Mutubwa, ‘The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013’ (2016) 82 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 135, 135.

⁵² London Court of International Arbitration, ‘Constitution of the LCIA Court’ (*London Court of International Arbitration*, 2017) <<http://www.lcia.org/LCIA/constitution-of-the-lcia-court.aspx>> accessed 2 May 2017.

⁵³ UK Crown, ‘Commercial Court’ (2017) <<https://www.gov.uk/courts-tribunals/commercial-court>> accessed 2 May 2017; Johannes Landbrecht (n 49) 124.

⁵⁴ Michael Hwang, ‘Commercial Courts and International Arbitration—competitors or Partners?’ (2015) 31 *Arbitration International* 193.



Fig 1: Conceptual interplay between international commercial arbitration, international commercial courts and the right of access to justice⁵⁵

This section has presented the conceptual framework guiding this study. The key concepts have been illustrated to show the guiding mind-set of the study. The concepts of international commercial arbitration co-existing with international commercial courts are presented as joint contributing factors to realising the right of access to justice.

1.6 Research Questions

This study sought to address the following research questions:

1. Does international commercial arbitration contribute toward the achievement of the right of access to justice in Kenya?
2. Do international commercial courts contribute to the realisation of the right of access to justice in other countries?

⁵⁵Johannes Landbrecht (n 49); Henneke Brink, 'International Commercial Dispute Resolution; How Singapore Works to Develop International Muscle Strength' <http://adrinstituut.nl/contents/uploads/platform/286_2.publicatie-henneke-brink-how-singapore-works-develop-interna.pdf> accessed 17 October 2016.

3. What lessons may be drawn from the establishment and operation of the Singapore International Commercial Court, to the pursuit of the right of access to justice in Kenya?

1.7 Hypotheses

The following hypotheses were suggested in relation to each of the research questions:

1. International commercial arbitration does not contribute toward the achievement of the right of access to justice in Kenya.
2. International commercial courts contribute to the realisation of the right of access to justice in other countries.
3. Lessons may be drawn from the establishment and operation of the Singapore International Commercial Court, to the pursuit of the right of access to justice in Kenya.

1.8 Objectives of the Study

The main objective of this research was to critically analyse the contribution of international commercial arbitration toward the achievement of the right of access to justice in Kenya. This involved an evaluation of whether international commercial arbitration contributes to access to justice, and whether it is therefore a promising avenue to achieving this right. This study also sought to determine whether there should be more emphasis on international commercial arbitration in Kenya, or whether instead there is a need to explore the avenue of international commercial courts as exemplified in Singapore. It therefore set out to identify any lessons that may be learnt from the establishment and operation of the Singapore International Commercial Court in pursuing the right of access to justice. The following were the specific objectives of this study:

1. To critically analyse the contribution of international commercial arbitration toward the achievement of the right of access to justice in Kenya.
2. To evaluate whether international commercial courts contribute to the realisation of the right of access to justice in other countries.
3. To analyse the contribution of the establishment and operation of the Singapore International Commercial Court in pursuing the right of access to justice in Singapore and other countries.

1.9 Research Methodology

1.9.1 Reasons for Studying the Singapore case

The study was based on secondary data on international commercial arbitration, international commercial courts and access to justice in Kenya and Singapore. The rationale behind analysing international commercial arbitration and international commercial courts in Singapore was to determine whether any best practices exist. While there are various examples of international commercial courts, and most including the Singapore case are modelled on the London Commercial Courts, this study focused on Singapore for the following reasons;

Kenya and Singapore are both commonwealth countries.⁵⁶ They share a common history in terms of the development of their legal frameworks. However, the development of their legal frameworks has been independent due to their different political, social and economic settings. For example, in 1963 as Kenya celebrated independence and Singapore joined the Federation of Malaysia, Kenya had a Gross Domestic Product (GDP) measurement of United States Dollars (USD) 926.6 million and Singapore had a GDP of USD 917.2 million.⁵⁷ While the economies of both Kenya and Singapore were ‘shoulder to shoulder’ in 1965 when Singapore gained independence from Malaysia, Singapore is now one of the richest countries in the world.⁵⁸ The Corruption Perceptions Index lists Singapore as one of the countries with the lowest levels of corruption in the world, while Kenya is characterised as the ‘hotbed of corruption’.⁵⁹

⁵⁶The Commonwealth, ‘Member Countries’ (*The Commonwealth*, 2016) <<http://thecommonwealth.org/member-countries>> accessed 17 October 2016.

⁵⁷Marvin Sissey, ‘Tale of Two Countries: Contrasting Fortunes of Singapore and Kenya’ *Business Daily* (Nairobi, Kenya, 2 April 2015) <<http://www.businessdailyafrica.com/Opinion-and-Analysis/-Contrasting-fortunes-of-Singapore-and-Kenya/539548-2674258-item-1-iluf1v/index.html>> accessed 17 October 2016; Mark Johnson, ‘How Singapore Gained Its Independence’ [2015] *The Economist* <<http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-22>> accessed 17 October 2016.

⁵⁸Mark Johnson (n 57).

⁵⁹Mark Kapchanga, ‘Why Kenya Should Follow in Singapore’s Footsteps to Tackle Rising Unemployment’ *Standard Digital News* (Nairobi, Kenya, 8 July 2013) <<http://www.standardmedia.co.ke/article/2000087837/why-kenya-should-follow-in-singapore-s-footsteps-to-tackle-rising-unemployment>> accessed 17 October 2016; Caroline Nganga, ‘53 Years later; Kenya in Comparison to Singapore’ <<http://www.ku.ac.ke/kutv/53-years-laterkenya-in-comparison-to-singapore/>> accessed 17 October 2016; Stephen Wainaina, ‘Corruption in Kenya Only Regarded as a Crime in Law, but Not in Practice’ (*Daily Nation*, 10 September 2015) <<http://www.nation.co.ke/oped/Letters/Corruption-in-Kenya/440806-2864142-p0odg7z/index.html>> accessed 17 October 2016.

Differences exist between the Kenya and Singapore, but the legal frameworks are similar in certain aspects. For example, both countries have a common-law system, where there is regard for precedents in case law. Both have regard for international commercial arbitration in promoting international trade. The court systems are also similar, with the highest court in Kenya being the Supreme Court of Kenya and its comparative in Singapore being the Supreme Court of Singapore.⁶⁰

1.9.2 Research Methods

This qualitative study evaluated data from a desk-based research. The study took a qualitative approach to research because it was based on a naturalistic paradigm to develop a theory that international commercial arbitration and international commercial courts as dispute resolution mechanisms influence attainment of access to justice, with words and not numbers, as the basic element of analysis.⁶¹ The desk-based research involved both primary and secondary sources of information. The primary sources of law which were employed in this study include court decisions, international legal instruments, regional legal instruments, the Constitutions of Kenya and Singapore, legislative texts, and court decisions. The study also used secondary information from books, journal articles, conference papers, and scholarly works including academic theses, and dissertations.

1.10 Thesis Outline

Chapter one has presented a background to the study. Chapter two contains an extensive literature review on the core issues arising in this study on international commercial arbitration, international commercial courts and access to justice. Chapter three analyses the legal framework for international commercial arbitration in relation to access to justice in Kenya, evaluating the current provisions and identifying areas of concern. Chapter four elaborates the discussion on international commercial courts in Singapore and similar international commercial courts in other countries, analysing the frameworks in light of the legal framework for access to justice in international commercial dispute resolution in Kenya.

⁶⁰Republic of Singapore, ‘Supreme Court of Singapore’ (*Supreme Court of Singapore*, 17 October 2016) <<http://www.supremecourt.gov.sg/>> accessed 17 October 2016; Republic of Kenya, ‘Supreme Court of Kenya’ (*The Judiciary*, 2014) <<http://www.judiciary.go.ke/portal/page/supreme-court>> accessed 17 October 2016.

⁶¹ Rebecca Keele, ‘Quantitative versus Qualitative Research or Both?’, *Nursing Research and Evidence-Based Practice* (Jones & Bartlett Learning 2012) 35 – 52 <http://samples.jbpub.com/9780763780586/80586_CH03_Keele.pdf> accessed 2 May 2017.

Chapter five carries the conclusions of the findings in the study, and offers recommendations on how the access to justice may be improved in Kenya.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This chapter contains a review of literature on the subject of international commercial arbitration, international commercial courts, and the interplay between these two dispute resolution mechanisms on access to justice. Existing literature serves as a backdrop to support the present study. It identifies gaps in the literature from various authors with different perspectives and various contributions to the knowledge base on international commercial arbitration, international commercial courts, and access to justice. It therefore highlights the relevance of the present study to the existing literature, and justifies the need for research on the area in focus.

2.2 Alternative Dispute Resolution and Access to Justice

This section discusses literature that relates to ADR and access to justice. The study considers international commercial arbitration as a component of ADR. The assumption is that international commercial courts increase access to ADR services. As a starting point, therefore, the relationship between ADR and access to justice indicates the relationship between access to justice, international commercial arbitration and international commercial courts.

There is literature available on ADR as a phenomenon on its own, and literature available on access to justice. This study therefore does not focus on literature on these well-researched concepts, but directs the probe at literature linking the two phenomena. McGregor notes that while agreement-based ADR such as mediation and conciliation, and adjudicative ADR such as arbitration, continue to advance, the issue of the standards of justice expected from these mechanisms, has not been adequately addressed.⁶² McGregor briefly highlights that it may be argued that ADR facilitates access to justice in areas such as housing, employment and family law.⁶³ Sinha argues that ADR contributes to access to justice because it is faster, cheaper, more user-friendly, and offers choice to parties to a dispute.⁶⁴ While McGregor and

⁶²Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 *The European Journal of International Law* 607, 607.

⁶³*ibid* 631.

⁶⁴Satya Brata Sinha, 'ADR and Access to Justice: Issues and Perspectives' (2015) 19 – 20 <<http://www.tnsja.tn.nic.in/article/ADR-%20SBSinha.pdf>> accessed 1 December 2016.

Sinha hold the view that ADR promotes access to justice, neither of the two include international commercial courts in their discussions. Neither McGregor nor Sinha specifically address the connection between international commercial arbitration, international commercial courts and access to justice. Further, while McGregor states that ADR may facilitate access to justice in three areas of disputes, McGregor does not include commercial disputes among those in which access to justice contributes. Also, while Sinha identifies the perceived advantages of international commercial arbitration over the national court system, the current study does not contrast international commercial arbitration with the national courts. Instead, this study discusses international commercial arbitration alongside international commercial courts. This study is therefore different from McGregor and Sinha's works.

In Russia, Nosyreva discusses three components of ADR, being negotiation, 'claims-based dispute resolution procedure', and mediation, arguing that ADR works alongside the 'justice system' to deliver justice to parties without offering competition to the courts or obstructing access to the courts.⁶⁵ From Nosyreva's work, it is notable that there is a difference between access to justice and access to courts. While access to courts appears as one angle through which one may access justice, there are other mechanisms through which one may achieve justice, such as ADR. In India, Bhat supports this view, that access to justice is a broad concept that may be achieved either through access to courts or through access to ADR.⁶⁶ Bhat remarks that arbitration is a good method of access to justice, even through arbitration has its challenges.⁶⁷ Nosyreva and Bhat address the issue of ADR and access to justice, but do not specifically present international commercial arbitration and its contribution to access to justice; and neither do they present international commercial courts offering ADR services as a means to access to justice. This thesis addresses this gap in literature, building on the conclusion in Nosyreval and Bhat's argument that ADR promotes access to justice, to evaluate whether international commercial arbitration promotes access to justice in Kenya; and whether international commercial courts advance the interests of justice in Singapore and other countries where similar courts have been established.

⁶⁵Elena Nosyreva, 'Alternative Dispute Resolution as a Means of Access to Justice in the Russian Federation' (2003) 12 Pacific Rim Law & Policy Journal 709.

⁶⁶Iftikhar Hussian Bhat, 'Access to Justice: A Critical Analysis of Alternative Dispute Resolution Mechanisms in India' (2013) 2 International Journal of Humanities and Social Science Invention 46, 46.

⁶⁷ibid 53.

With Ghana in context, Nolan-Haley's points out that ADR mechanisms such as court-annexed mediation have in recent years been hailed as an avenue to access to justice in developing countries.⁶⁸ In Kenya, Gichuhi opines that the introduction of court-annexed mediation in Kenya was a response to the urgent need to address the challenges faced by the courts in providing access to justice.⁶⁹ Amollo proffers that the Office of the Ombudsman in Kenya, offering ADR for complaints by members of the public, complements the formal judicial system.⁷⁰ Mbobu argues that the epic of embracing ADR in the country would be to achieve access to justice.⁷¹ While Nolan-Haley, Gichuhi, Amollo and Mbobu all concur that ADR is important in achieving access to justice, they do not directly refer to international commercial arbitration. This study focuses on international commercial arbitration as one of the ADR mechanism, and to critique its utility as a contributor to access to justice.

With reference to criminal matters, Kariuki suggests that Traditional Dispute Resolution Mechanisms (TDRMs) have the potential to increase access to justice.⁷² Muigua and Kariuki state that ADR and TDRM propel access to strengthen the rule of law and in turn spurn development.⁷³ Muigua advocates for the development of East Africa as a hub for international commercial arbitration, but notes that there is need to strengthen the legal and institutional framework to realise this goal.⁷⁴ Genn states that the tendency to shrug off public dispute resolution in favour of private dispute resolution is 'troubling'.⁷⁵ This thesis questions this tendency, to assess whether international commercial arbitration is viewed as a promoter of access to justice, or whether it is an attempt for Kenya to sweep under the rug the inherent institutional challenges of the civil justice system.

⁶⁸Jacqueline Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' 21 *Harvard Negotiation Law Review* 59, 60.

⁶⁹Allen Waiyaki Gichuhi, 'Court Mandated Mediation- the Final Solution to Expeditious Disposal of Cases' (2014) 2 *Alternative Dispute Resolution* 128, 130.

⁷⁰Otiende Amollo, 'Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya' (2014) 2 *Alternative Dispute Resolution* 92, 100.

⁷¹Kyalo Mbobu, 'Enhancing Access to Justice in Kenya Through ADR' (2014) 2 *Alternative Dispute Resolution* 197, 200.

⁷²Francis Kariuki, 'Enhancing Access to Justice in Kenya Through ADR' (2014) 2 *Alternative Dispute Resolution* 201, 227.

⁷³Kariuki Muigua and Kariuki Francis (n 15).

⁷⁴Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya' (n 35) 18.

⁷⁵Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 *Yale Journal of Law & the Humanities*: 398 <<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1392&context=yjlh>> accessed 17 October 2016.

In Nigeria, Otuturu agrees with Nolan-Haley's view, making specific reference to commercial arbitration through multi-door courthouses as an avenue to achieving access to justice.⁷⁶ Also from Nigeria, Morocco-Clarke expounds on the use of multi-door courthouses, which are constitutionally-backed court-annexed ADR centres.⁷⁷ Ajigboye explains that the multi-door courthouses in Nigeria are public courts with different dispute resolution doors: the court may refer the parties to mediation, negotiation or arbitration, alongside litigation.⁷⁸ Onyema chimes in the argument that court-annexed ADR through the multi-door courthouses in Nigeria are a contribution to dealing with the challenges to access to justice.⁷⁹ These authors write about court-annexed ADR in African countries. While in Nigeria the multi-door courthouses have been hailed to increase access to justice, this study concentrates on international commercial arbitration outside the courts. In this study, international commercial arbitration in Kenya is characterised as a dispute resolution mechanism resorted to outside the court system. There is therefore a gap in literature as to whether this external dispute resolution mechanism contributes to achievement of access to justice. This is a gap that this study sought to address.

This section has presented available literature on ADR and access to justice. This section of the literature review has shown that there is little interest in the question whether international commercial arbitration and international commercial courts influence access to justice. This section also shows that there is little available literature discussing international commercial arbitration, international commercial courts and access to justice in Kenya. Further, while most of the studies address ADR as a whole, and the relation between the cluster of ADR mechanisms and access to justice, this study concerns international commercial arbitration as an individual dispute resolution mechanism, and international commercial courts as a means of access to ADR. The scope of this study and that of available literature is therefore

⁷⁶George Gogo Otuturu, 'Some Aspects of the Law and Practice of Commercial Arbitration in Nigeria' (2014) 6 *Journal of Law and Conflict Resolution* 67, 75.

⁷⁷Ayodele Morocco-Clarke, 'The Concept of the Multidoor Courthouse in Nigeria: Lessons to Be Learnt by the National Industrial Court for the Proposed Court-Annexed Alternative Dispute Resolution Centre' (2012) 6 *Labour Law Review* 7, 24.

⁷⁸Oyeniya Ajigboye, 'The Concept of Multi-Door Courthouse in Nigeria: Rethinking Frank Sander's Concept' 1 <<http://poseidon01.ssrn.com/delivery.php?ID=817078078116004002101107078092090068001008007085063041068117112105027025066000126072026035111101049057019019008025099112003115012022021021058028091103004111084066015028023095001002115104004092105095102126097092007031127087068070110104075103010113103084&EXT=pdf>> accessed 17 October 2016; Ayodele Morocco-Clarke (n 78) 14.

⁷⁹Emilia Onyema, 'The Multi-Door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC' (SOAS University of London 2012) 25 <http://eprints.soas.ac.uk/14521/1/Final_Report_on_LMDC_2012.pdf> accessed 17 October 2016.

different. This justifies the study, which considers whether the rise of international commercial arbitration and international commercial courts influences access to justice.

2.3 International Commercial Arbitration versus International Commercial Courts

This section reviews literature concerning international commercial arbitration and international commercial courts. This section evaluates whether available literature has addressed the issue of the rise of international commercial courts alongside the growth of international commercial arbitration. This review seeks to identify gaps in available knowledge on the area. It also seeks to justify the need for this study.

Movsesian argues that international commercial arbitration has successfully been integrated in many countries across the world, but international courts do not share a similar level of acceptance.⁸⁰ Responding to the question why states have embraced international commercial arbitration but not international courts, Movsesian states that international commercial arbitration avoids legitimacy problems, fosters domestic growth, and appeals to influential domestic constituencies.⁸¹ However, international courts present legitimacy issues, do not directly facilitate economic growth, and do not share similar support from the concerned interest groups.⁸² Dalhuisen makes a case for an international commercial court, arguing that such a court should issue binding preliminary opinions to domestic commercial courts and commercial arbitrators, and handle international enforcements of commercial awards.⁸³

While Movsesian considers both international commercial arbitration and international courts, Movsesian does not specifically deal with international commercial courts. The discussion involves international courts in general, handling different areas of law at an international level. Dalhuisen then argues for international commercial courts but does not offer a comparative approach alongside international commercial arbitration. Further, neither Movsesian nor Dalhuisen considers these aspects of dispute resolution in relation to whether they have expounded on access to justice. This study addresses this gap by discussing international commercial arbitration on one end, international commercial courts on the other

⁸⁰Mark Movsesian, 'International Commercial Arbitration and International Courts' (2008) 18 *Duke Journal of Comparative and International Law* 423.

⁸¹*ibid* 24.

⁸²*ibid*.

⁸³Jan Hendrik Dalhuisen, 'The Case for an International Commercial Court' (Social Science Research Network 2014) SSRN Scholarly Paper ID 2433513 <<https://papers.ssrn.com/abstract=2433513>> accessed 1 December 2016.

end, and access to justice in the centre, questioning whether these two fronts of dispute resolution contribute to realisation of access to justice.

Smith discusses the Permanent Court of Arbitration, noting that almost 90% of the disputes that the Permanent Court of Arbitration handles, are ‘mixed’ disputes, involving a private entity on one side and a public entity on the other.⁸⁴ The Permanent Court of Arbitration also handles disputes between states. Ameli analyses the functioning of the Iran-United States Claims Tribunal, a tribunal that the Permanent Court of Arbitration helped set up to deal with the pacific settlement of a dispute between Iran and the United States of America.⁸⁵ Menon questions why there is a need for a transnational system of justice when international commercial arbitration is already in place to resolve commercial disputes where the parties are from different jurisdictions.⁸⁶ Smith and Ameli study aspects of international dispute resolution through the Permanent Court of Arbitration. While their works focus on international arbitration, they do not specifically address the commercial aspect. Further, neither Smith nor Ameli includes an analysis of access to justice through this international dispute resolution mechanism. This thesis addresses this gap, discussing international commercial dispute resolution in the context of access to justice.

Meshel analyses interstate arbitration, an international dispute resolution mechanism that considers both legal and political dimensions to resolve interstate disputes, leading to the conclusion that interstate arbitration is two-dimensional in nature.⁸⁷ Meshel highlights the operation of the Permanent Court of Justice and the International Court of Justice, two institutions which resolve disputes between states according to international law rules.⁸⁸ However, Meshel does not address international commercial arbitration between private

⁸⁴Fedelma Smith, ‘The Permanent Court of Arbitration (PCA)’ (2013) 2013-2: 100 jaar Vredespaleis <<http://www.nvvn.nl/artikel/the-permanent-court-of-arbitration-pca/pdf/>> accessed 1 December 2016.

⁸⁵Koorosh Ameli, ‘The Iran-United States Claims Tribunal’ in P Hamilton and others (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution* (Kluwer Law International 1999) 246 – 281 <<http://ameliarbitration.com/wp-content/uploads/2012/02/The-Iran-United-States-Claims-Tribunal-PCA-case-notes.pdf>> accessed 1 December 2016.

⁸⁶Sundaresh Menon, ‘International Commercial Courts: Towards a Transnational System of Dispute Resolution’ (2015) 8 <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---dific-lecture-series-2015.pdf>> accessed 1 December 2016.

⁸⁷Tamar Meshel, ‘Awakening the “Sleeping Beauty of the Peace Palace” – The Two-Dimensional Role of Arbitration in the Pacific Settlement of Interstate Territorial Disputes Involving Armed Conflict’ (LLM Thesis, University of Toronto 2013) ii <https://tspace.library.utoronto.ca/bitstream/1807/43233/3/Meshel_Tamar_201311_LLM_thesis.pdf> accessed 1 December 2016.

⁸⁸ibid 17.

actors. Instead, Meshel considers interstate disputes. This study considers the role of international commercial arbitration in achieving access to justice, in the context of the increase in interest in establishment of international commercial courts. This study, therefore, addresses the gap in literature on international commercial courts resolving disputes between private actors, and the relation with access to justice.

Oncel notes that while international commercial arbitration has become part of the international dispute resolution framework in the 21st Century, efforts to promote international commercial arbitration as a prime mechanism began in the 1920s.⁸⁹ Menon finds that there is a shift towards international commercial courts because of the shortfalls of international commercial arbitration, including a lack of ethical guidelines to govern the increasing numbers of arbitrators, lack of accountability to the public, rising costs and delays of international commercial arbitration, unpredictability in enforcement of international commercial awards, and lack of consistency in awards because of a lack of an appellate system of guidance from precedent.⁹⁰ Oncel focuses on international commercial arbitration only, while Menon only discusses international commercial courts. Neither Oncel nor Menon discusses both international commercial arbitration and international commercial courts. Neither Oncel nor Menon considers whether the rise in international commercial courts seeks to address a gap in access to justice that was not adequately filled by international commercial arbitration. This study seeks to address this question. This study therefore identifies this as a gap in literature on the subject, taking international commercial arbitration and international commercial courts in the same work, and evaluating the link between these two dispute resolution mechanisms and access to justice.

In Kenya, Mutunga views that court referrals to arbitration under Order 46 of the Civil Procedure Rules of 2010 and international commercial arbitration should be explored as a means to broaden access to justice.⁹¹ Muigua reinforces this argument, pointing out that commercial arbitration is a suitable facilitator for access to justice where the parties have equal bargaining power and seek a speedy conclusion to the dispute.⁹² According to Ngugi,

⁸⁹Sinan Oncel, 'International Commercial Arbitration as an Alternative Dispute Solving Mechanism and Its Role in the Turkish Judiciary System' (Master of Arts Thesis, Bilkent University 2006) 70 <<http://www.thesis.bilkent.edu.tr/0003206.pdf>> accessed 1 December 2016.

⁹⁰Sundaresh Menon, 'International Commercial Courts: Towards a Transnational System of Dispute Resolution' (n 87) 9, 10.

⁹¹Willy Mutunga, 'The Judiciary as Stewards of ADR' (2014) 2 *Alternative Dispute Resolution* 14, 15.

⁹²Kariuki Muigua, 'ADR: The Road to Justice in Kenya' (2014) 2 *Alternative Dispute Resolution* 28, 65 – 66.

the Nairobi Centre for International Arbitration, established in 2013, is poised to enhance access to justice in East Africa through ADR.⁹³ Mutunga, Muigua and Ngugi address international commercial arbitration outside the court system as a contributing factor to promoting access to justice. However, this study questions this assumption. This study critiques the idea that supporting out-of-court mechanisms truly increases access to justice. This thesis questions whether the focus should be on shying away from the courts or if it instead should be on building the court system to adopt mechanisms apart from litigation but within the judiciary.

Writing with Singapore in focus, Tan argues that the Singaporean legal system is based on English law.⁹⁴ While this makes the system familiar to Commonwealth lawyers, Stephenson, Hogan and Smith argue that one disadvantage of an international commercial court such as the SICC is that it does not benefit from the almost global enforceability attributed to international commercial arbitration under the New York Convention.⁹⁵ Landbrecht however notes that the SICC is not intended to replace international commercial arbitration, but is meant to complement it.⁹⁶ Chan highlights the features of the SICC, arguing that the court offers international commercial litigation services and expands the ADR options available, promoting cross-border streamlining of commercial law.⁹⁷ Brink presents the three-pronged approach taken in Singapore, where the Singapore International Arbitration Centre (SIAC), the Singapore International Mediation Centre (SIMC) and the SICC are jointly expected to enhance access to justice.⁹⁸ This study builds on the Singaporean approach to determine whether international commercial arbitration in Kenya offers any contribution to enhancing access to justice as the system stands.

This section of the literature review has evaluated work on international commercial arbitration and international commercial courts. I have presented the view that while there has been interest on international commercial arbitration on one hand and international commercial courts on the other, there is insignificant work on the two aspects of international

⁹³Lawrence Muiruri Ngugi, 'Reflections On Access To Justice Through Alternative Dispute Resolution Mechanisms In A Globalised Society' (2014) 2 *Alternative Dispute Resolution* 262, 264.

⁹⁴Kevin YL Tan (ed), *The Singapore Legal System* (Singapore University Press 1999) 531 <<http://lawjournal.mcgill.ca/userfiles/other/4326838-Glenn.pdf>> accessed 17 October 2016.

⁹⁵Andrew Stephenson, Lindsay Hogan and Jaclyn Smith (n 48).

⁹⁶Johannes Landbrecht (n 49) 124.

⁹⁷Sim Yong Chan, 'The Singapore International Commercial Court: The Brave New World of International Commercial Litigation' [2014] *Singapore Law Gazette* 26.

⁹⁸Henneke Brink (n 56).

dispute resolution in one study. Also, most authors do not discuss international commercial arbitration and international commercial courts in the same work as access to justice. This therefore leaves a gap in available knowledge on the nexus between international commercial arbitration, international commercial courts and access to justice. This study sought to address this gap, by questioning whether there is a relationship between these three concepts. Further, it sought to contribute to available knowledge on these three areas.

2.4 Conclusion

This chapter has presented findings of the review of literature concerning alternative dispute resolution and access to justice; and international commercial arbitration versus international commercial courts. The review has drawn out the conclusion that there is insufficient literature on the link between international commercial arbitration, international commercial courts and access to justice. If this gap is not addressed, then the question whether international commercial courts have emerged to contribute to access to justice that is not guaranteed by international commercial arbitration, would not be answered. This study therefore contributes to addressing this gap, as it focuses on whether international commercial arbitration contributes toward the achievement of the right of access to justice in Kenya; whether international commercial courts contribute to the realisation of the right of access to justice in other parts of the world; and whether lessons be drawn from the establishment and operation of the SICCC, to the pursuit of the right of access to justice in Kenya.

CHAPTER THREE: ACCESS TO JUSTICE IN THE LEGAL FRAMEWORK FOR INTERNATIONAL COMMERCIAL ARBITRATION IN KENYA

3.1 Introduction

This chapter analyses the legal framework for international commercial arbitration in relation to access to justice in Kenya, evaluating the current provisions and identifying areas of concern. The chapter gives highlights of the relevant provisions in international commercial arbitration, at an international and national level.

Courts are agents of both public and private justice, while arbitral tribunals such as those that handle international commercial arbitrations, offer private justice in support of the dispute resolution aspect of the judiciary.⁹⁹ As such, while referring to ‘access to justice’ normally infers access to courts, it is possible to include access to private dispute resolution mechanisms, which are some of the best ways of achieving access to justice.¹⁰⁰ This study was not based on the premise that there are impediments to access to justice in international commercial arbitration in Kenya; but instead was founded on the notion that it may be possible to *expand* the parties’ avenues to access justice.

In the 18th and 19th centuries, commercial arbitration was carried out through trade associations, mercantile guilds, stock exchanges and chambers of commerce.¹⁰¹ In 1919, the International Chamber of Commerce was established.¹⁰² In 1923, the Court of Arbitration was established at the headquarters of the International Chamber of Commerce in Paris.¹⁰³ Over the years, it has increasingly been acknowledged that access to justice may be granted outside the court system, through ADR mechanisms such as international commercial arbitration.¹⁰⁴ By the 1950s, the need for international enforcement of arbitral awards became

⁹⁹Sundaresh Menon, ‘Judicial Attitudes towards Arbitration and Mediation in Singapore’ (Asean Law Association Malaysia (ALA) & Kuala Lumpur Regional Centre for Arbitration (KLRCA) Talk & Dinner 2013, Kuala Lumpur, Malaysia, 25 October 2013) para 4 <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/judicial-attitudes-to-arbitration-and-mediation-in-singapore.pdf>> accessed 20 December 2016.

¹⁰⁰*ibid* 11.

¹⁰¹*ibid* 4.

¹⁰²*ibid*.

¹⁰³*ibid*.

¹⁰⁴Sundaresh Menon, ‘Shaping the Future of Dispute Resolution and Improving Access to Justice’ (Global Pound Conference, 17 March 2016) para 16

apparent, prompting keen interest of the international commercial arbitration, in putting in place the requisite international instruments discussed in this Chapter.

International commercial arbitration has made great strides in deciding cases relating to shipping, international contracts, construction and energy law, which over the years have been increasingly moved away from the national courts, and entered the realm of the international commercial arbitral tribunals.¹⁰⁵

3.2 Access to Justice in International Law Instruments Governing Kenya

The Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration¹⁰⁶ of 1985 (UNCITRAL Model Law) are international instruments that demonstrate the widely-accepted view that parties to a dispute have the autonomy to decide which forum will offer them access to justice and resolve their disputes and differences in a satisfactory manner.¹⁰⁷ The Arbitration Act of 1995 is based on the UNCITRAL Model Law.¹⁰⁸ In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others*,¹⁰⁹ the High Court of Kenya at Mombasa quoted the opinion of the Court of Appeal of Kenya in *Anne Mumbi Hinga v Victoria Njoki Gathara*¹¹⁰ that the Arbitration Act of 1995 and the arbitration Acts of many states across the world, are modelled on the UNCITRAL Model Law, adopting restricted review of arbitral awards and restricting the intervention of courts to only limited instances when the Acts invite the courts to facilitate or intervene in the arbitral process.¹¹¹ This restriction applies in all arbitrations in the jurisdictions where the relevant Acts are framed based on the provisions of the UNCITRAL Model Law, including international commercial arbitration.

<[http://www.supremecourt.gov.sg/Data/Editor/Documents/\[Final\]%20Global%20Pound%20Conference%20Series%202016%20-%20Shaping%20the%20Future%20of%20Dispute%20Resolution%20-%20Improving%20Access%20to%20Justice".pdf](http://www.supremecourt.gov.sg/Data/Editor/Documents/[Final]%20Global%20Pound%20Conference%20Series%202016%20-%20Shaping%20the%20Future%20of%20Dispute%20Resolution%20-%20Improving%20Access%20to%20Justice)> accessed 20 December 2016.

¹⁰⁵Sundaresh Menon, 'Judicial Attitudes towards Arbitration and Mediation in Singapore' (n 99) para 12.

¹⁰⁶ UNCITRAL Model Law on International Commercial Arbitration (n 47).

¹⁰⁷Sundaresh Menon, 'Judicial Attitudes towards Arbitration and Mediation in Singapore' (n 99) para 5.

¹⁰⁸ *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] Court of Appeal of Kenya Civil Application Nai 327 of 2009 (UR 225/2009), eKLR.

¹⁰⁹ *ibid.*

¹¹⁰ *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] Court of Appeal of Kenya at Nairobi Civil Appeal 8 of 2009, eKLR.

¹¹¹ *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* (n 109); *Anne Mumbi Hinga v Victoria Njoki Gathara* (n 111).

A substantial number of the provisions in the Arbitration Act of 1995 were ‘lifted’ from the UNCITRAL Model Law.¹¹² These include the provisions that deal with barring appeals to the courts of appeal in international commercial arbitration, once the first court to handle the application for recognition or enforcement of the arbitral award, has rendered its decision. In *Tanzania National Roads Agency v Kundan Singh Construction Limited*, the Court of Appeal of Kenya at Mombasa stated that Kenya became a signatory to the UNCITRAL Model Law on 2nd January 1996.¹¹³ While the correct assertion would have been that Kenya ‘adopted’¹¹⁴ the UNCITRAL Model Law considering that it is not an international agreement that can be signed or ratified, the understanding is that the provisions of the UNCITRAL Model law now form part of the legal framework for international commercial arbitration in Kenya. The Court held that a right of appeal from a High Court order is not automatic, but must be vested by the Arbitration Act and rules which regulate the procedure in arbitration matters, or in the case of International arbitration, the general rules of International Law, treaty or conventions ratified by Kenya. This provision is pertinent to the discussion on access to justice in international commercial arbitration because it caps the number of times an aggrieved party can seek refuge at the national courts where that party perceives that justice was not delivered at the first court to handle the matter; in Kenya, the High Court.

Kenya signed the New York Convention on 10th February, 1989, and the convention entered into force in Kenya on 11th May 1989.¹¹⁵ With a reciprocity reservation to the application of the Convention, Kenya is among the parties that committed to apply the New York Convention only to the recognition and enforcement of arbitral awards made in the territory of other states which are party to the convention.¹¹⁶ There are a total of 156 parties to the New York Convention,¹¹⁷ and 193 members of the United Nations,¹¹⁸ the world’s largest

¹¹² *Sebhan Enterprises Limited v Westmont Power (Kenya) Limited* [2006] High Court of Kenya at Nairobi, Milimani Commercial Courts Civil Case No. 239 of 2005, eKLR.

¹¹³ *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2014] Court of Appeal of Kenya at Mombasa Civil Appeal 38 of 2013, eKLR.

¹¹⁴ Jacob K Gakeri, ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’ (2011) 1 International Journal of Humanities and Social Science 219 <http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf> accessed 28 September 2016.

¹¹⁵ United Nations Commission on International Trade Law (UNCITRAL), ‘Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)’ (*UNCITRAL*, 2017) <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> accessed 22 January 2017.

¹¹⁶ *ibid*; Arbitration Act (n 23).

¹¹⁷ United Nations Commission on International Trade Law (UNCITRAL) (n 115).

¹¹⁸ United Nations, ‘Growth in United Nations Membership, 1945-Present’ (*United Nations*, 2017) <<http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html>> accessed 22 January 2017.

international organisation.¹¹⁹ From this statistic, and based on the reciprocity clause, Kenya will only allow the recognition and enforcement of awards from international commercial arbitrations which are made in 156 countries; and will not allow for the recognition and enforcement of awards from international commercial arbitrations made in 37 member countries of the United Nations. Does this limit the parties whose matters were concluded in these 37 countries, from achieving justice in Kenya? This brings into question whether a limit to access the courts in a particular nation also implies that there is a limit to access to justice. The fundamental issue here is whether limiting access to courts directly means there is a limit to access to justice. This study, which further discusses this issue, proposes that limiting direct access to the courts in these 37 countries does not imply a limit to access to justice. Indeed, limits to court intervention in arbitration, whether in international commercial arbitration or domestic commercial arbitration, does not necessarily imply a limit to access to justice.

There is no reference to the term ‘justice’ in either the New York Convention or the UNCITRAL Model Law. However, through expanding access to international commercial arbitration through ensuring that arbitral awards could be enforced in other member countries, the New York Convention and the UNCITRAL Model law may be seen as instruments improving access to justice. The next section discusses access to justice in national law of Kenya.

3.3. Access to Justice in National Law of Kenya

The Constitution of Kenya of 2010 is the supreme law of the Republic and binds all persons,¹²⁰ including parties to an international commercial arbitration and the arbitral tribunal, for international commercial arbitrations where Kenyan law is applied. The judicial system in Kenya has a mandate to ensure that the Constitution is applied across all areas of life in the Republic. Social justice is one of the national values and principles of governance that bind all State organs, State officers, public officers and all persons involved in dealing with the Constitution, any other law, or public policy decision.¹²¹ It is therefore considered a goal for relationships in the social context. This provision shows that the people of Kenya

¹¹⁹ National Geographic Society, ‘International Organization’ (*National Geographic Society*, 23 December 2012) <<http://www.nationalgeographic.org/encyclopedia/international-organization/>> accessed 22 January 2017.

¹²⁰ Constitution of Kenya (n 12), art 2.

¹²¹ *ibid*, art 10.

consider justice to be an important part of the national values. This also indicates that a dispute resolution mechanism that aims to achieve or improve social justice, is a benefit to the nation as it seeks to achieve its constitutional obligations.

The Constitution of Kenya of 2010 recognises and promotes human rights so that the supreme law of the land promotes social justice.¹²² Article 48 of the Constitution of Kenya of 2010 on ‘access to justice’ states 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.” As the main provision in the Constitution that refers to access to justice, article 48 fulfils its role as a human right provision and recognises the importance of access to justice as a fundamental need for all human beings in Kenya.

The right to a fair hearing is part of the right to access to justice, because when a party is given a fair platform to have the matter determined, it brings the party to the seat of justice, where the matter is determined fairly.¹²³ The Constitution of Kenya of 2010 secures every person’s right to a fair hearing, not only in its common use in criminal matters, but also in civil matters such as international commercial disputes. Article 50(1) of the Constitution of Kenya of 2010 recognises that every person should receive a fair hearing before any dispute resolution mechanism,¹²⁴ whether a court or even an arbitral tribunal. In *Caneland Limited v John Deere (Proprietary) Limited*, the High Court of Kenya at Kisumu held inter alia that Article 50(1) on fair hearing also applies to arbitration.¹²⁵ This supports a view that the parties to international commercial arbitration are assured the right to a fair hearing, under Kenyan law.

Tribunals deciding matters in international commercial arbitration offer an avenue for parties to access justice. In *Evangelical Mission for Africa & another v Kimani Gachuhi & another*,¹²⁶ the High Court of Kenya at Nairobi recognised this fact, noting that parties contract to enter an arbitral process in the hope that they may access justice.¹²⁷ This hope that

¹²² *ibid*, art 19(2).

¹²³ *Songa Ogoda & Associates v University of Nairobi* [2014] High Court of Kenya at Nairobi Civil Case 21 of 2013, eKLR.

¹²⁴ Constitution of Kenya (n 12), art 50(1).

¹²⁵ *Caneland Limited v John Deere (Proprietary) Limited* [2011] High Court of Kenya at Kisumu Civil Case 149 of 2010, eKLR.

¹²⁶ *Evangelical Mission for Africa & another v Kimani Gachuhi & another* [2015] High Court of Kenya at Nairobi Miscellaneous Civil Application 479 of 2014, eKLR.

¹²⁷ *ibid*.

parties to an international commercial arbitration have, is the same hope held by parties who engage in a dispute before the courts or other decision-making body, to have the dispute between them determined. The parties to an arbitration, be it a domestic commercial arbitration or an international commercial arbitration, in seeking determination of a dispute, seek justice through the avenue of the dispute resolution process.

The Constitution of Kenya of 2010 provides that “judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”¹²⁸ This provision takes into account the arbitral tribunals established under the Constitution. While arbitral tribunals are not established directly by the Constitution, they are constituted either under the Arbitration Act of 1995 or under the Civil Procedure Act and Rules. The Arbitration Act of 1995, the Civil Procedure Act and the Civil Procedure Rules are legal instruments subsidiary to the Constitution. It therefore follows that international commercial arbitration tribunals with either the seat or the venue in Kenya are put in place under the overall authority of the Constitution of Kenya of 2010. This includes enforcement of an international commercial arbitration award where neither the seat nor venue of the arbitral tribunal is in Kenya, but parties seek to realise the fruits of justice in Kenya. Arbitral tribunals therefore, from this provision, exercise judicial authority which is derived from the people of Kenya. All tribunals, including arbitral tribunals deciding international commercial disputes, must therefore be guided by the principles governing exercise of judicial authority according to the Constitution of Kenya of 2010.¹²⁹ In arbitral tribunals, “justice shall be done to all, irrespective of status”.¹³⁰

Arbitral tribunals must ensure that justice is not delayed.¹³¹ Delaying justice is akin to denying justice. Where a party to a dispute does not achieve justice within a reasonable time, it does not justify the ‘timeliness’ of arbitration. However, as the tribunals should ensure that justice is done, this shows that their profile has now been raised to a dispute resolution mechanism that promotes access to justice. ADR mechanisms including international commercial arbitration must be promoted.¹³²

¹²⁸ Constitution of Kenya (n 12), art 159(1).

¹²⁹ *ibid*, art 159(2).

¹³⁰ *ibid*, art 159(2)(a).

¹³¹ *ibid*, art 159(2)(b).

¹³² *ibid*, art 159(2)(c).

Arbitral tribunals must ensure that justice is “administered without undue regard to procedural technicalities”.¹³³ Where there is inflexibility in the administration of an arbitration, an issue may arise where the tribunal is not adaptable to dispute resolution even where there are some technicalities not met. However, access to justice does not mean that arbitral tribunals should disregard all rules of procedure, but rather respect the rules and recognise that they are essential to ensuring that parties achieve substantive access to justice. In *Telkom Kenya Limited v John Ochanda & 996 others*,¹³⁴ the Supreme Court of Kenya at Nairobi stressed that, while the courts (and by extension arbitral tribunals) should dispense justice without elevating the place of procedure over the place of substance, the need for respect of rules is still important because, in the words of the court, “it is to be borne in mind that rules of procedure are not irrelevant, but are the handmaiden of justice that facilitate the right of access to justice, in the terms of Article 48 of the Constitution, can only be fully realised within a disciplined programme of procedural rules.”¹³⁵ Further, all arbitral tribunals must carry out their mandate in a way that protects and promotes the purpose and principles of the Constitution of Kenya of 2010.¹³⁶

The High Court of Kenya has supervisory jurisdiction over arbitral tribunals, including those deciding international commercial disputes.¹³⁷ The High Court has the power to call into question the proceedings in an international commercial arbitration to secure the interests of justice.¹³⁸ This keeps the tribunals in a situation where they should, as much as the Judiciary, promote access to justice. However, the High Court may only hear a matter from an arbitral tribunal if the aggrieved party calls upon the limited provisions under the Arbitration Act of 1995. For example, a party may only apply to the High Court to set aside an arbitral award, or appeal the decision of an arbitral tribunal, through sections 35 and 37 of the Arbitration Act of 1995. The Kenyan courts have found that this limitation does not serve as a limit to access to justice. In *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Ltd*,¹³⁹ the High Court of Kenya at Nairobi held the view that the restriction of action by the courts in

¹³³ *ibid*, art 159(2)(d).

¹³⁴ *Telkom Kenya Limited v John Ochanda & 996 others* [2015] Supreme Court of Kenya at Nairobi Motion 17 of 2014, eKLR.

¹³⁵ *ibid* 19.

¹³⁶ Constitution of Kenya (n 12), art 159(2)(e).

¹³⁷ *ibid*, art 165(6), (7).

¹³⁸ *ibid*, art 165(6), (7).

¹³⁹ *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited* [2015] High Court of Kenya at Nairobi, Milimani Commercial Courts Miscellaneous Civil Application No. 129 of 2014, eKLR.

the arbitral process, is the key feature of arbitration; arbitration is a voluntary process; and therefore the limitation cannot be found to be a hindrance to achieving access to justice. This shows that while access to the courts is limited, access to justice is not impeded.

A potential conflict between the role of the High Court of Kenya and the role of the Arbitral Court, established under the Nairobi Centre for International Arbitration Act,¹⁴⁰ exists. The Nairobi Centre for International Arbitration Act does not explicitly outline the relationship between the Arbitral Court and the High Court of Kenya.¹⁴¹ The Arbitral Court is not, however, an international commercial court in the meaning used in this study. As a court of arbitration, the word ‘court’ in the name of the Arbitral Court appears to designate the institution as the main dispute resolution institution within the framework of the Nairobi Centre for International Arbitration. It also appears to elevate the institution to the level of a domestic court. However, the ‘court’, for example, draws its membership from ‘leading international arbitrators’,¹⁴² which seems to suggest that it would operate as an international commercial arbitration institution as opposed to an international commercial court within the national court system.

The Court of Appeal is granted jurisdiction to consider appeals from lower courts, on points of law and fact.¹⁴³ The question whether an order by the High Court on setting aside or refusal of enforcement of an arbitral award, may be appealed against at the Court of Appeal, has been considered by the courts. The main argument by the appellants is that barring a party from accessing the Court of Appeal where the High Court has made an erroneous finding concerning the arbitral award, is an infringement on the right to access to justice. In *Nyutu Agrovet Limited v Airtel Network Kenya Limited*,¹⁴⁴ the Court of Appeal of Kenya at Nairobi allowed an application by the appellant, to allow an appeal to be lodged at the Supreme Court, on the basis that the courts have a duty to uphold justice. Following this decision, the position of the courts in securing the right to access to justice in international

¹⁴⁰ The Nairobi Centre for International Arbitration Act (n 24).

¹⁴¹ Kariuki Muigua and Ngararu Maina, ‘Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration’ 12 <https://profiles.uonbi.ac.ke/kariuki_muigua/files/effective_management_of_commercial_disputes_opportunities_for_the_nairobi_centre_for_international_arbitration> accessed 20 May 2016.

¹⁴² The Nairobi Centre for International Arbitration Act (n 24).

¹⁴³ Constitution of Kenya (n 12), art 164(3).

¹⁴⁴ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* [2016] Court of Appeal of Kenya at Nairobi Civil Application Supplementary 3 of 2015, eKLR.

commercial arbitration, is certain: the courts must uphold access to justice in all matters, including those in international commercial arbitrations.

The Arbitration Act of Kenya also does not make reference to ‘justice’ in the context in which the Constitution of Kenya of 2010 refers to the term. There is, however, the enabling framework of the Constitution of Kenya of 2010 which supersedes any statute. The Constitution of Kenya of 2010 supplies guiding values and principles for achieving access to justice, and it does not elaborate extensively on the application of these guiding values and principles. It may therefore be appropriate to conclude that the provisions for access to justice in the Constitution of Kenya of 2010 apply directly to international commercial arbitral tribunals, as subsidiary bodies to the main law of the land.

3.4 Conclusion

This chapter has analysed the provision for access to justice in the legal framework for international commercial arbitration in Kenya. The first section had analysed the provision for access to justice in international commercial arbitration, in international instruments that affect Kenya. The main instruments considered are the New York Convention and the UNCITRAL Model Law. When Kenya became a signatory to the New York Convention, Kenya joined the ranks of countries which support the recognition and enforcement of international awards, thereby supporting international commercial arbitration in Kenya. Further, in adopting most of the provisions of the UNCITRAL Model Law, Kenya provided for international commercial arbitration under the Arbitration Act of 1995. These provisions underscore the operation of international commercial arbitration in Kenya, and in doing so increase the avenues for parties to an international commercial dispute to have their matters heard in Kenya.

The second section of this chapter has presented the provision for access to justice in international commercial arbitration, in the national law of Kenya. There is no direct mention of access to justice in the Arbitration Act of 1995. However, this does not rule out the existence of access to justice in international commercial arbitration in Kenya. Noting that the Constitution of Kenya of 2010 binds all persons including arbitrators in an international commercial arbitration, then justice must be done not only through the national court system, but also through international commercial arbitration. In this chapter, it is noted that the High Court of Kenya has supervisory jurisdiction over tribunals handling international commercial

arbitration matters. However, due to the limitation of intervention by national courts under the New York Convention and the provisions of the UNCITRAL Model Law adopted into the Arbitration Act of 1995, the High Court of Kenya can only handle an issue emerging from an international commercial arbitration where the Act allows. Further, there is no appeal allowed to the Court of Appeal of Kenya, according to jurisprudence from the national courts. However, this does not curtail the parties' prospects of achieving access to justice because limitation of access to courts does not directly mean limitation of access to justice.

There is no international commercial court in Kenya. To facilitate the discussion on whether introduction of an international commercial court would promote access to justice, this study discusses the example of the SICC. The next chapter introduces the concept of access to justice in the SICC in Singapore. It discusses whether the SICC has contributed to improvement of access to justice, or whether it is a redundant aspect to introduce in a country with a common-law jurisdiction.

CHAPTER FOUR: ACCESS TO JUSTICE IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT IN SINGAPORE

4.1 Introduction

This chapter elaborates the discussion on international commercial courts in Singapore and similar international commercial courts in other countries, analysing the frameworks in light of the developments in international commercial dispute resolution in Kenya. There are five pioneer jurisdictions which have offered international examples of the roll-out of international commercial courts: the Singapore International Commercial Court, the London Commercial Court, the Qatar International Court, the courts of the Dubai International Financial Centre and the Abu Dhabi Global Market.¹⁴⁵ The first international commercial court was established in Dubai, incorporating some aspects of common law to supplement the use of local Islamic Law and Dubai Law.¹⁴⁶

4.2 The Singapore International Commercial Court: An Example of International Commercial Courts

Singapore introduced the Singapore International Commercial Court to sit amongst other pioneer jurisdictions in the area of international commercial courts.¹⁴⁷ Australia is considering the benefits and detriments of establishing an international commercial court, and may soon join the ranks of the pioneer jurisdictions.¹⁴⁸ While international commercial courts are seen to be a possible avenue to offer access to justice, these international commercial institutions have also been termed as ‘unnecessary’ in jurisdictions that already have courts that are inclined to resolving commercial disputes.¹⁴⁹ This chapter examines whether SICC plays a part in increasing the avenues for access to justice for parties to international commercial disputes.

The SICC is a recent addition to the pioneer international commercial courts. In other jurisdictions, there are similar international commercial courts, which boast of their contribution to improving avenues for access to justice across the world. The London

¹⁴⁵ Lara Bullock (n 29).

¹⁴⁶ Lara Bullock (n 30).

¹⁴⁷ *ibid.*

¹⁴⁸ Lara Bullock (n 29); Lara Bullock (n 30).

¹⁴⁹ Lara Bullock (n 30).

Commercial Court is a national court which has jurisdiction over international commercial disputes. This should not be confused with the London Court of International Arbitration, which is an international institution for commercial dispute resolution, offering administration of international commercial arbitration matters where parties to a dispute invite it to administer.¹⁵⁰ The Qatar International Court and Dispute Resolution Centre was set up in 2009, with the aim of increasing commercial interest in Qatar through improving the prospects for international commercial disputes to be resolved efficiently.¹⁵¹ The Court of the Dubai International Financial Centre was established in 2008.¹⁵² It was developed based on the model of the English Commercial Court.¹⁵³ The Court of the Abu Dhabi Global Market forms a key part of the market, a commercial centre established in October 2015 with the objective of drawing investment to Abu Dhabi.¹⁵⁴

While there are a number of international commercial courts in the world, this study focuses on the SICC because Singapore and Kenya both gained independence in the early 1960s, but later took different trajectories in the development of their economies; akin to children of a similar age group but growing up into different personalities. Another reason why the SICC is a key focus for this study in relation to the international commercial arbitration system in Kenya, is that Singapore is the second-most favourable jurisdiction among 190 jurisdictions in the world, for enforcement of contracts, signalling that Singapore has one of the world's most efficient dispute resolution environments.¹⁵⁵ The SICC is noted as a major competitor to the London Commercial Court,¹⁵⁶ even though the SICC was established based on the model of the London Commercial Court, showing that the SICC is a deserving example of an international commercial court for Kenya to learn lessons from. The SICC is arguably the leading international commercial dispute resolution destination in Asia, attracting parties from India, Indonesia and Asia, who would otherwise have resorted to more distant locations

¹⁵⁰ London Court of International Arbitration, 'Introduction' (*London Court of International Arbitration*, 2017) <<http://www.lcia.org/LCIA/introduction.aspx>> accessed 22 January 2017.

¹⁵¹ William Blair (n 49) 12.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ World Bank, 'Doing Business 2017: Singapore: Economy Profile' (World Bank Group 2017) 83 – 90 <<http://www.doingbusiness.org/~media/wbg/doingbusiness/documents/profiles/country/sgp.pdf>> accessed 22 January 2017.

¹⁵⁶ Eva Lein and others, 'Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts' (British Institute of International and Comparative Law 2015) 4 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf> accessed 22 January 2017.

like the London Commercial Court.¹⁵⁷ In following the experiences of the SICC, which itself was established based on the experiences of the London Commercial Court, this study takes the position that Kenya may draw insights on how to become the preferred international commercial dispute resolution destination in Africa.

Specialised courts, such as international commercial courts, are considered an avenue of complementing the contribution of international commercial arbitration towards achieving access to justice.¹⁵⁸ To pursue this argument, it would be correct to state that international commercial arbitration gives a person with a dispute more avenues to access justice than if the courts were the only means to have disputes resolved. Further, specialised courts with judicial officers and experts with training and experience in international commercial arbitration; a set panel of persons presiding over the disputes, eliminating the high costs of engaging an arbitrator in certain disputes; and set structures still allowing flexibility of ADR processes; are anticipated to offer swifter and more cost effective competition to international commercial arbitration, to access to justice.¹⁵⁹ The SICC may therefore be presented as an example of a specialised court, anticipated to contribute to increasing avenues to access to justice.

4.3 Access to Justice through the Singapore International Commercial Court

The Government of Singapore has been supportive of international commercial arbitration since the 1980s.¹⁶⁰ In 1986, Singapore acceded to the New York Convention, established the SIAC in 1991 and adopted the UNCITRAL Model Law in its national law through enacting the International Arbitration Act (Cap 143A) (the “IAA”) in 1995.¹⁶¹ The Constitution of Singapore makes no reference to ‘access to justice’ or ‘arbitration’, therefore the discussion on Singapore will extend to international instruments and statutes. The Constitution of Singapore of 1965 does not have any reference to ‘justice’ in a similar context as that in the Constitution of Kenya of 2010. It does not refer to the principle of justice, which should be evenly applied throughout the judicial system. The fact that ‘justice’ is not quoted in the

¹⁵⁷ *ibid* 27, 28.

¹⁵⁸ David Caron and others, *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 40, 41.

¹⁵⁹ *ibid* 41.

¹⁶⁰ Ang Yong Tong, ‘Arbitrating in Singapore: The SIAC Procedure’ (1 May 2016) 1 <http://www.gsla.de/download/SIAC_Presentation_010516_Conference.pdf> accessed 23 December 2016.

¹⁶¹ *Ibid*.

Constitution of Singapore of 1965 does not have the effect of diminishing prospects for justice to be meted out in the dispute resolution system. While it may not be mentioned in the Constitution of Singapore of 1965, the more important question to focus on is whether justice is done through the operation of the dispute resolution system, which includes the SICC.

The SICC is established under the Supreme Court of Judicature Act of Singapore, as a division of the High Court of Singapore.¹⁶² The Supreme Court of Judicature Act of Singapore provides that the Supreme Court is a superior court of record and consists of the Court of Appeal and the High Court.¹⁶³ The jurisdiction of the SICC primarily involves matters which are international and commercial in nature, and those which the High Court may hear and try in its original civil jurisdiction.¹⁶⁴ In *Telemidia Pacific Group Ltd and another v Yuanta Asset Management International Ltd and another*,¹⁶⁵ the plaintiff successfully argued a claim of breach of contract, breach of fiduciary duties and conversion.¹⁶⁶ The substance of the matter before the SICC being commercial in nature, the other aspect of the case that confirms the jurisdiction of the SICC is that the parties were from different jurisdictions. While matters that are commercial in nature but not international, may be adequately dealt with by the High Court of Singapore, those which have an international aspect to them are under the preserve of the SICC. The following illustration shows the court structure in Singapore, where the SICC is shown as a division of the High Court of Singapore.

¹⁶² Supreme Court of Judicature Act s 18A.

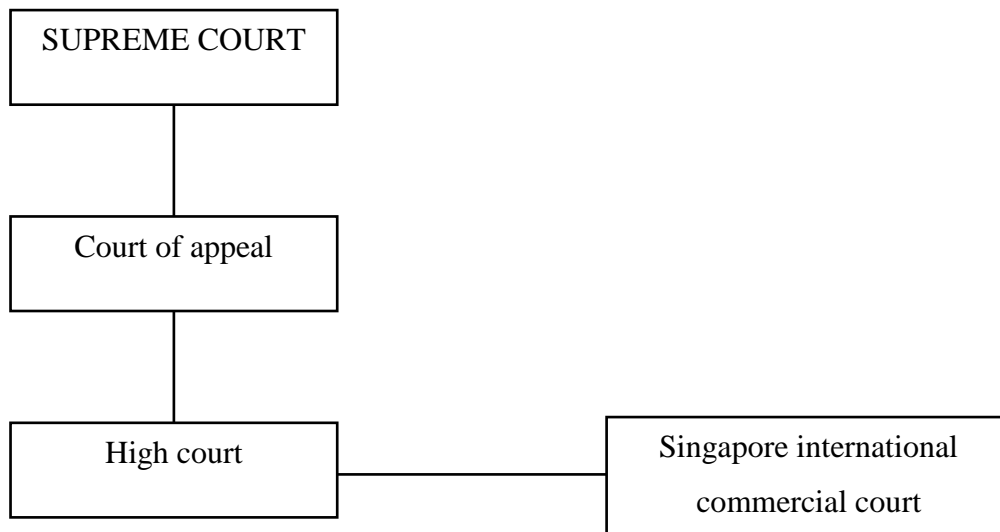
¹⁶³ *ibid* 3.

¹⁶⁴ *ibid* 18D.

¹⁶⁵ *Telemidia Pacific Group Limited & Another v Yuanta Asset Management International Limited & Another* [2016] Singapore International Commercial Court of the Republic of Singapore SGHC(I) 06 Suit No 2 of 2015.

¹⁶⁶ *ibid*.

Fig 2: The place of the Singapore International Commercial Court in the court structure in Singapore,



Source: SICC

In general, the SICC has jurisdiction to hear and determine an action which is international and commercial in nature; which the High Court may hear and try in its original civil jurisdiction.¹⁶⁷ Parties may submit to the exclusive jurisdiction of the SICC through a jurisdiction agreement, where they agree to be bound by the SICC, to carry out any decision of the SICC without undue delay, and to waive recourse to a court or tribunal outside Singapore to challenge enforcement of the decision of the SICC, to the extent that this waiver is valid.¹⁶⁸ This provision seeks to engender the finality of the decision of the SICC, such that a party that claims to be aggrieved may only challenge enforcement on limited terms.

The SICC delivered its first written judgement on 12 May 2016, in the first case presented to the Court since it was established in January 2015.¹⁶⁹ In *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another*,¹⁷⁰ a joint venture between parties in Australia and Indonesia, with associated companies in Singapore; where the joint venture sought to use technology developed in Australia, called the Binderless Coal Briquetting

¹⁶⁷ Supreme Court of Judicature Act (n 162).

¹⁶⁸ *ibid* 18F.

¹⁶⁹ Mike McClure, Elizabeth Poulos and Kathryn Sanger, 'Singapore International Commercial Court Issues Its First Judgment in Cross-Border Dispute' <<http://hsfnotes.com/arbitration/2016/06/03/singapore-international-commercial-court-issues-its-first-judgment-in-cross-border-dispute/>> accessed 23 December 2016.

¹⁷⁰ *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] Singapore International Commercial Court of the Republic of Singapore SGHC(I) 01, Suit No 1 of 2015.

Process with sub-bituminous coal sourced from mines in Indonesia.¹⁷¹ Three different jurisdictions were involved in this case. The case was brought before the SICC on 4th March 2015 and the judgment delivered on 12th May 2016.¹⁷² This period of one year and two months is fast, compared to certain arbitration cases where the ‘timeliness’ of the international commercial arbitration remains a myth. The court received praise on the timeliness of the decision, as it delivered the judgment only four months after conclusion of the hearing.¹⁷³ Resolution of this dispute was key to the SICC to try to meet the high expectations set for it, as it endeavours to solidify the hold of Singapore as an international commercial hub; through resolving disputes between foreign parties using foreign laws.¹⁷⁴

The SICC increases the options a litigant in an international commercial dispute has, for resolution of a dispute, by judges with expertise in different legal jurisdictions.¹⁷⁵ The SICC also gives parties the opportunity to be represented by foreign lawyers,¹⁷⁶ permitting a party from one jurisdiction to appoint counsel that is well versed with the legal environment in that party’s jurisdiction of concern. In *BNP Paribas Wealth Management v Jacob Agam and another*,¹⁷⁷ the plaintiff, a multinational private bank incorporated in France, acting through its local branch in Singapore, brought a claim against the defendants, two Israeli nationals, for breach of personal guarantees given in respect of four credit facilities granted in favour of four companies owned by the defendants, in France and Monaco.¹⁷⁸ The SICC alluded to the practice of ‘forum shopping’ in an instance such as that where different jurisdictions are involved, with different substantive and procedural laws.¹⁷⁹ The SICC has a panel of commercial judges from Singapore, and 12 eminent judges from different jurisdictions with expertise in commercial law from both civil and common law backgrounds.¹⁸⁰ This brings the

¹⁷¹ Mike McClure, Elizabeth Poulos and Kathryn Sanger (n 169).

¹⁷² *ibid.*

¹⁷³ Alastair Henderson and Emmanuel Chua, ‘Singapore International Commercial Court Issues Its First Judgment in Cross-Border Dispute’ (*Herbert Smith Freehills - Arbitration notes*, 3 June 2016) <<http://hsfnotes.com/arbitration/2016/06/03/singapore-international-commercial-court-issues-its-first-judgment-in-cross-border-dispute/>> accessed 24 December 2016.

¹⁷⁴ Sean Hardy, ‘Singapore International Commercial Court Hands down First Decision’ (*Out-Law.com*, 23 May 2016) <<http://www.out-law.com/en/articles/2016/may/singapore-international-commercial-court-hands-down-first-decision/>> accessed 24 December 2016.

¹⁷⁵ Supreme Court of Judicature Act (n 162).

¹⁷⁶ *ibid* 18M.

¹⁷⁷ *BNP Paribas Wealth Management v Jacob Agam and Ruth Agam* [2016] Singapore International Commercial Court of the Republic of Singapore SGHC(I) 5, Suit No 2 of 2016 (Summons No 4 of 2016).

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ Supreme Court of Judicature Act (n 162); Sundaresh Menon, ‘Shaping the Future of Dispute Resolution and Improving Access to Justice’ (n 104) para 43.

reality of accessing different jurisdictions through the application of international expertise, within the limits of contractual clauses on jurisdiction.

Similar to the way in which the jurisdiction of an international commercial arbitral tribunal is called upon, the jurisdiction of the SICC is made at the point of contracting, where the dispute resolution clause selects the SICC as the body responsible for resolving any disputes arising between the parties to the transaction.¹⁸¹ In the agreement, the parties would also indicate that they would be bound by the decision by the SICC concerning the issue in dispute; and that they waive any further action to an order by the SICC, in any court outside Singapore.¹⁸² However, even if there is no previous agreement to submit disputes to the SICC, and such a dispute arises, then the parties may still agree to submit the matter to the SICC at that point in time.¹⁸³ In a situation where parties resist the jurisdiction of the SICC but the action is one which is international and commercial in nature, the SICC may also, without the express agreement of the parties, determine disputes which were before the High Court, where the High Court of its own motion transfers the cases to the SICC.¹⁸⁴

The SICC deals with cases filed before the court, and also cases referred to it by the High Court. The SICC may transfer a case commenced in the High Court to itself, and similarly the High Court may transfer a case to the SICC if it deems that it would be best determined by the SICC due to its nature as a case which is international and commercial in nature.¹⁸⁵ In *CPIT Investments Ltd v Qilin World Capital Ltd and another*,¹⁸⁶ the defendants had filed two applications, to vary an injunction order, and to vary a consent order, where the proceedings initially were instituted at the Singapore High Court.¹⁸⁷ The international commercial transaction involved the transfer of shares by CPIT to Qilin, where Qilin provided CPIT with a loan. Qilin transferred some of the shares, upon which CPIT contested the validity of the dealing, and Qilin maintained that it was entitled to deal with the shares as it had, on the basis that CPIT defaulted on the loan, leaving Qilin as the full legal and

¹⁸¹ Supreme Court of Judicature Act (n 162).

¹⁸² *ibid.*

¹⁸³ Supreme Court of Singapore, 'Model Clauses' (*Singapore International Commercial Court*, 2014) <<http://www.sicc.gov.sg/Guide.aspx?id=87>> accessed 21 January 2017.

¹⁸⁴ Johannes Landbrecht (n 49) 115.

¹⁸⁵ Supreme Court of Judicature Act (n 163).

¹⁸⁶ *CPIT Investments Ltd v Qilin World Capital Ltd and another* [2016] Singapore International Commercial Court of the Republic of Singapore SGHC(I) 04, Suit No 5 of 2016 (HC/Summons No 2398 of 2016 and HC/Summons No 3128 of 2016).

¹⁸⁷ *ibid.*

beneficial owner of the shares.¹⁸⁸ This provision allows for the High Court to determine that a matter would be best dealt with by the SICC, and gives leeway to the SICC to, on its own action, assume cases from the High Court. This gives the parties to a dispute access to the tailor-made dispute resolution system, for international commercial disputes. This, in effect, increases the avenues for parties to an international commercial dispute, to access justice.

The SICC improves access to justice by increasing the possibility that a foreign party will engage legal counsel from outside Singapore. This is illustrated in the unprecedented situation where for the first time in Singapore, a lawyer who was qualified in another jurisdiction but not qualified in Singapore, argued before a Singaporean court.¹⁸⁹ Another aspect that elevates the SICC as a point of access to justice, is that the Court decides matters of international nature, whether or not there is any link to Singapore through the commercial transaction.¹⁹⁰ A party may engage foreign counsel where the dispute concerns subject matter that has no substantial connection with Singapore. In *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*,¹⁹¹ a dispute arose from contracts dealing with three liquefied natural gas projects in or off Queensland, Australia.¹⁹² The SICC underscored the fact that there would be no need to engage counsel that is expert in Singapore law, where the dispute concerned a commercial transaction that had little dealings in Singapore.¹⁹³

The foreign lawyers engaged by parties to represent them in disputes before the SICC, are subject to rules on ethics that bind them and permit the courts to regulate the conduct of counsel. This feature sets international commercial courts apart from international commercial arbitration. While counsel in an international commercial arbitration may be subject to the rules on the legal profession in the jurisdiction where they practise, the SICC seeks to ensure that foreign lawyers who engage in unethical practice relating to proceedings before the SICC, may be disciplined. This provision contributes to securing justice because

¹⁸⁸ *ibid.*

¹⁸⁹ Alastair Henderson and Emmanuel Chua (n 174).

¹⁹⁰ Singapore Academy of Law, 'Singapore International Commercial Court' (2016) <<http://www.singaporelaw.sg/sglaw/singapore-legal-system/2013-01-28-11-14-34/supreme-court-2>> accessed 24 December 2016.

¹⁹¹ *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] Singapore International Commercial Court of the Republic of Singapore SGHC(I) 02 Suit No 1 of 2016 (HC/Summons No 1542 of 2016 and SIC/Summons No 3 of 2016).

¹⁹² *ibid* 17.

¹⁹³ *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* (n 192).

the ethical standards of counsel would be upheld and may be enforced by the SICC if a foreign lawyer does not adhere to the ethical rules.

The SICC is advantageous to the prospects of a party in achieving access to justice, because it opens a further option for dispute resolution to parties not only in Singapore, but also those who intend to invest in other parts of Asia and also to parties from other parts of the world.¹⁹⁴ However, the fact that the SICC improves access to justice does not necessarily mean that it comes cheap. A plaintiff is required to deposit into the court Singapore Dollars (SGD) 8,000 to commence an action, and the defendant is similarly required to deposit SGD 8,000 when entering appearance or when required by the Registrar to do so.¹⁹⁵ Also, any additional party such as an additional plaintiff, additional defendant, third party or subsequent party, would also be required to deposit SGD 8,000 when that party enters appearance or is ordered by the Registrar to make the payment.¹⁹⁶ This amounts to approximately Kshs 580,000 per party. In a simple dispute with one plaintiff and one defendant, the deposit paid into the court would amount to approximately Kshs 1,160,000. Once the funds are deposited with the court, the Registry deducts funds for each event that requires payment, and the parties receive an electronic written advice on the amount deducted and its purpose.¹⁹⁷ The cost factor may not be large when put in perspective: The first case decided by the SICC had a subject matter value of SGD 1.2 billion.¹⁹⁸ The cost of the initial deposit therefore does not, in such a circumstance, appear to pose a hindrance to the parties involved, to commence an action. It, however, may be considered a challenge to accessing justice.

ADR increases the chances of parties to a dispute to achieve access to justice, by opening up the prospects for finding a suitable dispute resolution mechanism where the parties can have their matter heard.¹⁹⁹ However, access to arbitration and access to justice are not necessarily synonymous; where a citizen may be in a position to access justice through the civil courts, but may not have access to arbitration possibly due to the high cost of international commercial arbitration. The public policy reasons for ensuring citizens who do not have the

¹⁹⁴ Johannes Landbrecht (n 48) 124.

¹⁹⁵ 'Singapore International Commercial Court Practice Directions (Effective from 1 Jan 2017)' para 36 <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---effective-from-1-jan-2017.pdf>> accessed 21 January 2017.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid* 38.

¹⁹⁸ *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* (n 171).

¹⁹⁹ Kariuki Muigua and Kariuki Francis (n 15) 1.

financial ability to access the national courts, do not necessarily apply to international commercial arbitration, which is a voluntary dispute resolution mechanism.²⁰⁰

The principle of access to justice means that parties should have an avenue to have the dispute resolved, whether through litigation at international commercial courts or arbitration through international commercial arbitration; and both these avenues have their respective costs, termed as the cost of access to justice.²⁰¹ Access to justice does not mean that the dispute resolution mechanism is free. It does, however, mean that the mechanism is reasonably priced for a prospective party to a dispute. Considering the high value of claims in most international commercial disputes, the costs of international commercial arbitration involving costs associated with cross-border transactions, may be comparable to the cost of international commercial courts and international commercial arbitrations. This means that the cost of initiating and prosecuting a matter before an international commercial court, or through international commercial arbitration, may not necessarily hinder the parties' efforts to access justice. Under this aspect, both international commercial courts and international commercial arbitration are high cost avenues for access to justice to parties in international commercial disputes.

In Singapore, this expansion of the platforms for achieving access to justice is evident in the establishment of not only the SICC, but also in the creation of the SIAC, which is a dispute resolution centre for both domestic and international arbitration in Singapore.²⁰² This means that parties with an international commercial dispute may either have the matter dealt with through international commercial arbitration at the SIAC, or alternatively may have the dispute heard by the SICC, an international commercial court. This is evidence that having both an international commercial court and international commercial arbitration in Singapore, increases the selection of appropriate dispute resolution mechanisms for the dispute to be heard and determined. The parties therefore have the prerogative to decide whether the national court system with specialised 'international' judges, a characteristic of the SICC,

²⁰⁰ David Williams and John Walton, 'Costs and Access to International Arbitration' (2014) 80 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 433 <<http://bankside.ongoing.co.nz/wp-content/uploads/2015/12/David-A.R.-Williams-et-al-Costs-and-Access-to-International-Arbitration.pdf>> accessed 22 January 2017.

²⁰¹ Ali Assareh, 'Forum Shopping and the Cost of Access to Justice: Cost and Certainty in International Commercial Litigation and Arbitration' (2013) 31 *Journal of Law and Commerce* 1, 2.

²⁰² Judith Prakash, 'Making the Civil Litigation System More Efficient' (Asia Pacific Judicial Reform Forum Round Table Meeting, Singapore, 21 January 2009) 13 <http://www.apjrf.com/papers/Prakash_paper.pdf> accessed 22 January 2017.

would be favourable to an arbitration with an arbitrator of their choice. The aspect of party autonomy is therefore evident in both international commercial courts as exemplified by the SICC, and international commercial arbitration, as shown by the SIAC.

The SICC and the SIAC are complementary. Whereas the SICC as a national court with international jurisdiction does not offer the opportunity for parties to have the judgement directly recognised and enforced in multiple jurisdictions, the SIAC in offering international commercial arbitration under the New York Convention assures the enforceability of the international awards under the Convention.²⁰³ Parties that opt to submit the dispute to the SIAC as opposed to the SICC would also find favour in the lower threshold for disclosure, confidentiality rules of international commercial arbitration, more flexibility and control over the arbitration proceedings, and the opportunity to select arbitrators.²⁰⁴ However, parties that favour the SICC over the SIAC would do so because of similarly high cost of the dispute resolution mechanism in the context of highly specialised judges accessible in short time frames, relatively shorter procedures especially where one party may seek to delay the process if the matter were heard by an arbitrator, and the certainty that emerges from the development of precedents through international commercial courts,²⁰⁵ a feature which is not available in international commercial arbitration due to the confidentiality aspect.

In summary, the SICC does not seek to replace the SIAC, and neither is it a replacement to the national court's commercial jurisdiction. In offering an additional choice for parties to an international commercial dispute, the SICC expands the opportunities for the parties to access justice. The SICC therefore presents a good example to Kenya, for ways in which access to justice may be improved through establishment of an international commercial court.

4.4 Conclusion

This chapter has discussed the experience of the SICC and its contribution to achieving access to justice. The first section has presented the SICC as an example of international commercial courts. This study recognises that the SICC is not the first international commercial court to be established. The SICC was established based on the model of the London Commercial Court. While the SICC is a more recently established court than the

²⁰³ Eva Lein and others (n 156) 29, 30.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

London Commercial Court, the SICC is poised to become the most favoured international commercial dispute resolution destination in Asia.

The SICC was established to operate synonymously with the SIAC, an international commercial arbitration centre which also offers dispute resolution to parties to international commercial transactions. This is the basis for the argument that the SICC is a superfluous institution, established to increase avenues for dispute resolution without there really being a need to increase the options. However, this chapter finds that the SICC contributes to increasing opportunities for parties to international commercial transactions to access justice.

The SICC offers efficient dispute resolution services with international judges and the opportunity for parties in a dispute with no substantial connection to Singapore to engage foreign counsel. The possibility for a party to engage counsel that is most familiar with the legal environment in the jurisdiction which has a substantial connection to the international commercial dispute places the parties in a more favourable position than parties who would be bound to engage counsel familiar with the Singaporean legal environment only.

The cost of access to justice varies, depending on the dispute resolution mechanism the parties to a dispute submit the matter to. In international commercial arbitration, parties have free reign to select an arbitration process which is most favourable to them in terms of cost. In international commercial courts such as the SICC, the cost is generally high, but when put in context of the high value claims placed before these international commercial courts, the cost does not hinder access to justice. The view that the cost of international commercial arbitration or international commercial courts hinders access to justice may be countered by the finding in this study, that while the cost of access to domestic courts may prevent low-income citizens from having an opportunity to ventilate their issues before a competent dispute resolution mechanism, both international commercial courts and international commercial arbitration have a voluntary aspect to them. Opening up the choices for parties does not rule out their access to national courts. However, once the parties have provided in the international commercial transaction agreement that they would submit their dispute to a particular international commercial court or international commercial arbitration, then they are bound by the rules of the dispute resolution mechanism, including the rules on costs.

From this chapter, it is evident that the establishment of the SICC has contributed to increasing avenues for parties to an international commercial dispute to access justice. While

in Kenya there is no international commercial court, international commercial arbitration exists and is provided for under the Arbitration Act of 1995. International commercial arbitration offers parties to an international commercial dispute the opportunity to enforce contracts in the member states of the New York Convention. International commercial arbitration supplements the national courts, and adds a further choice to parties to an international commercial dispute to ventilate their disputes in Kenya. Based on the experience of the SICCC, it emerges that establishing an international commercial court in Kenya would further enhance the opportunities for parties to an international commercial dispute to have their matters heard. This would therefore improve access to justice in Kenya.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter lays out the conclusions and recommendations of this study. The previous chapters have explained the relationship between access to justice and international commercial arbitration in Kenya; and access to justice and international commercial courts in Singapore. This study set out to establish whether access to justice is guaranteed in the legal framework for international commercial arbitration.

5.2 Conclusions

This study set out to establish whether international commercial arbitration in Kenya has been an avenue for increasing access to justice. The study also examined the example of the SICC to determine whether establishing an international commercial court would further enhance the possibilities for parties to an international commercial dispute to attain access to justice.

Chapter one outlined a background to the study. It gave an overview of international commercial arbitration in Kenya, stating that the main problem that this study sought to address, was the perceived lack of access to justice for parties to international commercial disputes. The theoretical framework employed in this study was explained, showing that the study was guided by the theories of justice: where from a natural law perspective, justice should be assured in every legal system across the world, for the rule of law to be truly upheld. This theoretical framework guided the study to the main argument that the legal system for international commercial dispute resolution should allow parties the opportunity to realise the right of access to justice.

Chapter two discussed literature concerning international commercial arbitration and international commercial courts, underlying the justification that the issue of access to justice in international commercial arbitration in Kenya and international commercial courts in other parts of the world, is a little researched subject. This study therefore adds to available literature on international commercial arbitration and international commercial courts, offering readers not only in Kenya, but in other jurisdictions across the world, insight into whether international commercial arbitration and international commercial courts increase

avenues for access to justice; or whether they are superfluous to the public policy interests for persons before the courts, to receive access to justice.

Chapter three and Chapter four lend responses to the research questions posed in Chapter one of this study. Chapter three presents a discussion on access to justice under the legal framework for international commercial arbitration in Kenya. There is no international commercial court in Kenya. This study therefore examines the SICC in Singapore to discuss aspects of access to justice in relation to international commercial courts. A brief discussion of the responses therefore sums up the main conclusions of this study. The conclusions to this study are summarised as responses to the research questions posed in Chapter one of the study, and flow from the findings of the study.

Does international commercial arbitration contribute toward the achievement of the right of access to justice in Kenya?

Yes. International commercial arbitration contributes toward the achievement of the right of access to justice in Kenya. In offering choice of dispute resolution mechanisms to parties to an international commercial dispute, international commercial arbitration offers a platform for those parties to ventilate their grievances. While international commercial arbitration limits intervention by the national courts, the main point to underscore is that a limit to access to courts is not synonymous with a limit to access to justice. Through a voluntary selection of international commercial arbitration, the parties are bound by the rules governing the dispute resolution mechanism, including the limited access to the High Court of Kenya, and bar to appeals to the Court of Appeal.

Under this question, this study sought to reveal confirmatory evidence to disprove the null hypothesis that international commercial arbitration does not contribute toward the achievement of the right of access to justice in Kenya. The study has found that international commercial arbitration contributes toward the achievement of the right of access to justice to Kenya, therefore successfully disproving the null hypothesis.

Do international commercial courts contribute to the realisation of the right of access to justice in other countries?

Yes. International commercial courts contribute to the realisation of the right of access to justice in other countries. This study took the example of the SICC in Singapore, to determine

whether the SICC has improved access to justice in Singapore. The SICC is an international commercial court, which operates under the Supreme Court of Singapore. The SICC handles courts which are international and commercial in nature. This conclusion is based on the hypothesis that international commercial courts in other parts of the world including the SICC, allow parties to an international commercial dispute to access a competent platform, with the required expertise, and have the dispute determined in a manner that upholds the rule of law.

What lessons may be drawn from the establishment and operation of the Singapore International Commercial Court and other similar international commercial courts, to the pursuit of the right of access to justice in Kenya?

This study hypothesised that lessons may be drawn from the establishment and operation of the SICC to the pursuit of the right of access to justice in Kenya.

First, the provision for specialised judges is important to ensuring that parties have a competent tribunal to determine a dispute. In the context of national commercial courts, it is important for the judges in the Commercial Division of the High Court to be conversant and well qualified to hear disputes. In certain disputes which require specialist expertise, then capacity may be grown in-house, where judges are supported to gain further training and experience in certain issues. This would involve both current judges serving in the Judiciary, as well as guiding the recruitment for judges in the future. The expertise of the judges in the SICC gives the parties confidence that the dispute would be handled by a competent panel with knowledge on the legal and industry issues. Similarly, this should guide parties to international commercial arbitration, in selection of an arbitrator. The parties to an international commercial dispute should select an arbitrator with the requisite expertise in the subject matter, and not immediately accept the options given by the international arbitral institution, even where the dispute resolution centre is reputable. The parties should be sensitive to the fact that in selecting an arbitrator, regard should also be had to the previous clients, concerning the appreciation of the law, of the arbitrators. While at the SICC and in other international commercial courts, the decisions are available to the public, allowing prospective parties to examine the quality of the decision, parties to an international commercial arbitration should invest in research on potential arbitrators, to ascertain their level of expertise.

Secondly, the experience of the SICC in promoting access to justice in Singapore is evidence that should Kenya decide to establish an international commercial court, it would increase the opportunities for parties to an international commercial arbitration to achieve justice. One beneficial aspect of the SICC to parties is that they may engage foreign counsel to represent them. This means that under the SICC, foreign counsel may argue in the national court system, opening up the opportunities for parties to select counsel of their choice. In Kenya, as in other parts of the world, international commercial arbitration also allows parties to an international commercial arbitration to select counsel of their choice, regardless of their nationality. However, the foreign counsel would not be permitted under local law, to represent the parties if the matter were to proceed to the High Court. The parties would need to engage local counsel to argue on their behalf. While this is beneficial to the local legal fraternity as it prevents competition, it is not favourable to parties who may have particular needs in terms of legal counsel.

Thirdly, this study shows that the high cost of access to justice for international commercial arbitration in Kenya is comparable to the high cost of access to justice for international commercial courts, like the SICC. However, this is not a limit to access to justice, because it does not lock out the parties that would in general resort to either of the two dispute resolution mechanisms. The international commercial transactions which are the root of international commercial dispute resolution would ordinarily be high value claims of international nature. With high stakes, the parties to the dispute would favour paying high fees for quality, as opposed to paying low fees for compromised standards. If the quality of dispute resolution is above board, this would justify paying the cost. It would therefore be improper to argue that the high cost of international commercial dispute resolution hinders access to justice. Access to justice has a cost implication. International commercial arbitration and international commercial courts offer the avenue to access to justice, even though at a high cost.

The following section outlines recommendations based on this study, and the lessons learnt from the experience of the SICC, on how international dispute resolution may improve access to justice.

5.3 Recommendations

The SICC is hailed as one of the aspects which make Singapore an ideal international commercial dispute resolution destination. Through offering timely dispute resolution, the SICC contributes to the legal framework in Singapore, that propels Singapore towards offering access to justice for parties to international commercial dispute resolution. The following recommendations emerge from this study on international commercial dispute resolution.

5.3.1 Legal Recommendations

This study proposes the following legal recommendations:

- a. Kenya should consider establishing an international commercial court, to supplement the efforts of the international commercial arbitration already provided for under the law. From the study, it is established that both international commercial arbitration and international commercial courts contribute to achievement of access to justice. They are complementary dispute resolution processes, which do not compete, but instead complement one another. The establishment of an international commercial court may be done through statute, in the form of a Nairobi International Commercial Court as a division of the High Court of Kenya.
- b. Establishment of a division of the High Court of Kenya specialised to handle international commercial disputes may be unnecessary if there is no corresponding action to address the challenges that face the judiciary. To this end, Kenya should invest in improving the efficiency of the national court dispute resolution system. This should be done through concerted efforts at enforcing legal provision to give life to Article 48 of the Constitution of Kenya of 2010. The Chief Justice of the Republic of Kenya, through the rules of the courts in Kenya, may promote enhanced efficiency through simplified procedures in the court that lead to speedier, more cost effective and reliable decision-making mechanisms for the benefit of the parties to commercial disputes.
- c. There is a general perception that access to justice in the Judiciary in the Kenyan context has been hindered by corruption.²⁰⁶ In light of this, Kenya would not benefit

²⁰⁶Macharia Mwangi and Maureen Kakah (n 10)

from establishment of an international commercial court if the current state of the judiciary remains unaddressed.

5.3.2 Policy Recommendations

The following are the policy recommendations made on the basis of this study:

- a. The SICC is housed under the national court system. The only difference between the SICC and the national courts is that the SICC draws some judges from other jurisdictions; and it has a specialised mandate. However, in terms of administration of justice including the filing systems and efficiency, the SICC is based on the backbone of the Supreme Court of Singapore. To introduce an international commercial court as part of the national court system in Kenya would be counterproductive if the systemic issues are not dealt with, including issues of corruption, limited staffing, and slow uptake of technology. This study therefore recommends further research and action in improving the efficiency of the national court dispute resolution system, which would not only boost confidence in the courts, but also contribute to improving access to justice.
- b. To place Kenya as the ideal international commercial dispute resolution destination in Africa, much must be done in terms of marketing, to sell the idea of a jurisdiction where access to justice may be attained. This study therefore recommends investment in marketing of Kenya as an ideal destination for dispute resolution. This involves marketing of international commercial arbitration centres in Kenya, including the Nairobi Centre for International Arbitration. The parties to international commercial disputes would predominantly resort to dispute resolution centres which they are familiar with, or have heard of from other businesses which have had to deal with similar disputes. However, the global attention towards the SICC even before it was established, based solely on marketing the idea of Singapore as an ideal international commercial dispute resolution destination, shows that the importance of perception cannot be underestimated.

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